UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

FRANCISCO DE LUNA and ELIZABETH DIAZ, Individually and on Behalf of Others Similarly Situated,	§	
Plaintiffs,	§	
v.	§	
HIDALGO COUNTY, TEXAS; MARY ALICE PALACIOS; GILBERTO SAENZ; JESUS MORALES; BOBBY CONTRERAS; ROSA E. TREVIÑO; LUIS GARZA; ISMAEL OCHOA; CHARLIE ESPINOSA; E. "SPEEDY" JACKSON; In Their Official Capacities as Hidalgo County Magistrates and Justices of the Peace,	§	**CIVIL ACTION NO. 7:10-CV-00268** **JURY**
Defendants.	§	

DEFENDANTS' OPPOSED MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT OF SAME

TO THE HONORALBE JUDGE OF SAID COURT:

COMES NOW, **Defendants, Hidalgo County, Texas; Mary Alice Palacios; Gilberto Saenz; Jesus Morales; Bobby Contreras; Rosa A. Treviño; Luis Garza; Ismael Ochoa; Charlie Espinosa; E. "Speedy" Jackson; In Their Official Capacities as Hidalgo County Magistrates and Justices of the Peace** and pursuant to FRCP 56, files this, their Opposed Motion for Summary Judgment and Memorandum of Law in Support of Same and would show the Court as follows:

I. STATEMENT OF PLAINTIFFS' ALLEGATIONS AND PROCEDURAL HISTORY

1. This lawsuit was filed on July 26, 2010 by two adult residents of Hidalgo County, Texas, Francisco De Luna and Elizabeth Diaz. Both the original and amended complaints are over forty pages long and encompass 193 separate paragraphs. However, after reviewing all of the pleading and contextual background, Plaintiffs' entire lawsuit can be reduced to the following contention: that they were incarcerated in the Hidalgo County jail because of an inability to pay fines for Class "C" misdemeanors without the County's determination of their indigent status, as prescribed by Texas Code of Criminal Procedure §45.046, and, consequently, without the opportunity to receive alternative methods of satisfying their fines. Plaintiffs allege that they are among a larger class of individuals who have been similarly wronged and have, therefore, filed a class action suit. Thus, all of the superfluous pleading and factual allegations can be condensed by the small portion of Plaintiff's complaint which identifies the potential class as follows:

> Plaintiffs bring all declaratory and injunctive claims set forth in this Complaint on their own behalf and on behalf of all similarly situated persons pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. Plaintiffs seek to represent the following class:
>
> > All individuals who have been or may in the future be adjudicated or processed for commitment to jail for unpaid fines or costs, pursuant to the provisions of Texas Code of Criminal Procedure Art. 45.046, while in the custody of the Hidalgo County Sheriff's Office. **[Exhibit A, Plaintiffs First Amended Complaint ¶167]**

2. The Plaintiffs request injunctive and declaratory relief, alleging both due process and equal protection violations, as set out as follows:

> By consistently failing, prior to committing an individual to jail for non-payment of fines and costs, to make a factual determination that the

individual is not indigent and has not made a good faith effort to discharge his or her outstanding debt, Defendant Magistrates have violated and continue to violate Plaintiffs' right to due process of law, as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. **[Exhibit A, Plaintiffs' First Amended Complaint ¶ 170]**.

By consistently failing, prior to committing an individual to jail for non-payment of fines and costs, to offer the individual alternatives to immediate incarceration such as community service or an installment payment plan, Defendant Magistrates have violated and continue to violate Plaintiffs' right to due process of law, as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. **[Exhibit A, Plaintiffs' First Amended Complaint ¶ 171]**.

By supervising, controlling and directing Hidalgo County Sheriff's Office administrative staff and officers who process, book and ultimately confine individuals in the Hidalgo County jail for non-payment of fines and costs without necessary indigency examinations, Defendant Sheriff Treviño has violated and continues to violate Plaintiffs' right to due process of law, as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. [**Exhibit A, Plaintiffs' First Amended Complaint ¶ 172]**.

All Defendants' policies, practices, acts, and omissions in processing and adjudicating individuals for commitment to the county jail for non-payment of fines and costs without necessary indigency examinations and despite the inability of many such individuals to pay their outstanding debt violate Plaintiffs' right to due process of law, as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. [**Exhibit A, Plaintiffs' First Amended Complaint ¶ 173]**.

All Defendants' policies, practices, acts, and omissions place Plaintiffs at continuing and foreseeable risk of being committed to Hidalgo County jail for non-payment of fines and costs despite their inability to discharge such financial obligations. [**Exhibit A, Plaintiffs' First Amended Complaint ¶ 174]**.

Plaintiffs seek prospective injunctive relief because they have no plain, adequate or complete remedy at law to prevent future injury caused by confinement in jail in violation of their constitutional rights. [**Exhibit A, Plaintiffs' First Amended Complaint ¶ 175]**.

3. The Plaintiff's allegations as set out above are identical for their equal protection and damages claims. On June 24, 2011, this Court entered an order granting the Defendants' 12(b) Motions to Dismiss thereby completely dismissing the Hidalgo County Sheriff, Lupe Treviño, from the lawsuit and dismissing all claims except the Plaintiffs' claim for declaratory relief against the nine individual justices of the peace ("JP's"). Hidalgo County remains a defendant for both injunctive and declaratory relief as well as for the two named Plaintiffs' claims for monetary damages. Despite over 35 pages of contextual allegations and other factual assertions, including lengthy portions of irrelevant material regarding school truancy, the quoted allegations in the paragraphs above serve as the sole potential basis of any recovery asserted by the Plaintiffs. In fact, Plaintiffs themselves have asserted repeatedly that all of the other assertions are not relevant, as in Plaintiffs' counsel's letter of February 15, 2011, in which she stated stated without equivocation that "the underlying description of school ticketing in the complaint is contextual, not relevant to the claims states." **[Exhibit I]**. Thus, it is important to note that although the allegations that Hidalgo County and its JP's were enforcing a policy of "jailing teens . . . because of their inability to pay fines and costs associated with missing school" may grab headlines in the local newspaper, they are completely baseless and superfluous, as they fail to provide either context or factual support for Plaintiffs' claims. **[Exhibit A, p. 1].** This case is not about a practice of putting school children in jail for truancy, as the ACLU's smear campaign through the newspaper would lead one to believe. No one under age seventeen, the age that the Texas Penal Code defines as an "adult," went to jail. Furthermore, no one was jailed for merely missing school. This case is about the allegation that the County routinely jails adults for Class "C"

misdemeanors without either conducting an indigency examination or offering alternative sentencing. The evidence in this case squarely contradicts these accusations and, in fact, will reflect that the County and its JP's followed both Texas statutory law and the Constitution of the United States, as interpreted by the Supreme Court, in every single respect.

