

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

RANDY MILLER,
RUSSELL DAVIS,
LANCE HENDRIX,
REGINALD WOOTEN,
GREGORY CARSWELL, and
JOE HUNTER,

Plaintiffs, on behalf of
themselves and all persons
similarly situated,

v.

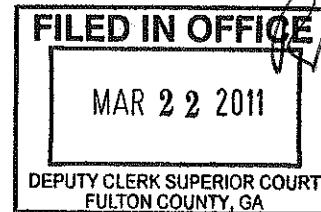
NATHAN DEAL, in his official
capacity as Governor of the State
of Georgia,

CLYDE REESE, III, in his official
capacity as Commissioner of the
Georgia Department of Human
Services,

KEITH HORTON, in his official
capacity as Director of the Division
of Child Support Services,

TAMMY BROOME, in her
official capacity as Manager of the
Rome Child Support Office,

BETTY SMITH, in her official
capacity as Manager of the
Alapaha Child Support Office,



CIVIL ACTION

No. 2011CV198121

CLASS ACTION

PATRICIA GUNN, in her official)
capacity as Manager of the Middle)
Swainsboro Child Support Office,)
)
CYNTHIA HEAD, in her official)
capacity as Manager of the Alcovy)
Monroe Child Support Office,)
)
Defendants.)
_____)

VERIFIED COMPLAINT

1. This civil rights lawsuit is brought to remedy the State of Georgia's persistent failure to guarantee legal representation to indigent parents who face incarceration in child support contempt proceedings, as required by the Georgia Constitution and the United States Constitution.

2. Plaintiffs are indigent parents who have been jailed without counsel for being too poor to fulfill their court-ordered child support obligations. Some of the Plaintiffs have serious physical disabilities. Others have spent months looking for work, only to find none. All are destitute, but all have been or will likely be incarcerated pursuant to civil contempt orders that condition their release on payment of enormous "purge fees." Languishing in jail for weeks, months, and sometimes over a year, these parents share one trait in common besides their poverty: they went to jail without ever talking to an attorney. Not one Plaintiff had an appointed attorney to explain to a court that, through no fault of his own, he had no ability to pay. Not one had an appointed attorney to bring to a court's attention

that he had been sitting in a jail for weeks or months without the means to pay his purge fee. And every Plaintiff who sought the assistance of appointed counsel has been met with no reply. The families of the Plaintiffs have been left with gaping holes – jailed parents and a source of financial support rendered unable to provide a helping hand.

3. The Plaintiffs and other similarly situated persons have all made efforts to fulfill their child support obligations. But for reasons entirely out of their control, they cannot. Some indigent parents, like Plaintiff Lance Hendrix, are veterans who have returned from military service to their economically depressed towns at a time when unemployment is at an all-time high,¹ and as a result they have been unable to find full-time work. Other indigent parents, like Plaintiff Russell Davis, have disabilities that render compliance with their child support obligations impossible, yet they have been sent to jail for falling behind in their payments. Others, like Plaintiffs Reginald Wooten and Joe Hunter, are caught in a cycle of incarceration due to their inability to make full child support payments; as soon as they are released from jail for nonpayment, the State demands thousands of dollars within a short period, resulting in an inevitable, subsequent incarceration for their inability to pay.

¹ See Henry Unger, "Georgia's Jobless Rate Again Hits All-Time High of 10.4%," *Atlanta Journal-Constitution*, March 3, 2011.

4. In some aspects, the civil contempt process resembles a criminal proceeding. Parents held in contempt are sent to jail, often for long periods of time. The State is represented at any court appearance by a special assistant attorney general. But parents facing incarceration in civil child support contempt proceedings are afforded fewer rights than persons facing criminal prosecutions.

5. Because child support contempt proceedings are labeled civil, Plaintiffs and other similarly situated parents are denied legal assistance. Whereas persons charged with *criminal contempt* are afforded the right to counsel and may be incarcerated for no more than twenty days, *see* O.C.G.A. § 15-6-8, parents charged with *civil contempt* for falling behind in their child support obligations are routinely jailed indefinitely² – for months, a year, or longer – without any help or guidance from an attorney.

6. People facing criminal charges are accorded process: they appear in front of judges; their hearings are recorded; they have the right to a jury trial. By contrast, indigent parents such as Plaintiffs go to jail after civil contempt proceedings that are often perfunctory, un-recorded proceedings, lasting just minutes, at which there is no significant inquiry into their ability to pay. In some instances, Plaintiffs have been jailed for months without a hearing and without any judicial review of their incarceration.

² See *Ensley v. Ensley*, 238 S.E.2d 920, 921-22 (Ga. 1977).

7. The State's policy and practice of denying counsel to indigent child support obligors facing incarceration has resulted in the following:

- a. a breakdown in the fundamental fairness of child support contempt proceedings brought against indigent parents across Georgia;
- b. child support orders that demand impossible sums from impoverished individuals, resulting in serial incarcerations for inability to pay;
- c. the incarceration of people with disabilities who lack the ability to comply with their child support orders;
- d. significant racial disparities in the numbers of people sent to jail for their inability to pay child support; and
- e. the creation of debtors' prisons.

8. The State's practice of denying counsel to indigent child support obligors facing jail has also resulted in extraordinary instances of injustice. For example, Frank Hatley was jailed for 19 months, without counsel, for his inability to pay child support arrears notwithstanding conclusive DNA evidence proving that Mr. Hatley was not the father of the child in question.³ Quinton Jackson was jailed for over one year, without a hearing and without counsel, for failing to reimburse the state for \$619.34 in child support – an amount that became due before Mr. Jackson ever received an order to pay.⁴ Plaintiff Randy Miller, an Iraq

³ See Bill Rankin, "Court Knew Man Jailed for a Year for Non-Support Was Not Child's Father," *Atlanta Journal-Constitution*, July 14, 2009; Mariano Castillo, "Childless Man Freed After Serving Time for Child Support Violations," *CNN*, July 16, 2009.