II. STATEMENT OF FACTS

4. Both De Luna and Diaz attended school within the Edinburg Consolidated Independent School District ("ECISD"). While both De Luna and Diaz were juveniles, they were ticketed by ECISD for a variety of violations associated with their conduct at school. Diaz was ticketed on four occasions between 2006 and 2009 for failure to attend school, a violation of Texas Education Code 25.094 and punishable by a fine of not more than $500. TEX. CODE CRIM. P. §25.094. De Luna was ticketed on multiple occasions between May 2005 and December 2008, and the records demonstrate that his offenses included both failure to attend school and failure to comply with school directives. These offenses are Class "C" misdemeanors under the Texas Education Code, which initially posed no threat of incarceration of any kind, whether or not they paid the fine, because a juvenile in Texas cannot be incarcerated for a Class "C" offense.

5. It is undisputed that the Plaintiffs pled guilty to each and every offense, and the Plaintiffs' complaint further concedes that there is no evidence that Diaz or De Luna ever satisfied the underlying obligations, while they were juveniles, either through payment or via some other alternative form of sentencing, despite having been given the opportunity to do so. Failing to satisfy these Class "C" offenses carried no further penalty while the Plaintiffs remained juveniles, again because the courts in Texas have no

power to incarcerate a juvenile for a fine-only offense. So as to reduce the confusion created by the ACLU's press campaign, Defendants reiterate that *at no time* was either Plaintiff incarcerated as a juvenile for any of these offenses.

6. The offenses remained unadjudicated and, thus, lay dormant while Plaintiffs were juveniles. Under Texas law, however, offenses incurred by juveniles that are unsatisfied when they become an adult upon turning seventeen do not simply disappear. Texas law requires that the judge presiding over unresolved cases such as these notify the former juveniles and newly classified adults of their continuing obligation to appear for offenses incurred as juveniles. Thus, a Notice of Continuing Obligation to Appear ("NCOA") is mailed to the defendant's last known address, instructing him or her to appear and answer for the unsatisfied juvenile offenses. NCOA's were sent to both Mr. De Luna and Ms. Diaz after they turned seventeen years of age. Although Diaz claims that she did not receive a NCOA, she did acknowledge receiving a notice to appear for her fourth ticket in 2009.

7. At approximately 11:35 p.m. on January 10, 2010, De Luna was arrested, as an adult, for public intoxication. He was taken and booked into the Hidalgo County jail, and approximately six hours later he was arraigned before Justice of the Peace Rosa Treviño. At the time he was arraigned, he received the admonishments required by *Miranda*, the Texas Code of Criminal Procedure, and the Hidalgo County Local Rules. De Luna waived his right to counsel and pled guilty both to the public intoxication and the juvenile fines. When asked if he had any questions with regard to his fines he clearly responded "no." Mr. De Luna has admitted in deposition that at no time did he ever tell anyone, including Judge Treviño, that he was indigent. It is also clear that in addition to

failing to raise his indigent status, he also failed to request any type of alternative sentence. Although Mr. De Luna may now regret his decision, he had the absolute right, as recognized by Texas Code of Criminal Procedure 1.14, to waive all of his rights, including that of an indigency determination and alternative sentencing. After exercising that right, he was sentenced to 132 days in jail, as an adult, for his unsatisfied Class "C" offenses.

8. After she turned seventeen, Elizabeth Diaz received a notice in the mail from Judge Mary Alice Palacios's court regarding her fourth ticket for failure to attend school. She appeared, as required, on February 25, 2011 and was told of the offense and the penalty. When she expressed that she could not pay the ticket, she was offered an alternative sentencing arrangement whereby she would pay the fine in installments until April 25, 2010, when it would be paid in full. She accepted the alternative sentencing arrangement. Ultimately, she returned to Judge Palacios's court, notified the court that she could not pay at all, and requested community service instead. In the most defendant-friendly indigency examination possible, Judge Palacios's court took Ms. Diaz at her word that she was indigent, found that she could not pay the fine, and granted her second request for alternative sentencing by allowing her to perform community service. When she could not complete the community service by the original deadline, the Court again accommodated her by providing a 30-day extension. She finally completed 40 hours of community service at the Hidalgo County Historical Museum by May 10, 2010. On the same day that she requested and received alternative sentencing for her fourth ticket, however, County records indicated that she had warrants for failure to appear on the three prior unadjudicated tickets for the exact same offense when she was a juvenile.

It is essential to consider Ms. Diaz's state of mind at this crucial moment. She had actual knowledge of how to satisfy a fine in lieu of serving time in jail, because she had already benefitted from the process of raising her indigent status receiving alternative sentencing. At that point, as Judge Palacios's staff turned her attention to the other three charges, they explained to Diaz that she had three options on the outstanding warrants. She could do community service of over 100 hours, she could do the time in jail, or, as Diaz already knew, she could extend the time for payment of her fines. By the time the three warrants were discovered, however, Judge Palacios was no longer present, so she could not rescind the warrants. Judge Palacios's staff notified Diaz that she had to be taken into custody by the deputy constable office on her three outstanding warrants and that she would have another opportunity to arrange for alternative sentencing for those offenses when she was arraigned by JP Bobby Contreras the next morning. Although she had been fully apprised of all her options, and despite having requested and received the alternative sentencing of community service and extended payment plans for the fourth offense, she never raised the issue of her indigent status with JP Contreras at her arraignment for the other three offenses. As with the case of Mr. De Luna, she apparently decided to exercise her right under TCCP 1.14 to waive her right to alternative sentencing.

III. SUMMARY JUDGMENT EVIDENCE

9. Defendants rely upon the following summary judgment evidence:

Exhibit A: Plaintiff's First Amended Complaint;

Exhibit B: Affidavit of Robert Leal

Attachment 1: Community Service Documents;

Exhibit C: Transcript of Elizabeth Diaz Arraignment;

Exhibit D: Transcript of Francisco De Luna's Arraignment;

Exhibit E: Interrogatory Responses of Elizabeth Diaz;

Exhibit F: Interrogatory Responses of Francisco De Luna;

Exhibit G: Transcript excerpts of Elizabeth Diaz Deposition;

Exhibit H: Transcript excerpts of Francisco De Luna Depositions;

Exhibit I: Dana Levy letter, February 15, 2011;

Exhibit J: Trial transcript of Lee Roy Treviño March 8, 2011 w/Exhibit showing denial of alternative sentencing;

Exhibit K: Diaz Production, Bates #000002-000043;

Exhibit L: Affidavit of Marcella Cherry

Attachments 1-5: Elizabeth Diaz Court Records;

Exhibit M: JP Indigency Documents;

Exhibit N: "Pay or Lay: Tate v. Short Revisited," *Texas Prosecutor*, Vol. 33, No. 4 (July/August 2003); and

Exhibit O: Transcript excerpt of Stephen A. Thorne Ph.D. Deposition;

IV. ARGUMENT AND AUTHORITIES

A. Summary Judgment Standard

10. Although described as a "drastic remedy," it is apparent that summary judgment is no longer truly disfavored as a procedural shortcut, but instead, recognized as an integral part of the rules and trial process as a whole. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548 (1986), *Central Corp. v. Research Products Corp.,* 272 Wis. 2d 561, 574, 681 N.W. 2d 178 (2004). In *Matsushita Elec. Indus., Co., Ltd. v. Zenith Radio Corp.* 475 U.S. 574, 106 S. Ct. 1348 (1986), *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 106 S.Ct. 2505 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317,

106 S.Ct. 2548 (1986), the Supreme Court of the United States, for the first time, equated the summary judgment standard to that applied to directed verdicts. The new standard was to be, "whether, after considering all evidence in a light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law." *See Celotex*, 106 S.Ct. at 2552.

11. Thus unlike in a Motion to Dismiss under FRCP 12(b)(6), where a non-movant must only demonstrate that it has pled a cause of action and facts to support the claim upon which it could prevail, a respondent in a FRCP 56 Summary Judgment proceeding has a different, more onerous burden that requires actual proof. The Supreme Court outlined the principals that are utilized in determining if summary judgment is appropriate: (1) the party moving for the summary judgment must meet an initial burden of showing that no genuine issue of material fact exists, and this burden may be met by pointing to the absence of support for an essential element of the plaintiff's case; (2) the substantive law governing the cases will determine what issues are material; (3) if the moving party meets its burden, the party opposing the motion must present affirmative evidence and must produce more than a mere scintilla of evidence to overcome the motion; and (4) the court does not need to look to the entire record to establish whether a genuine issue exists requiring trial, but need only look to those portions of the record to which the parties cite to the court. *Celotex,* 106 S.Ct. at 2552-55; *See also* 3 ATLA's Litigating Tort Cases § 31.3. To defeat a motion for summary judgment on a certain claim or element, Rule 56(c) requires the respondent to show that a "genuine" dispute remains as to that issue. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v.*

Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The 1986 trilogy of decisions from the Supreme Court makes it clear that a dispute is genuine only if the evidence that the non-movant presents is competent, admissible, and such that a reasonable jury could use it as support to return a verdict for the nonmoving party. *See Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 US 574, 586-86, 106. S.Ct. 1348 (1986); *Anderson*, 477 U.S. at 248, 10 S.Ct. 2505. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita,* 475 U.S. at 586-87, 106 S.Ct. 1348. Furthermore, a movant may raise the lack of competent evidence to support an element of a party's claim or defense as grounds for summary judgment under Rule 56(c). The Supreme Court has explained that a movant for summary judgment need not support its motion with evidence negating the opponent's case. Rather, once the movant establishes that there is an absence of evidence to support the non-movant's case, the burden shifts to the non-movant to make a sufficient showing establishing each element as to which that party will have the burden of proof at trial. *Celotex,* 477 U.S. at 322-25, 106 S.Ct. 2548. Summary judgment is appropriate when the non-moving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof at trial. *See* FED.R.CIV.P. 56(c); *Celotex,* 477 U.S. at 323, 106 S.Ct. 2548. With this standard in place, the first inquiry is, simply: what are the issues?

B. Plaintiffs Cannot Raise Genuine Issues of Material Fact With Regard to Any Element of Their Claims

12. To meet their burden to defeat Defendants' Motion for Summary Judgment, Plaintiffs must submit evidence that creates genuine issues of material fact to support the following elements of a claim under 42 U.S.C. §1983: (1) the conduct

complained of was committed by a person acting under color of state law; and (2) the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or the laws of the United States. *Parratt v. Taylor,* 451 U.S. 527, 535, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1981), *overruled in part on other grounds, Daniels v. Williams,* 474 U.S. 327, 331–32, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). When analyzing the first element of a section 1983 claim against a municipality or governmental entity, the court must decide if the governmental entity promulgated "an official policy, practice, or custom," which could subject it to section 1983 liability. *See Monell v. Dept. of Social Services of City of New York,* 436 U.S. 658, 690–94, 98 S.Ct. 2018, 2035–37, 56 L.Ed.2d 611 (1978). Thus, the essential elements of Plaintiffs' claims are: (1) that Defendants promulgated an official policy, practice, or custom that serves as the moving force behind Plaintiffs' constitutional deprivations; (2) that Defendants in fact violated the Plaintiffs' constitutional rights; and (3) that Defendants' violation of Plaintiffs' constitutional rights caused them to suffer damages. See *Parratt v. Taylor,* 451 U.S. 527, 535, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1981), *overruled in part on other grounds, Daniels v. Williams,* 474 U.S. 327, 331–32, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Monell v. Dept. of Social Services of City of New York,* 436 U.S. 658, 690–94, 98 S.Ct. 2018, 2035–37, 56 L.Ed.2d 611 (1978). Plaintiffs' inability to develop any evidence to support these essential elements is fatal to their claims.

1. <u>Essential Element No. 1</u>: Plaintiffs Cannot Provide Evidence of an "Official Policy, Practice, or Custom" Violative of the Constitution

13. Plaintiffs first must demonstrate that the constitutional deprivation they suffered was the result of an official policy, practice, or custom promulgated by Hidalgo County. It is well settled that not every alleged tort or wrong constitutes a violation of a

civil right that is actionable under 42 U.S.C. § 1983. *Paul v. Davis*, 424 U.S. 693 (1976); *Collins v. City of Harker Heights, Texas*, 916 F.2d. 284 (5th Cir. 1990); *Green v. McKaskle*, 788 F.2d. 1116 (5th Cir. 1986). Furthermore, even if a plaintiff establishes a violation of his or her civil rights, liability may not attach. *See, e.g.*, *Mouille v. City of Live Oak,* 918 F.2d 548, 551 (5th Cir.1990); *Pfannstiel v. City of Marion,* 918 F.2d 1178, 1183 (5th Cir.1990). A governmental unit cannot be vicariously liable under a theory of *respondeat superior* on claims asserted against it under the Federal Civil Rights Acts. *Monell v. New York City Department Of Social Services*, 436 U.S. 658 (1978); *Scofield v. City of Hillsborough*, 862 F.2d 759 (9th Cir. 1988); *Meehan v. County of Los Angeles*, 856 F.2d 102 (9th Cir. 1988); *Wilson v. City of North Little Rock*, 801 F.2d 316 (8th Cir. 1986). Liability can be established against a governmental unit under The Federal Civil Rights Act only if the governmental entity promulgated "an official policy, practice, or custom," which could subject it to section 1983 liability. *Monell,* 436 U.S. at 690–94, 98 S.Ct. at 2035–37. The Fifth Circuit has defined an "official policy" for the purposes of section 1983 liability to be either: (1) a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's law-making officers or by an official to whom the lawmakers have delegated policy-making authority; or (2) a 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. *Webster v. City of Houston,* 735 F.2d 838, 841 (5th Cir.1984). Further, the entity's policy or custom must have been the "moving force" behind the alleged deprivation. *Monell,* 436 U.S. at 694, 98 S.Ct. at 2037.