⁴ See Pet. for Release, *Dep't of Human Res. v. Quinton Jackson*, Civil Action No. 2004-U-88 (Cook County Superior Court, May 21, 2009) at 1.

War veteran with an exemplary child support payment history, was recently jailed for three months, without counsel, after he lost his job.⁵ And Plaintiff Joe Hunter, age 20, has been in the Walton County Jail since October 2010; five months later he cannot afford to pay the \$250 fee that would secure his release.

9. Evidence from one south Georgia jail is illustrative of the scope of the problem. In February 2009, the county jail in Adel, Georgia held 140 people. Of those 140, just under one-third, or 45 people (32 men and 13 women), were held solely for child support contempt.⁶ Virtually all of these men and women were jailed despite being destitute and unable to pay their purge fees.

10. Defendants' policy of incarcerating indigent parents and denying them the right to counsel violates the requirement of fundamental fairness under the Due Process Clause of the Fourteenth Amendment. *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981) (holding that the right to counsel presumptively applies in any proceeding, civil or criminal, that could lead to incarceration.).⁷ In *Lassiter*, the Supreme Court held that it is "the defendant's interest in personal freedom" and

⁵ See Bill Rankin, "Jail For Child Support Debt Questioned," *Atlanta Journal-Constitution*, Dec. 15, 2010.

⁶ See Charles Shriver, "Hatley Set Free From Cook County Jail; Atlanta Group Refers to 'Debtors' Prison,'" *Adel News Tribune*, July 22, 2009.

⁷ In *Lassiter*, the Court held that "fundamental fairness" did not require a categorical right to counsel at a parental termination hearing at which the defendant's liberty was not at stake. *Id.* at 25-27, 33. Where a defendant faces incarceration, however, the right to counsel is presumed and then weighed against the three traditional due process factors: "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Id.* at 27.

not the Sixth Amendment right to counsel in criminal cases “which triggers the right to appointed counsel.” *Id.* at 25.

11. Twenty-two federal courts of appeals and state courts of last resort have held, consistent with *Lassiter*, that an indigent defendant has a constitutional right to appointed counsel at a civil contempt proceeding that results in his incarceration.⁸ The Eleventh Circuit Court of Appeals has already acknowledged that “[t]he right to counsel exists” in a civil contempt proceeding “if the litigant may lose his physical liberty if he loses the litigation.”⁹ The Court of Appeals of Georgia has similarly held that the right to counsel “applies to a contempt hearing that . . . results in a sentence of imprisonment.” *Merritt v. State*, 583 S.E.2d 283, 284 (Ga. Ct. App. 2003).¹⁰

⁸ See Pet. for a Writ of Cert., *Turner v. Price*, No. 10-10, 2010 WL 2604155 (June 25, 2010) at 12-19 (compiling decisions of seven federal courts of appeals and fifteen state courts of last resort, all holding that indigent defendants in civil contempt proceedings have a right to appointed counsel if they face incarceration). See also *Ridgway v. Baker*, 720 F.2d 1409, 1413 (5th Cir. 1983) (granting habeas relief to child support obligor who was denied counsel and explaining that the right to counsel “extends to every case in which the litigant may be deprived of his personal liberty if he loses”); *Servier v. Turner*, 742 F.2d 262, 267 (6th Cir. 1984) (“Since [the defendant] was incarcerated for sixteen days as a result of the civil contempt hearing, he was entitled to have the assistance of counsel during that proceeding.”).

⁹ See *United States v. McAnlis*, 721 F.2d 334, 337 (11th Cir. 1983) (citing *Lassiter* and “not disput[ing]” that a right to counsel exists at civil contempt proceedings where imprisonment is possible, but finding a waiver of that right).

¹⁰ Although *Merritt* involved contempt proceedings against a grand juror who failed to appear in court, the *Merritt* court, in finding a right to counsel, relied on two cases that upheld the right to counsel in child support contempt proceedings. See *Merritt*, 583 S.E.2d at 284 (citing *Mann v. Hendrian*, 871 F.2d 51, 52 (7th Cir. 1989) (stating that an indigent parent had the right to counsel in child support contempt proceeding at which he was sentenced to 60 days in prison) and *Walker v. McLain*, 768 F.2d 1181, 1183 (10th Cir. 1985) (“It would be absurd to

12. As a matter of federal constitutional law, the United States Supreme Court is poised to address the issue of right to counsel in civil child support contempt proceedings in *Turner v. Rogers*. See *Turner v. Rogers*, 131 S. Ct. 504 (2010) (granting petition for writ of certiorari). A decision in *Turner* is expected later this year.¹¹ In the meantime, the State continues to incarcerate, on a daily basis, hundreds of destitute parents without affording them the right to counsel.

13. By depriving Plaintiffs of their right to counsel and their liberty, Defendants have caused Plaintiffs irreparable injury. Confined to jails, Plaintiffs have lost homes and had to forego job opportunities. They have had to leave their children and elderly parents without the benefit of their support. Defendants have also cost the citizens of Georgia tens of thousands of dollars in taxes spent to house impoverished parents in county jails and detention centers.

14. Although some Plaintiffs have been or will be released from jail before the resolution of this case, the State's illegal practices are still a threat to them. Plaintiffs are subject to continuing orders of child support. They owe child support arrearages and are currently unable to pay them. The State of Georgia has

distinguish criminal and civil incarceration; from the perspective of the person incarcerated, the jail is just as bleak no matter which label is used.”).