14. This "custom or policy" requirement is essential, because in construing the due process clause violations, the United States Supreme Court has held that mere negligent acts by state actors do not effect a "deprivation" of due process rights. *Davidson v. Cannon,* 474 U.S. 344, 347 (1986); *Daniels v. Williams*, 474 U.S. 327, 333 (1986). Thus, when the foregoing case law is applied, it could generate a result in which a plaintiff's constitutional rights were violated because they "slipped through the cracks," so to speak, and yet no liability attaches against the governmental entity under 42 U.S.C. § 1983. This is because an isolated event, such as the one forming the basis of the instant lawsuit, does not establish a widespread custom or practice. *See*, *e.g., City of St. Louis v. Praprotnik*, 485 U.S. 107 (1988); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Monell v. New York City Department Of Social Services*, 436 U.S. 658 (1978); *Rodriguez v. Avita*, 871 F.2d 552 (5th Cir. 1989); *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985); *Bennett v. City of Slidell*, 735 F.2d 861 (5th Cir. 1984); *Languirand v. Hayden*, 717 F.2d 220 (5th Cir. 1983); *Davis v. City of Ellensburg*, 869 F.2d 1230 (9th Cir. 1989); *Fargo v. City of San Juan Bautista*, 857 F.2d 638 (9th Cir. 1988); *Johnson v. Panizzo*, 664 F.Supp. 336 (D.C. 111. 1987).

15. As defined by the case law, therefore, the first issue requires a showing of some kind of county-wide policy that is established, implemented, and enforced by Hidalgo County that deprives persons of their procedural due process rights under the U.S. Constitution. Defendants unequivocally assert that no evidence exists. Plaintiffs have focused all of their efforts on the wrong issue. They seek to somehow prove that because they may have "slipped through" a procedural "crack" or otherwise been

incarcerated when they should not have been, that such an occurrence gives rise to an actionable claim. The case law cited above clearly renders such a theory inadequate to establish liability under 42 U.S.C. § 1983, however. Plaintiffs have failed to demonstrate that an act or omission by the justices of the peace ("JP's"), and specifically Bobby Contreras and/or Rosa Treviño, was the product of a countywide policy to incarcerate Class "C" defendants who cannot pay a fine without giving a proper indigency hearing and offering alternative sentencing. No such policy exists, and the Plaintiffs can present no evidence that any County official or law-making officer officially adopted such a policy.

16. Plaintiffs will inevitably argue that although possibly not officially adopted, the practice of ignoring the right to an indigency screening and alternative sentencing was so widespread that it constituted a custom that represented the County's policy. To prove "custom or usage," however, Plaintiffs must demonstrate the following: (1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees; (2) ***deliberate indifference*** to authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and (3) the plaintiff's injury by acts pursuant to the governmental entity's custom. *Jane Doe A v. Special Sch. Dist. of St. Louis County,* 901 F.2d 642, 646 (8th Cir.1990) [emphasis added]. Thus, a key component to Plaintiffs' burden is to present evidence that Hidalgo County and its JP's were **deliberately indifferent** to the alleged deprivation of their constitutional rights. The standard of deliberate indifference is high. *Alton v. Texas A & M University,* 168 F.3d 196, 201 (5th Cir.1999) (citing *Doe v. Dallas Indep. Sch. Dist.,* 153 F.3d 211, 218 (5th Cir.1998)).

Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference and do not divest officials of qualified immunity. *Id.* To demonstrate deliberate indifference, a plaintiff must show (1) a grave risk of harm, (2) the defendant's actual or constructive knowledge of that risk, and (3) his or her failure to take easily available measures to address the risk. *Camilo–Robles v. Hoyos,* 151 F.3d 1, 7 (1st Cir.1998), *cert. denied, Hoyos v. Camilo–Robles,* 525 U.S. 1105, 119 S.Ct. 872, 142 L.Ed.2d 773 (1999) (citing *Manarite v. City of Springfield,* 957 F.2d 953, 956 (1st Cir.), *cert. denied,* 506 U.S. 837, 113 S.Ct. 113, 121 L.Ed.2d 70 (1992)). Plaintiffs have developed absolutely zero evidence, through discovery or otherwise, to support a claim that any defendant acted with deliberate indifference in enforcing a custom that deprived Class "C" defendants of an indigency screening once raised or that anyone notified any County official of that indigents were being ignored.

17. All of the evidence, in fact, contradicts Plaintiffs' contentions. Defendants' summary judgment evidence reflects that a constitutionally-sound policy, in fact, exists and is followed. The policy is simply that when a defendant properly raises indigency, the JP's take the defendant at his or her word and provide alternative means to satisfy the fine. **[See Exhibit M].** Attached as Exhibit M and incorporated by reference is a package of 72 random files taken from the nine JP courts that all reflect cases in which a defendant charged with a Class "C" misdemeanor requested and received community service. Many of these cases were adjudicated before the ACLU filed this lawsuit. These constitute evidence of Hidalgo County's policy to provide alternative sentencing in lieu of jail for defendants who are convicted of a fine-only offense.

18. In light of the County's actual policy, the Court must consider that the burden upon Plaintiffs to show another municipal policy or custom that is the moving force behind the constitutional deprivation is a heavy one. The law is clear that, for the sake of argument, any JP, including Judge Contreras in Ms. Diaz's case or Judge Treviño in Mr. De Luna's case, failed to properly screen for indigency in violation of the law, these isolated constitutional deprivations *still do not give rise to a 1983 claim*. Moreover, even if the County had such a policy, if the acts of the Defendants did not serve to deprive the Plaintiffs of a constitutional right, they cannot prevail. As the Defendants will show, both Plaintiffs failed to take the affirmative action necessary to trigger an indigency hearing. Therefore, they cannot establish any liability or wrongdoing on the part of Hidalgo County or the individual JP's for the simple reason that their constitutional rights were not violated.

2. Essential Element No. 2: Plaintiffs Can Provide No Evidence That Defendants Actually Violated Their Constitutional Rights

19. It seems obvious that to prevail, Plaintiffs must establish that the County's policy or procedure resulted in an actual violation of their constitutional rights. Even if a municipality does have an actionable policy or custom, no liability attaches if the official or officer acting for the governmental unit did not violate a constitutional right. *Heller v. City of Los Angeles*, 475 U.S. 796 (1986); *Monell v. .New York City Department of Social Services*, supra. As Plaintiffs have pled the case, therefore, they must demonstrate that the County failed to screen for indigency *after it was properly raised*.

20. The focus of the Plaintiffs' case has been upon the requirements of Texas Code of Criminal Procedure ("TCCP") §45.046 that requires an indigency screening prior to incarceration for non-payment of a Class "C" misdemeanor fine. What the Plaintiffs

have ignored, however, is that indigency under TCCP §45.046 has not been given as hallowed a legal status of other constitutional rights, such as the Fifth Amendment right to counsel. Unlike this, and other *Miranda*-prescribed rights, the law does not require the government to advise a defendant of the right to declare his indigent status. Not to be confused with the indigent defendant's right to counsel, the mandates of TCCP §45.046 apply only when a defendant asserts indigency in the context of the inability to pay a fine. In *Tate v. Short,* 401 U.S. 395, 398, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), the U.S. Supreme Court held that the Constitution prohibits a state from imposing a fine as a sentence and then automatically converting the fine to a jail term if an indigent defendant cannot immediately make payment in full. The holding in *Tate* was reaffirmed in *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). But the Fifth Circuit Court of Appeals has ruled that *Tate* and *Bearden* are based on the assumption that a defendant must have appeared before the court and asserted his indigency. *See Sorrells v. Warner,* 21 F.3d 1109, 1112 (5th Cir. 1994); *Garcia v. City of Abilene,* 890 F.2d 773, 776 (5th Cir. 1989). In *Garcia* the Plaintiff contended that the City of Abilene had violated TCCP 45.06 (the statutory provision in 1989 that allowed a county or city to impose a fine) and had violated the principles established in *Tate* and *Bearden* by attempting to jail her solely because she could not pay her fines. In analyzing TCCP §45.52, which was enacted shortly after the Tate decision and, thus, is the substantively identical predecessor to the current TCCP §45.046, the Fifth Circuit Court of Appeals rejected her claim stating:

> Mrs. Garcia contends that the City of Abilene violated the principles established in *Tate* and *Bearden* by attempting to jail her solely because she could not pay her fines. However, these cases rest on the assumption that the indigent appears before the court to assert his inability to pay.

> Even assuming an individual who is fined is too poor to pay, ***if he does not appear and assert his indigency, the court cannot inquire into his reasons for not paying and offer alternatives.***

Garcia v. City of Abilene, 890 F.2d 773, 776 (5th Cir. 1989) [emphasis added]. The Fifth Circuit reiterated its ruling in *Garcia* that the defendant, not the magistrate, has the obligation to raise indigency before his right to a written determination of indigency and alternative sentencing is triggered, ruling:

> The exhibits attached to Sorrells's complaint reflect that Sorrells never personally advised the county officials of his indigence, but that he merely contested the legal validity of the capiases issued. Therefore, Reeves did not unlawfully arrest Sorrells under the clearly established law because Sorrells had failed to assert his indigence in response to the orders to pay the fines.

Sorrells v. Warner, 21 F.3d 1109, 1112 (5th Cir. 1994). Had the ACLU bothered to investigate the law before it filed suit, it would not only have found the above case law and decades-old statute, but it would have also discovered what the Defendants discovered: that there is no mechanism in Texas for investigating indigency and the burden to raise the issue is, again, on the *defendant, not the magistrate.* **[See Exhibit N]**.

21. The Fifth Circuit's decisions in *Sorrels* and *Garcia* require that a plaintiff who sues based upon his or her incarceration for a fine-only offense despite indigent status must first prove that he or she timely asserted indigency. All that is required of the municipal or judicial defendant until that point is to give the defendant an opportunity to assert that he or she could not pay the fine. *See, e.g., Doe v. Angelina County* 733 F. Supp. 245 (E.D. Tex. 1990). It remains undisputed that Hidalgo County provides every arrestee with an arraignment, which provides each with a forum to assert his or her constitutional rights. This opportunity that was afforded to each Plaintiff. The parties agree that both Plaintiffs were promptly arraigned, read their rights and given the

opportunity to speak directly to a magistrate. **[Exhibit B, C, and D].** Because their assertion of indigency at that point is a prerequisite to assert their claims, the Plaintiffs must provide evidence of the second issue in this case. To wit, did the Plaintiffs assert their indigency when given the opportunity to do so at their arraignment?

22. Fortunately, video recordings exist of each of the Plaintiff's arraignments, which provide irrefutable evidence that both Plaintiffs clearly failed to raise indigency at that crucial moment. Defendants have attached transcripts of those arraignments hereto as Exhibits C and D, and incorporate them by reference. As one reviews the arraignment proceedings, one discovers that both Plaintiffs were first given the opportunity to assert indigency when they were immediately admonished regarding their right to receive a appointment of counsel if they could not afford one. **[Exhibit C and D].** Both declined counsel, however, and in the process obviated any suspicion that they were indigent. **[Exhibit C and D].** Had they even pled "not guilty" to the fines, that alone would have stopped the sentencing process and allowed them to post bond. Instead, both Plaintiffs were read their rights in English and Spanish, declined them and then proceeded to plead out.

23. Mr. De Luna was given the opportunity to ask any questions he may have had and was provided much more than an ample opportunity to raise indigency. **[Exhibit D, pp. 5-7].** Even if, for some reason, he had not thought to do so, he remained in the room to wintess a defendant named Arnulfo Garza Ramirez, who was charged with contributing to truancy, specifically assert his indigency response to Judge Rosa Treviño's sentence and directly inquire what alternative arrangement he could pursue to satisfy the fine. **[Exhibit D, p. 12].** In doing so in plain view of Mr. De Luna, Mr.

Ramirez provided him with a perfect example of how to raise indigency, which would have led to the same result for him as experienced by Mr. Ramirez: being released *that very day* and being ordered to consult with Judge Palacios regarding how he could obtain alternative sentencing given his indigent status. In short, the key to obtaining an indigency screening is appearing and simply raising the issue as required by *Garcia* and *Sorrels*, which then triggers the County's policy to automatically provide the opportunity to obtain alternative sentencing. In Mr. De Luna's case, he failed to do so despite a clear opportunity and immediate example of exactly what to do. Applying *Garcia* and *Sorrels*, his failure in this regard precludes his claim under 42 U.S.C. §1983.