¹¹ While *Turner* may resolve some of the *federal* constitutional issues raised in this Complaint, questions of construction of the *state* constitution are strictly matters for the highest court of this state. See *Pope v. City of Atlanta*, 240 S.E.2d 241, 242 (Ga. 1977) (“The construction of similar federal constitutional provisions, though persuasive authority, is not binding on this State’s construction of its own Constitution.”).

a policy of denying appointed counsel to indigent parents who are jailed for nonpayment of child support. Thus, there is not only a reasonable expectation, but a virtual certainty that Plaintiffs will again face incarceration without having counsel appointed to assist in their defense. Plaintiffs seek prospective relief so that Defendants will not, in the future, violate their rights. Defendants' illegal practices are capable of repetition, yet evade review.

15. Plaintiffs bring this putative class action on behalf of themselves and all other indigent parents in Georgia who are: (1) currently being incarcerated for nonpayment or underpayment of child support following a contempt proceeding at which they were not afforded the right to counsel; or (2) facing the imminent threat of future incarceration in Georgia, without counsel, for nonpayment or underpayment of court-ordered child support.

16. Plaintiffs assert claims for violation of their rights under 42 U.S.C. § 1983 and violation of Article I, Section, I, Paragraphs I, II and XIV of the Georgia Constitution. They seek injunctive relief and a declaratory judgment that Defendants must conform their actions to the law.

17. Plaintiffs bring this action to compel the State to: (a) inform all accused indigent child support contemnors facing jail of their right to court-appointed counsel; and (b) provide court-appointed counsel for indigent, accused

child support contemnors who face incarceration, as required by the United States and Georgia Constitutions.

JURISDICTION AND VENUE

18. This action is brought to enforce rights conferred by the United States and Georgia Constitutions and other applicable law. It is brought pursuant to the authority vested in this Court by O.C.G.A. §§ 9-4-2 and -3, O.C.G.A. § 9-5-1, O.C.G.A. §§ 9-6-20 to 23, and -25; and 42 U.S.C. §§ 1983, 1985.

19. Venue is proper in Fulton County as substantial equitable relief is sought against at least one Defendant residing in Fulton County. *See* O.C.G.A. § 9-10-30. Substantially the same equitable relief is sought against resident and non-resident defendants.

20. All actions and refusals to act by the Defendants were under color of state law and with deliberate indifference to Plaintiffs' rights.

PARTIES

PLAINTIFFS

RANDY MILLER

21. Randy Miller is a 39-year-old African American man who resides in Rome, Georgia. His child support case is pending in the Superior Court of Floyd County and is administered by the Rome Office of Child Support. Mr. Miller is under court orders to pay \$593 per month for his 16-year-old daughter and \$269 per month for his 12-year-old daughter.¹²

22. Mr. Miller is a veteran of the Iraq War. He served in the military reserves for fourteen years, was employed while not on active duty, and had an excellent child support payment history for over a decade. But he lost his job in July 2009 and thereafter struggled to find full-time work. After he lost his job, Mr. Miller continued to support his children, making about \$2,700 in payments using money from income tax refunds and odd jobs. By October 2010, however, Mr. Miller had lost his home to foreclosure and exhausted his savings. His bank account contained just 39 cents.

23. Mr. Miller was incarcerated from November 15, 2010 until February 14, 2011 after a Floyd County Superior Court judge held him in civil contempt of a court order to pay child support. The contempt order provided that Mr. Miller

¹² The child support order for Mr. Miller's younger daughter was issued on March 3, 2011.

could purge his contempt and gain release from jail if he paid \$3,000, but Mr. Miller, who is indigent, was unable to pay, so he remained in jail for three months until the State consented to his release.¹³

24. Mr. Miller was not represented by counsel at the contempt hearing that led to his incarceration, nor did the court advise him of his right to counsel. Had counsel been appointed, Mr. Miller could have made the evidentiary demonstration and legal arguments necessary to establish that he could not pay the \$3,000 he owed, which, under state law, would have been a complete defense precluding his incarceration. Instead, Mr. Miller was left to defend himself and was jailed, in effect, for being too poor to pay. Because Mr. Miller was denied his right to counsel, the contempt proceedings and his subsequent incarceration were fundamentally unfair, in violation of the state and federal constitutions.

25. Mr. Miller was recently released from jail, and despite his best efforts, has not yet found full-time work. His income from his current, part-time job assembling furniture places him well below the poverty line, and his child support obligation of \$862.52 per month far exceeds his gross monthly income. Without the means to fulfill his child support obligation, Mr. Miller is subject to an

¹³ On December 14, 2010, the undersigned counsel filed a petition seeking Mr. Miller's release in the Floyd County Superior Court. Mr. Miller was released from jail on February 14, 2011 before the petition was heard. The fact that Mr. Miller was represented on a voluntary *pro bono* basis by an attorney does not render his claim moot. The constitutional violation that Miller challenges in this case is the failure of the court to *appoint* counsel.

immediate threat of re-incarceration without court-appointed counsel. Mr. Miller seeks the enforcement of his rights in this Court so that he will not be subject to further unconstitutional deprivations of his liberty.

RUSSELL DAVIS

26. Russell Davis is a 35-year-old African American man who lives in Adel, Georgia. His child support case is pending in the Superior Court of Cook County and is administered by the Alapaha Child Support Office. Mr. Davis is under a court order to pay \$250.54 per month for his son.

27. Mr. Davis is a veteran of the United States Armed Forces. He served in the United States Navy from 2001 to 2006.

28. While in the Navy, Mr. Davis was diagnosed with psychiatric conditions, including psychosis and post-traumatic stress disorder (PTSD). He takes psychotropic medications for hallucinations and receives treatment at a Veterans Administration hospital. While in the Navy, Mr. Davis also sustained physical injuries in an accident. Mr. Davis's physical and mental conditions are permanent and render him unable to maintain gainful employment.

29. Despite Mr. Davis's indigence and his disabilities, employees of the Alapaha Child Support Office have repeatedly sought to jail Mr. Davis for falling behind in his child support payments. When Mr. Davis missed one payment of

\$208.29 in July 2009, for example, the State filed a complaint for contempt seeking Mr. Davis's incarceration.

30. Mr. Davis was subsequently jailed from November 3, 2010 until February 2, 2011 after a Cook County Superior Court judge found that he failed to pay \$83.50 in arrears and \$471.58 in current child support. The contempt order provided that Mr. Davis could purge his contempt and gain release from jail if he paid all of his arrears, but Mr. Davis, who is indigent, was unable to pay. He remained in jail for three months until the State consented to his release.

31. Mr. Davis was not represented by counsel at his contempt hearing, nor did the court advise him of his right to counsel. Had counsel been appointed, Mr. Davis could have made the evidentiary demonstration and legal arguments necessary to establish that his disabilities prevented him from paying, which, under state law, would have been a complete defense precluding his incarceration. Instead, Mr. Davis was left to defend himself and was jailed, in effect, for being too poor to pay. The court was not informed of Mr. Davis's disabilities.

32. On the date of his release from jail, Wednesday, February 2, 2011, the Superior Court of Cook County ordered Mr. Davis to pay \$3,400 by 5:00 p.m. on Monday, February 7, 2011, or face re-incarceration.¹⁴ Mr. Davis did not and does

¹⁴ On February 2, 2011, Mr. Davis was transported from the Cook County Jail to the superior court for a hearing on whether he would be released from jail. The court inquired as to how much child support Mr. Davis could pay. Mr. Davis replied that he received Veterans

not have \$3,400. Because his Veterans benefits were terminated while he was in jail, Mr. Davis is now destitute.

33. On March 9, 2011, Mr. Davis was summoned to court for another contempt proceeding. Following a hearing at which he was not afforded counsel, Mr. Davis was jailed again for nonpayment of child support. Mr. Davis's purge fee was set at \$2,089.30 – a sum he has no hope of paying.

34. Because Mr. Davis was denied his right to counsel, the contempt proceedings and his subsequent incarcerations were fundamentally unfair, in violation of the state and federal constitutions.

35. Mr. Davis is presently unable to fulfill his child support obligations. He seeks the enforcement of his rights in this Court so that he will not be subject to further unconstitutional deprivations of his liberty.

LANCE HENDRIX

36. Lance Hendrix is a 23-year-old Caucasian man who resides in Adel, Georgia. His child support case is pending in the Superior Court of Cook County and is administered by the Alapaha Child Support Office. He is under a court order to pay \$480 per month for the support of his 5-year-old daughter.

benefits, some of which *might* have accumulated in his bank account during his incarceration. The court ordered Mr. Davis to appear at the child support office by 5 p.m. on February 7, 2011 with \$3,400. The court ordered that a warrant would issue for Mr. Davis's arrest if Mr. Davis did not either appear at the child support office with \$3,400, or with the name of any person who may have removed the money from his account. It was only after Mr. Davis was released from custody that he learned that his Veterans benefits were terminated as a result of his incarceration.

37. Mr. Hendrix previously served in the military and was stationed overseas until September 2009. While in the military, Mr. Hendrix had a solid payment history. But when he returned from military service to his small, economically depressed town, he had trouble finding full-time work.¹⁵ Mr. Hendrix worked whatever jobs he could find to pay child support – from picking up pecans and scrap metal to doing home restoration and yard work. But his payments of \$400 per month were not lowered to account for the fact that he no longer had steady employment. Instead, his payments were increased from \$400 to \$480 per month.

38. Between his return from military service in September 2009 and his arrest for child support contempt in July 2010, Mr. Hendrix managed to pay \$3,796.36 toward his child support debt. Despite his efforts to pay, employees of the Alapaha Child Support Office sought to incarcerate Mr. Hendrix, who could not afford to hire counsel to defend him. The following is a chronological summary of recent events in Mr. Hendrix's child support case:

- a. On May 26, 2010, the Superior Court of Cook County issued a contempt order against Mr. Hendrix, finding him in arrears in the amount of \$4,107.78. The order stated: "Payments are said to be made every 30 days. Failure to make said payments shall result in incarceration of the defendant until further order of the judge."

¹⁵ See "More Than 200 Unemployment Claims in September," *Adel News Tribune*, Oct. 27, 2010 (reporting that as of August 2010, the unemployment rate in Cook County was 13%).

- b. On July 13, 2010, a child support agent from the Alapaha Child Support Office transmitted an affidavit to the Cook County Sheriff's Office in which she represented that Mr. Hendrix "failed to make arrears payments in the amount of \$80.00." Without any further order or review by a court, a warrant issued for Mr. Hendrix's arrest.
- c. On July 23, 2010, Mr. Hendrix was arrested after police stopped his vehicle and discovered the warrant. Mr. Hendrix did not appear before a judge following his arrest. He was taken straight to jail where he remained, without a hearing or review of his case, for four months.
- d. On November 24, 2010, Mr. Hendrix was released from jail on the condition that he pay \$1,822.18 by February 2, 2011.

39. Mr. Hendrix was not represented by counsel in any of the foregoing contempt proceedings, nor did any officer of the court advise him of his right to counsel. Had counsel been appointed, Mr. Hendrix could have made the evidentiary demonstration and legal arguments necessary to establish that he could not pay the thousands of dollars he owed, which, under state law, would have been a complete defense precluding his incarceration. Instead, Mr. Hendrix was left to defend himself and was jailed, in effect, for being too poor to pay. Because Mr. Hendrix was denied his right to counsel, the contempt proceedings and his subsequent incarceration were fundamentally unfair, in violation of the state and federal constitutions.