24. Elizabeth Diaz's complaint is more puzzling, because the record clearly reflects not only that she was aware of her right to raise indigency and the opportunity for alternative sentencing, but also that she was offered alternative sentencing and accepted it for one of the charges against her. Any confusion is dispelled, however, by the fact that the Court offered her the opportunity for alternative sentencing on three other charges as well, but she declined it despite having all of her alternatives explained, and instead elected to do the time in jail. **[Exhibit B and L].**

25. Ms. Diaz was given the opportunity to assert indigency twice. When she appeared in Judge Palacios's Court, the judge's staff, without the judge even being present, implemented the court's policy to allow for alternative sentencing if the defendant stated that he or she could not pay a fine on a Class "C" charge. **[Exhibit B].** As stated, Ms. Diaz raised indigency as to the first charge, which court staffer Marcella Cherry communicated to Judge Palacios, who took her at her word and offered to allow Ms. Diaz to pay the fine in installments. **[Exhibit B].** When Ms. Diaz indicated she

could not fulfill her obligation under the payment plan to which she had agreed, Judge Palacios ultimately converted the payment plan into the alternative sentence of community service. **[Exhibit B, Attachment 1, Exhibit L]**. At the second opportunity to assert her indigent status, when she was arraigned before Judge Bobby Contreras for the three additional charges, she chose not to do so. She evidently chose to serve the time in jail instead of working it off in what to her may have seemed like countless hours of community service, because she never told Judge Contreras that she was indigent. **[Exhibits B and C].** We may never understand why she made this decision, but what stands as an uncontroverted fact is that Ms. Diaz knew of the procedure by which she could plead indigence and receive an alternative sentence in lieu of incarceration because *she had been through the process once already*. Yet despite this second opportunity, before she ever pled to the offenses, to raise indigency and assert any of the options explained to her by Marcella Cherry, she simply chose not to do so.

26. This practice of screening for indigency is the policy in Judge Palacios's court as it is throughout the other eight JP courts. For example, Lee Roy Treviño, a Class "C" defendant, and one of the people on the list provided by the Plaintiff's as a potential plaintiff in a class action case **[Exhibit K, Diaz Bates Stamp #000020],** admits that Judge Palacios offered him a payment plan and community service, but he declined because he did not want his mom doing work. **[Exhibit J]**. In most instances, once they raise the issue as required by law, Class "C" defendants are not given a rigorous screening. Rather, their indigence is presumed, and they are offered alternative means to satisfy the fine. Another example is the case of the aforementioned Mr. Arnulfo Garza Ramirez, who raised his inability to pay with Judge Treviño at the same arraignment as

Mr. De Luna, was taken at his word as to his indigency and released that day **[Exhibit K: Diaz Bates Stamp #000035]**. Furthermore, Defendants have provided evidence of 72 other examples of Class "C" defendants who asserted their indigency and automatically received community service or some other means of satisfying their fine in lieu of jail from all nine Hidalgo County JP courts, before and after this lawsuit was filed. **[See Exhibit M].**

27. As *Garcia* and *Sorrels* hold, Plaintiffs cannot state a valid claim under 42 U.S.C. §1983 because they can provide no evidence that they raised indigency when given the forum and opportunity to do so. In fact, the arraignment videos provide irrefutable proof that they did not raise their indigent status, which consequently failed to trigger TCCP 45.046 or a right to alternative sentencing as espoused by *Bearden* and *Tate*. Simply put, their respective failures to raise indigency are fatal to their claim of a procedural due process violation under the United States Constitution and, by extension, to the claims asserted in this lawsuit. Although Plaintiffs are mistakenly asserting that they perfected their right to alternative sentencing, they are ignoring another absolute right that they asserted at their respective arraignments: the right to *waive* their rights. Texas Code of Code of Criminal Procedure 1.14(a) states, "the defendant in a criminal prosecution for any offense may waive any rights secured him by law . . ." The Fifth Circuit has established that the obligation to raise indigency rests squarely with the defendants. If they raise indigency, the County's obligation is then to ensure that they are provided alternative sentencing if a screening proves they are indigent. If they do not assert indigency, however, and assert their right under TCCP 1.14(a) to waive their right to alternative sentencing, as in the case of Mr. De Luna and Ms. Diaz, no constitutional

violation has occurred as a matter of law, and the Court is compelled to grant Defendants' Motion for Summary Judgment in its entirety.

3. Essential Element No. 3: Plaintiffs Cannot Provide Any Evidence that Defendants Caused Them Any Damages

28. Plaintiffs' most recent amended complaint requests three types of relief: declaratory relief, injunctive relief, and monetary damages. In this case, the Plaintiffs have asserted that the only parties seeking monetary relief are the two named Plaintiffs. In addition, Plaintiffs have made no effort to certify a class, so as the case is now postured, in light of the court's Order Granting Defendants' 12(b) Motions to Dismiss, the Plaintiffs seek only declaratory relief against the nine JP's and injunctive, declaratory and monetary damages from Hidalgo County. Plaintiffs' claims for monetary damages are divided between pecuniary and non-pecuniary. Pecuniary damages are for past and future lost wages, and actual dollars lost as a result of constitutional deprivations. Non-pecuniary damages are most common in the form of mental anguish and emotional distress damages, which are recoverable under the post-Civil War Civil Rights Acts, 42 U.S.C. §§1981, 1983. *Patterson v. McLean Credit Union*, 491 U.S. 164, 182 n. 4 (1989) (42 U.S.C. §1981); *Hafer v. Melo*, 502 U.S. 21, 31 (1991) (42 U.S.C. §1983).