40. Mr. Hendrix now faces the immediate threat of re-incarceration. On February 2, 2011, Mr. Hendrix appeared *pro se* at another contempt hearing at which he was ordered to pay \$600 by March 2011 and \$512 by April 2011 or face "incarceration of the defendant until further order of the judge."

41. Despite his best efforts to find full-time employment, Mr. Hendrix currently works part-time at a home restoration company. His income from that job places him below the poverty line. As of February 24, 2011, Mr. Hendrix had \$4.00 to his name. Mr. Hendrix seeks the enforcement of his rights in this Court so that he will not be subject to further unconstitutional deprivations of his liberty.

REGINALD WOOTEN

42. Reginald Wooten is a 36-year-old African American man who lives in Adel, Georgia. His child support case is pending in the Superior Court of Cook County and is administered by the Alapaha Child Support Office. He is under a court order to pay \$300 per month for the support of his 15-year-old daughter.

43. Mr. Wooten previously had steady employment at a factory specializing in the fabrication of metal products. In the last several years, however, Mr. Wooten has been unable to find full-time work in Adel. Since 2007, Mr. Wooten has been jailed three times, without counsel, because he cannot afford to fulfill his child support obligations.

44. Mr. Wooten was first incarcerated from December 19, 2007 until February 28, 2008 after a Cook County Superior Court judge found that he was \$4,954.14 in arrears. The contempt order provided that Mr. Wooten could purge his contempt and gain release from jail if he paid \$990.88, but Mr. Wooten, who is indigent, was unable to pay, so he remained in jail for over two months until the State consented to his release.

45. Mr. Wooten was not represented by counsel at his contempt hearing, nor did the court advise him of his right to counsel. Had counsel been appointed, Mr. Wooten could have made the evidentiary demonstration and legal arguments necessary to establish that he could not pay the money he owed, which, under state law, would have been a complete defense precluding his incarceration. Instead, Mr. Wooten was left to defend himself and was jailed, in effect, for being too poor to pay.

46. This was not the last time that Mr. Wooten was incarcerated for failure to pay child support without the aid of counsel. Because his daughter's mother had received public assistance benefits, she assigned her right to child support to the Georgia Department of Human Services (DHS), and the child-support enforcement proceedings against Mr. Wooten became subject to automatic procedures carried out by DHS and the Superior Court of Cook County. Each time Mr. Wooten's account fell into arrears, DHS automatically filed a complaint for

contempt. Mr. Wooten has been incarcerated for falling behind in his child support payments on *three* occasions for a total of over one year.

47. The following is a chronological summary of recent, pertinent proceedings in Mr. Wooten's child support case:

- a. On April 8, 2009, Mr. Wooten was held in contempt for his inability to pay child support at a hearing at which he was not represented by counsel. The court ordered him to make payments every thirty days or "be incarcerated until a purge payment is made or until further order of the court."
- b. On June 11, 2009, Mr. Wooten was arrested because he could not afford to make complete child support payments. He was taken to jail where he remained, without seeing a judge or talking to a lawyer, for five months.¹⁶
- c. On November 18, 2009, Mr. Wooten was released from jail pursuant to an order that promised re-incarceration if he fell more than 30 days behind on his payments of \$300 per month.
- d. On April 7, 2010, Mr. Wooten was again held in contempt at a hearing at which he was unrepresented by counsel. The Superior Court ordered Mr. Wooten to be jailed unless he paid: (1) \$265 by April 9, 2010; (2) \$300 by April 30, 2010; and (3) \$300 every 30 days.
- e. On May 13, 2010, an agent from the Alapaha Child Support Office submitted an affidavit to the Cook County Sheriff's Office in which she asserted that Mr. Wooten had only paid \$235 toward arrears (instead of the required \$565) since the April 7, 2010 hearing. A warrant was issued for Mr. Wooten's arrest. Upon information and belief, no judicial officer reviewed or approved the warrant.

¹⁶ On October 11, 2009, Mr. Wooten wrote a letter to his child support enforcement agent informing her that he had obtained a notarized affidavit confirming he had been offered a job. He received no response to his letter and he was detained for another month.

- f. On June 15, 2010, Mr. Wooten was arrested again for his inability to make full child support payments. He was taken to jail where he remained, without seeing a judge or talking to a court-appointed lawyer, for over five months.
- g. On November 24, 2010, the State consented to Mr. Wooten's release from jail. At his release hearing, Mr. Wooten was ordered to pay \$3,000 by February 2, 2011 – an impossible sum for someone in Mr. Wooten's financial position.
- h. On Wednesday, February 2, 2011, Mr. Wooten appeared in court for another contempt hearing at which the State asked that Mr. Wooten be jailed. Mr. Wooten told the court that he had just found a job and that he hoped to earn \$350 by the end of the week. The court ordered Mr. Wooten to appear at his local child support office with his entire, anticipated week's paycheck of \$350 by 5:00 p.m. on Monday, February 9, 2011. The court informed Mr. Wooten that if he did not pay the entire \$350, a warrant for his arrest would be issued.

48. Because Mr. Wooten was denied his right to counsel, the foregoing contempt proceedings and Mr. Wooten's subsequent incarcerations were fundamentally unfair, in violation of the state and federal constitutions.

49. Mr. Wooten currently faces an immediate threat of re-incarceration. He is destitute and homeless. Despite his best efforts, he cannot afford to make full child support payments. Mr. Wooten seeks the enforcement of his rights in this Court so that he will not be subject to further unconstitutional deprivations of his liberty.

GREGORY CARSWELL

50. Gregory Carswell is a 35-year-old African American man who resides in Swainsboro, Georgia. His child support case is pending in the Superior Court of Emanuel County and is administered by the Middle Swainsboro Office of Child Support. He is under a court order to pay \$371 per month for his two children.

51. Mr. Carswell was gainfully employed for most of the last decade and has paid child support for his children since 1996. From 2001 to 2007, Mr. Carswell worked as a tractor driver for a company specializing in highway and bridge construction.

52. Mr. Carswell made regular child support payments until 2007, when he was seriously injured in a car accident. Following the accident, Mr. Carswell was hospitalized and underwent orthopedic surgery for injuries to his pelvis. His injuries rendered him unable to work and he lost his job. For a time, he received unemployment benefits of about \$230 per week, nearly half of which were intercepted by Georgia's Division of Child Support Services.

53. Like other recipients of unemployment benefits, Mr. Carswell experienced lapses in his benefits. During one lapse in mid-2009, Mr. Carswell took a job at a local farm to earn money to fulfill his child support obligations. Soon thereafter, he re-injured himself while hauling hay. Mr. Carswell had five

surgeries to repair his fractured bones, but he remains disabled. He cannot walk even short distances without pain.

54. Mr. Carswell provided his state child support agent with a doctor's letter, dated December 2010, which confirmed that he "will likely indefinitely" have problems with his ankle that will prohibit him from doing "heavy labor, lifting, walking, standing, etc." The doctor's letter further stated that Mr. Carswell will not likely "ever" return to "normal regular activities." A separate doctor's letter dated September 2010 forbade Mr. Carswell from working for six months, or until at least March 9, 2011.

55. Despite Mr. Carswell's disability, the State has sought to send Mr. Carswell to jail for nonpayment of child support. Most recently, on January 5, 2011, the State filed a motion for contempt alleging that Mr. Carswell was in arrears in the amount of \$12,450.43. The State asked the superior court to order Mr. Carswell to pay the amount due "or be incarcerated in the common jail of this county until all arrears and costs are paid in full."

56. Mr. Carswell has represented himself at his contempt proceedings. He has not been afforded the right to counsel in spite of his indigence.

57. Although Mr. Carswell has not yet been jailed, he is under an obligation to pay child support and faces an immediate threat of incarceration for his inability to make child support payments. As of March 16, 2011, Mr. Carswell

has no money to his name. He seeks the enforcement of his rights in this Court so that he will not be subject to further unconstitutional deprivations of his liberty.

JOE HUNTER

58. Joe Hunter is a 20-year-old African American man who lives in Monroe, Georgia. His child support case is pending in the Superior Court of Walton County and is administered by the Alcovy Monroe Office of Child Support. He is under a court order to pay \$264 per month for his 4-year-old son.

59. Mr. Hunter was first ordered incarcerated in January 2010 after a Walton County Superior Court judge found that he was \$528 in arrears. The contempt order provided that Mr. Hunter would be jailed:

beginning on Friday, January 29, 2010 and every weekend thereafter until such time as the Defendant pays \$528.00 towards his arrears on the case listed above or until further order of the Court or [sic] obtains verifiable employment with the employer deducting from wages per a wage withholding order.

60. Mr. Hunter, who is indigent, was unable to pay \$528, so he remained subject to the order of incarceration and served approximately four weekends in jail.

61. Mr. Hunter was not represented by counsel at his contempt hearing, nor did any officer of the court advise him of his right to counsel. Had counsel been appointed, Mr. Hunter could have made the evidentiary demonstration and legal arguments necessary to establish that he could not pay the money he owed,

which, under state law, would have been a complete defense precluding his incarceration. Instead, Mr. Hunter was left to defend himself and was jailed, in effect, for being too poor to pay.

62. This was only the first of three times that Mr. Hunter was incarcerated for inability to pay child support. Because Mr. Hunter's son's guardian received public assistance benefits, she assigned her right to child support to the Georgia Department of Human Services (DHS), and the child-support enforcement proceedings against Mr. Hunter became subject to automatic procedures carried out by DHS and the Superior Court of Walton County. Each time Mr. Hunter's account fell into arrears, DHS automatically filed a complaint for contempt. Mr. Hunter was subsequently jailed for nonpayment of child support, without counsel, from May 10, 2010 until August 2, 2010, and from October 4, 2010 to the present.

63. Mr. Hunter remains in the Walton County Jail today because he is unable to pay his purge fee of \$250.

64. Because Mr. Hunter was denied his right to counsel, the contempt proceedings and his subsequent incarcerations were fundamentally unfair, in violation of the state and federal constitutions.

65. Mr. Hunter seeks the enforcement of his rights in this Court so that he will not be subject to further unconstitutional deprivations of his liberty.

DEFENDANTS

GOVERNOR NATHAN DEAL

66. Nathan Deal is the Governor of the State of Georgia and is sued in his official capacity. His principal place of business is in Fulton County, Georgia.

67. Governor Deal has the ultimate authority within the executive branch of the government of the State of Georgia to direct and control the operation of the Georgia Department of Human Services, the Division of Child Support Services within DHS, and all of Georgia's local child support enforcement offices.

68. As the chief executive of the State of Georgia, Governor Deal has an obligation to "take care that the laws are faithfully executed." Ga. Const. art. V, § II, ¶ II. Accordingly, Governor Deal has a mandatory and non-discretionary constitutional obligation to ensure that the State provides appointed counsel to indigent child support obligors who face incarceration for nonpayment.

69. Defendant Deal's failure to meet his mandatory and non-discretionary constitutional obligation to ensure the provision of counsel to indigent parents facing incarceration in child support contempt hearings violates Plaintiffs' rights and subjects him to a court order mandating equitable and declaratory relief.

COMMISSIONER CLYDE REESE

70. Defendant Clyde Reese is the Commissioner of the Department of Human Services and is sued in his official capacity. His principal place of business is in Fulton County, Georgia.