22. In this case, it is clear that the named Plaintiffs have zero pecuniary damages, as they have testified under oath. Neither Plaintiff was employed at the time of their incarceration, and neither Plaintiff suffered any monetary loss as a result of being incarcerated. **[Exhibit G pp. 10-13; Exhibit H, p. 9**]. This is corroborated by their sworn interrogatory answers, which means that their sole basis for monetary damages is based on emotional distress. **[Exhibit E, p. 3 & Exhibit F, p. 3].**

29. In order to recover damages for emotional distress, Plaintiffs must prove proximate cause between the alleged wrongful incarceration and the emotional distress. Further, there must be proof of the emotional distress itself. As set out herein below, Plaintiffs can show no proximate cause, because in this case the Plaintiff's either agreed to the incarceration, in the case of Diaz, or completely failed to raise indigency and admitted that they did not, in the case of De Luna.

a. Diaz Destroyed Both Her Liability and Her Damage Claim By Opting for Incarceration As Opposed to Alternative Sentencing

30. It is uncontroverted that Elizabeth Diaz appeared in Judge Palacios's court and was apprised of both the charges against her and the fines she faced if found guilty. It is further undisputed that she asked for alternative sentencing, was taken at her word that she was indigent, and ultimately received both a payment and plan and community service. **[Exhibit B, Attachment 1, Exhibit L]**. She did not even have to appear before the judge, who was not on the bench that day. The court's policy of dealing with indigency was not only established and clear, but also capable of being instituted by the court's non-judicial staff, subject only to Judge Palacios's approval. **[Exhibits B and L]**. Ms. Diaz was given the opportunity to perform community service, declined it, and now wants the Court to believe that the court's staff would offer her alternative sentencing for one offense, yet deny it to her for the three other identical charges. Ms. Diaz asserts this fiction despite the fact that, upon her request numerous times, the court accommodated her requests to modify her sentence through payment plans and extensions of time to complete that alternative sentence. When she went up for her arraignment before Judge Contreras, she had already decided what she was going to do. At her arraignment, she

waived counsel and made no effort to assert indigency or to request any of the alternatives provided to her by Judge Palacios's staff. Having been given the opportunity for an alternative sentence and been found to be indigent without the requirement of any proof of financial resources or lack there of, Ms. Diaz fails to fall within the prohibitions of TCCP 45.046 or the Supreme Court case law as articulated in *Tate* and *Bearden*. Furthermore, the issues raised in both *Garcia* and *Sorrells* do not come into play, because she was given alternative sentencing options. Because Defendants provided her with procedural due process in this manner, therefore, there was no constitutional violation that proximately caused their damages.

b. De Luna Cannot Prove that He Suffered Damages

(1) De Luna's Admission That He made No Effort to Raise Indigency at His Arraignment Despite the Clear Opportunity to Do So Precludes Both His Liability and Damage Claim

31. De Luna was arraigned approximately five to six hours after his arrest. **[Exhibit H, pp. 38-39].** He has admitted in his deposition that he had not taken his prescription medication and when he doesn't do so he has a hard time being focused. [**Exhibit H, pp. 38-39**]. His arraignment video and subsequent transcript of that process reveals that Judge Rosa Treviño read Mr. De Luna his rights in English and in Spanish, and that he acknowledged that he heard and understood his rights, including the right to request that an attorney be appointed. He testified in his deposition that he neither filled out nor remembered answering the attorney request form that was a part of his jail record, but he did confirm that Judge Treviño read him his rights and that he did not question her as to any of his rights or ask that they be repeated. **[Exhibit H. pp. 87]**. After Mr. De Luna's rights were read, Judge Treviño then addressed each individual defendant, read

the charge, made sure they understood the charge and then offered each defendant the opportunity to address the court and raise any issues, including counsel and indigency. **[Exhibit D].** Mr. De Luna was read each truancy charge, the amount of the fine and then pled guilty. After he pled guilty he was again given the opportunity to address the court and raise any question he had, including the fact that he could not pay the fine. He did not do so. **[Exhibit D, pp. 6-7; Exhibit H, pp. 30-31].** As in the case of Ms. Diaz, Mr. De Luna was provided with the constitutionally appropriate level of due process, as interpreted by the Fifth Circuit in *Garcia* and *Sorrels*. His failure to raise his indigent status when given the opportunity precludes a finding of a constitutional violation, thereby obviating the contention that Defendants proximately caused his damages. As the Court considers causation, however, it may want to consult with Plaintiffs' expert in this case, Stephen A. Thorne, Ph.D.

2. Plaintiffs' Expert Cannot Identify Any Damages Suffered by De Luna

32. Dr. Thorne is a psychologist who evaluated both Plaintiffs for purposes of establishing their non-pecuniary damages in this suit. In his deposition, Dr. Thorne testified that Mr. De Luna did not suffer any mental or psychological trauma as a result of the incarceration about which he complains, as follows:

> Q: Did you find any indication that Frank is suffering from post-traumatic stress syndrome?
>
> A: No.
>
> Q: And I mean this in the most affectionate way. Did you find any indication that Frank was suffering from stress of any kind?
>
> A: I mean, I wouldn't say stress. I mean, I believe his mom that it probably maybe changed his social patters a little bit, but I don't

> think there's any kind of significant clinical stress or anxiety or anything like that.
>
> * * *
>
> Q: Let me ask you, then: In terms of evaluating Francisco's psychological functioning for purposes of damages in this case, what can you tell me about how he's been damaged?
>
> A: From the detainment?
>
> Q: Yeah.
>
> A: You know, again, I think – I think that kind of stuff probably affects all of us at some level. I mean, again, I think there's probably something to it. He changed his social habits a little bit. But I don't – *I can't point to any damages that – that I think are the result of his being detained.*

[Exhibit O, pp. 181-82, pp. 184-85] [Emphasis Added]. Thus, Mr. De Luna's own expert obviates his claim for damages.

V. CONCLUSION

33. There exists no genuine dispute as to one crucial fact: neither Mr. De Luna nor Ms. Diaz raised the issue of indigency when given the opportunity to do so before the court at their respective arraignments. In evaluating this dispositive issue, the Court must be mindful of the distinction between an indigent defendant's right to appointment of counsel, which is not at issue in this suit, and an indigent defendant's right to alternative sentencing in lieu of incarceration. Plaintiffs would have the Court believe that the right to declare indigency for purposes of obtaining alternative sentencing must be included in the litany of *Miranda* warnings prescribed by the Supreme Court. This is not the case. The law does not require a court to inquire of every defendant faced with a fine if he or she is indigent, nor does it require that the state advise a defendant of the right to declare indigent status. The Fifth Circuit has established that the obligation to

provide alternative sentencing to an indigent is triggered only when the defendant raises the issue of indigency. *See Garcia v. City of Abilene,* 890 F.2d at 776; *see also Sorrells v. Warner,* 21 F.3d at 1112. A municipal defendant's obligation is merely to ensure that there is a forum for a defendant to raise indigency, if he or she so wishes. *See Doe v. Angelina County* 733 F. Supp. 245 (E.D. Tex. 1990). Hidalgo County provides that forum, as is evidenced by Mr. De Luna's own arraignment and in the statements of Arnulfo Ramirez Garza at that very hearing. His actions, which were witnessed by Mr. De Luna, are so significant to this Court's inquiry that they bear repeating. Mr. Garza was picked up for a Class "C", but he also had an outstanding warrant from Judge Mary Alice Palacios, the same judge that issued the warrants on Mr. De Luna. As the court can see, when he was asked if he had questions, Mr. Garza immediately explained that he could not pay the fine and that he wanted the opportunity to work out something with the court. He admitted repeatedly that he was guilty, but he wanted to arrange for some kind of alternative sentencing. Initially, Judge Treviño thought he was arrested for his contribution to truancy violation, and would be released for time served, but it was then made apparent that was not the case. Judge Treviño then made arrangements for him to contact Judge Palacios's court, and he was out of jail that same day. **[Exhibit D, pp 12, Exhibit K: Diaz bates stamp #000035].** This same opportunity was offered to the following defendants, who were also released shortly after they expressed their inability to pay a fine at their arraignment:

- Andrea Rodriquez, booked in on January 29, 2009 and released January 30, 2009. She had nine counts of failure to attend ("FTA") and two other Class "C" misdemeanors. **[Exhibit K, Diaz bates stamp #000003]**

- Edgar Certa, booked in on February 5, 2009 and released the same day. He had three counts of FTA and a theft charge. **[Exhibit K, Diaz bates stamp #000004]**

- Fernando Lopez Silva, booked in on March 9, 2009 and released March 10, 2009. He had six outstanding Class "C" misdemeanors of which one was FTA. **[Exhibit K, Diaz bates stamp #000008]**

- Patricia Morales, booked in on May 29, 2009 and released on May 30, 2009. She had 7 Class "C" counts including one FTA. **[Exhibit K, Diaz bates stamp #000015]**

- Ruby Estrada, booked in on June 2, 2009 and released the same day. She had two FTA's **[Exhibit K, Diaz bates stamp #000016]**

- Raymond Jesus Garza, booked in on September 15, 2009 and released the same day, he had seven FTA's. **[Exhibit K, Diaz bates stamp #000025]**

- Gabrille Nicole Gonzalez Nino, booked in on December 14, 2009 and released December 15, 2009. She had four Class "C"'s including 3 FTA's. **[Exhibit K, Diaz bates stamp #000035]**

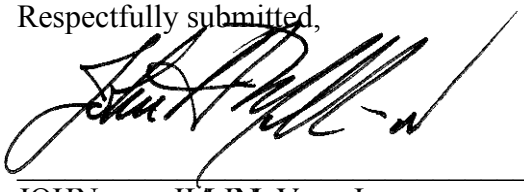
These are just a few of the hundreds, if not thousands, of examples of how the County's system of providing alternative sentencing for indigents works at the Class "C" level, when indigency is raised properly and timely by the defendant. There is no systematic incarceration of Class "C" misdemeanor defendants without an indigency hearing, and in almost every case set out above, the judges took the defendant at his or her word, without subjecting them to a screening procedure. Mr. De Luna and Ms. Diaz had the exact same opportunity as these other defendants, and yet they failed to raise indigency at their respective arraignments. When a Class "C" Defendant raises indigency, every single JP court has a clear policy of providing alternative sentencing and does so freely. **[Exhibit M].** The Plaintiffs' failure to raise indigency did not trigger the County's obligation to provide alternative sentencing. Thus, no constitutional violation occurred.

34. Although it is not their burden to do so, Defendants respectfully assert that they have disproved the elements of Plaintiffs' claim under 42 U.S.C. §1983. Plaintiffs' burden is to present evidence of (1) an official policy, practice, or custom (2) that served as the moving force behind a constitutional deprivation (3) and that caused Plaintiffs' damages. Defendants argue that Plaintiffs cannot present *any* evidence to support any one of these elements, let alone all three. Furthermore, Defendants have affirmatively proved the following: (1) that Hidalgo County's has a policy in place that follows the Texas Code of Criminal Procedure and passes constitutional muster under *Tate*, *Bearden*, *Garcia*, and *Sorrels*; (2) that Defendants exercised their right to waive their right to alternative sentencing due to their indigency; (3) that, therefore, their procedural due process rights under the Fourteenth Amendment were not violated; and (4) that consequently they cannot prove that anything the Defendants did or failed to do caused their damages, which in the case of Mr. De Luna have been conclusively disavowed.

35. The Plaintiffs' burden is extremely high. Even if this Court believes that the County or its JP's were not careful enough with the Plaintiffs and they "slipped through the cracks," leading to constitutional violations, that is not enough to sustain their §1983 claims against Defendants. This is because mere negligent acts or omissions are not enough to support liability. Plaintiffs must present evidence of *deliberate indifference* on behalf of everyone that interacted with Plaintiffs before their incarceration, which constitutes a higher burden of proof even than that of gross negligence. Plaintiffs cannot meet this standard, meaning that their claims are barred as a matter of law. Because Plaintiffs cannot raise an genuine issue of material fact as to each

and every element of their claims, therefore, Defendants' Motion for Summary Judgment must be granted in its entirety.

Respectfully submitted,



JOHN . IL LIM V I
State ar o B N 24005166
Federal D o I N 24026
1305 ast o lana N oop, Luite S F
McAllen, exas T 78504
(956) 456 87-
(956) 136 41-fax) (

OF COUNSEL:

Ortiz & Millin, L.P.

MARK . E TZ W
State ar o B N 21116500
Southern District ID No. 102493
100 Congress Avenue, Suite 2000
Austin, exas T 78701
Tel: 512) 89 0-
Fax: 512) 22 0-

OF COUNSEL:

Weitz Morgan PLLC

ATTORNEYS IN CHARGE FOR DEFENDANTS, HIDALGO COUNTY, TEXAS; GUADALUPE TREVINO, IN HIS OFFICIAL CAPACITY AS HIDALGO COUNTY SHERIFF; MARY ALICE PALACIOS; GILBERTO SAENZ; JESUS MORALES; BOBBY CONTRERAS; ROSA A. TREVINO; LUIS GARZA; ISMAEL OCHOA; CHARLIE ESPINOSA; E. "SPEEDY" JACKSON; IN THEIR OFFICIAL CAPACITIES AS HIDALGO COUNTY MAGISTRATES AND JUSTICES OF THE PEACE

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading was served on Courtney Bowie and Mike Caddell, who are the attorneys in charge for Plaintiffs, Francisco De Luna and Elizabeth Diaz, Individually and on Behalf of All Others Similarly Situated, via electronic mail on October 18 2011.

JOHN . IIALIM V I

CERTIFICATE OF CONFERENCE

I certify that on the 18th day of October 2011, I conferred, in good faith, with counsel for Plaintiffs in an unsuccessful attempt to reach an agreement regarding the foregoing Opposed Motion for Summary Judgment and Memorandum in Support of Same. Counsel for Plaintiffs have expressed that they are opposed to same.

JOHN . IIALIM V I