71. As the chief administrative officer of the Department of Human Services, Commissioner Reese is required to “supervise, direct, account for, organize, plan, administer, and execute the functions vested in the department.” *See* O.C.G.A. § 49-2-1(b). Commissioner Reese has supervisory authority over the Division of Child Support Services within DHS, which has day-to-day operating responsibility for child support services throughout the state.

72. Commissioner Reese, through his actions and inactions as set forth herein, has caused Plaintiffs and other indigent child support obligors to be incarcerated, without the assistance of counsel, in violation of the state and federal constitutions.

73. Commissioner Reese has a mandatory and nondiscretionary constitutional obligation to prevent his agency from seeking to jail indigent child support obligors who have not been afforded the right to counsel. Commissioner Reese’s systemic failure to satisfy this mandatory and non-discretionary constitutional obligation violates Plaintiffs’ rights and subjects him to a court order mandating equitable and declaratory relief.

KEITH HORTON

74. Defendant Keith Horton is the Director of the Division of Child Support Services and is sued in his official capacity. His principal place of business is in Fulton County, Georgia.

75. Defendant Horton is responsible for directing child support services throughout the state, including locating non-custodial parents, confirming paternity, establishing and enforcing child support orders, and collecting and distributing payments.

76. As the chief administrative officer of the Division of Child Support Services, Defendant Horton has the duty to comply with all constitutional and legal requirements in connection with his agency's efforts to collect child support.

77. Defendant Horton, through his actions and inactions as set forth herein, has caused Plaintiffs and other indigent child support obligors to be incarcerated, without the assistance of counsel, in violation of the state and federal constitutions.

78. Defendant Horton knows that his agency routinely seeks to jail indigent child support obligors who have been denied the right to counsel. The following persons provided Mr. Horton with written notice that they were either jailed following contempt proceedings at which they were denied the right to

counsel, or were in imminent danger of future incarceration without the assistance of counsel:

Name of Non-Custodial Parent	County Where Order Originated	Date of Notice to Mr. Horton	Response Received
1. Richard Adkins	Cook	November 15, 2010	None
2. Andy Williams	Berrien	November 15, 2010	None
3. Amanda McIntyre	Berrien	November 15, 2010	None
4. Kenneth Brown	Cook	November 15, 2010	None
5. Reginald Wooten	Cook	November 15, 2010	None
6. Lance Hendrix	Cook	November 15, 2010	None
7. James Pickett	Cook	November 15, 2010	None
8. Randy Miller	Floyd	December 15, 2010	None
9. Travis Joiner	Cook	January 3, 2011	None
10. Billy Joe Waldon	Cook	January 3, 2011	None
11. Patrick Gessford	Cook	January 3, 2011	None
12. Morse Keeley, Jr.	Cook	January 3, 2011	None
13. Michael Carter	Cook	January 3, 2011	None
14. Nathaniel Floyd	Floyd	January 15, 2011	None
15. Denson Goff	Gwinnett	January 24, 2011	None
16. Joshua Long	Cherokee	January 24, 2011	None
17. Joe Hunter	Walton	March 3, 2011	None
18. Russell Davis	Cook	March 4, 2011	None
19. Darryl Spencer	Floyd	March 9, 2011	None
20. Jeffrey Turner	Floyd	March 9, 2011	None
21. G. Carswell	Emanuel	March 17, 2011	None

Name of Non-Custodial Parent	County Where Order Originated	Date of Notice to Mr. Horton	Response Received
22. Earl Williams	Screven	March 17, 2011	None

79. The foregoing individuals asked Mr. Horton to take steps to ensure that counsel would be provided to them. None received a response from Mr. Horton. None received counsel.

80. Defendant Horton has a mandatory and nondiscretionary constitutional obligation to prevent his agency from seeking to jail indigent child support obligors who have not been afforded the right to counsel in child support contempt proceedings. Defendant Horton's systemic failure to satisfy this mandatory and non-discretionary constitutional obligation violates Plaintiffs' rights and subjects him to a court order mandating equitable and declaratory relief.

TAMMY BROOME

81. Defendant Broome is sued in her official capacity as the Regional Manager of the Rome Child Support Office. She has her principal place of business in Rome, Georgia. Defendant Broome is the executive and administrative officer of the Rome Child Support Office and is responsible for its operation and personnel.

82. Defendant Broome, through her actions and inactions, has caused Plaintiff Randy Miller and other indigent child support obligors to be incarcerated, without the assistance of counsel, in violation of the state and federal constitutions.

83. Indigent parents including Plaintiff Randy Miller, Jeffrey Turner, and others have provided the Rome Child Support Office with written notice that they were jailed following contempt proceedings at which they were denied the right to counsel. None received a response to their notice. None received counsel.

84. Defendant Broome has a mandatory and nondiscretionary constitutional obligation to refrain from procuring the incarceration of indigent child support obligors who have not been afforded the right to counsel. Defendant Broome's systemic failure to satisfy this mandatory and non-discretionary constitutional obligation violates Plaintiffs' rights and subjects her to a court order mandating equitable and declaratory relief.

BETTY SMITH

85. Defendant Smith is sued in her official capacity as the Regional Manager of the Alapaha Child Support Office. She has her principal place of business in Nashville, Georgia. Defendant Smith is the executive and administrative officer of the Alapaha Child Support Office and is responsible for its operation and personnel.

86. Defendant Smith, through her actions and inactions, has caused Plaintiffs Davis, Hendrix, Wooten, and other indigent child support obligors to be incarcerated, without the assistance of counsel, in violation of the state and federal constitutions.

87. Indigent parents including Russell Davis, Lance Hendrix, Reginald Wooten, Richard Adkins, Amanda McIntyre, Kenneth Brown, Travis Joiner, Billy Joe Waldon, Patrick Gessford, and Morse Keeley have provided the Alapaha Child Support Office with written notice that they were jailed following contempt proceedings at which they were denied the right to counsel. None received a response to their notice. None received counsel.

88. Defendant Smith has a mandatory and nondiscretionary constitutional obligation to refrain from procuring the incarceration of indigent child support obligors who have not been afforded the right to counsel. Defendant Smith's systemic failure to satisfy this mandatory and non-discretionary constitutional obligation violates Plaintiffs' rights and subjects her to a court order mandating equitable and declaratory relief.

PATRICIA GUNN

89. Defendant Gunn is sued in her official capacity as the Regional Manager of the Middle Swainsboro Child Support Office. She has her principal place of business in Swainsboro, Georgia. Defendant Gunn is the executive and administrative officer of the Middle Swainsboro Child Support Office and is responsible for its operation and personnel.

90. Defendant Gunn, through her actions and inactions, has caused Plaintiff Gregory Carswell and other indigent child support obligors to face

incarceration, without the assistance of counsel, in violation of the state and federal constitutions.

91. Plaintiff Gregory Carswell provided the Middle Swainsboro Child Support Office with written notice that he was facing jail without the benefit of counsel at upcoming contempt proceedings. He did not receive a response to his notice. He was not provided with counsel.

92. Defendant Gunn has a mandatory and nondiscretionary constitutional obligation to refrain from procuring the incarceration of indigent child support obligors who have not been afforded the right to counsel. Defendant Gunn's systemic failure to satisfy this mandatory and non-discretionary constitutional obligation violates Plaintiffs' rights and subjects her to a court order mandating equitable and declaratory relief.

CYNTHIA HEAD

93. Defendant Head is sued in her official capacity as the Regional Manager of the Alcovy Monroe Child Support Office. She has her principal place of business in Monroe, Georgia. Defendant Head is the executive and administrative officer of the Alcovy Monroe Child Support Office and is responsible for its operation and personnel.

94. Defendant Head, through her actions and inactions, has caused Plaintiff Joe Hunter and other indigent child support obligors to be incarcerated, without the assistance of counsel, in violation of the state and federal constitutions.

95. Plaintiff Joe Hunter provided the Alcovy Monroe Child Support Office with written notice that he was jailed following contempt proceedings at which he was denied the right to counsel. He did not receive a response to his notice. He did not receive counsel.

96. Defendant Head has a mandatory and nondiscretionary constitutional obligation to refrain from procuring the incarceration of indigent child support obligors who have not been afforded the right to counsel. Defendant Head's systemic failure to satisfy this mandatory and non-discretionary constitutional obligation violates Plaintiffs' rights and subjects her to a court order mandating equitable and declaratory relief.

FACTUAL ALLEGATIONS

I. APPOINTMENT OF COUNSEL IS NECESSARY IN CIVIL CONTEMPT PROCEEDINGS THAT MAY RESULT AND HAVE RESULTED IN EXTENDED IMPRISONMENT FOR CLASS MEMBERS UNABLE TO PAY.

97. While the State of Georgia has a number of tools at its disposal to encourage parents to comply with court-ordered child support obligations,¹⁷ the ultimate sanction of imprisonment has become a routine part of child support enforcement practice. As of July 2010, there were at least 526 parents confined in Georgia jails solely on child support contempt charges.¹⁸ Many of these men and women are jailed for months, a year, or longer, even though they have no way to pay the purge fees demanded of them.

98. It is unlawful to send someone to jail merely because he is poor. *See Bearden v. Georgia*, 461 U.S. 660 (1983); *Tate v. Short*, 401 U.S. 395 (1971).

Rather, a superior court may send a parent to jail for falling behind in his child

¹⁷ Statutorily authorized collection procedures include: the issuance of demand letters; notification of employers that a wage assignment is in effect; use of state and federal income tax refund intercept programs; and liens, levies, and seizures of property. *See* O.C.G.A. § 19-11-18(a). The State can also garnish the earnings of non-compliant parents, *see* O.C.G.A. § 19-11-19(b), or suspend occupational and driver's licenses for non-payment. *See* O.C.G.A. § 19-11-9.3. The ultimate enforcement tool for collecting child support is imprisonment for contempt of a court's order.

¹⁸ In July 2010, the Southern Center for Human Rights surveyed county sheriffs in Georgia to determine the number of child support contemnors confined to the state's jails solely on civil contempt charges. Responses were received from 135 of the state's 159 counties. The sheriffs who responded reported that 526 child support contemnors were confined to Georgia jails as of July 2010 on civil child support contempt charges only.

support obligations only if it finds that the parent *willfully* failed to comply with a child support order. *See Dep't of Human Res. v. Tabb*, 472 S.E.2d 540, 542 (Ga. Ct. App. 1996) (“[A] finding of willfulness is necessary to hold a parent in contempt of a support order”).

99. In such instances, a parent may be held in either *civil* or *criminal* contempt. If the contemnor is imprisoned for a specified, unconditional period, the purpose of the incarceration is punishment and the contempt is criminal. *See Ensley*, 238 S.E.2d at 921-22. If the contemnor is imprisoned until he performs a specified act, such as the payment of a purge fee, the purpose is remedial and the contempt is civil. *See id.*¹⁹

100. The Supreme Court of Georgia has recognized that the purpose of civil contempt is not served when the contemnor is unable to pay his purge fee. *See Hughes v. Dep't of Human Res.*, 502 S.E.2d 233, 234 (Ga. 1998) (holding that a parent who was jailed for two months had to be released after the parent filed a “petition for release” stating he did not have money to pay the purge fee). Thus, a court must release a parent held in civil contempt for failure to pay child support when it is clear the parent does not have money to pay the purge fee. *See id.*

¹⁹ The procedural protections accorded to the defendant in “civil” versus “criminal” contempt proceedings in Georgia strongly favor criminal contemnors, who are afforded a right to counsel, given the opportunity to present a true defense and, if found guilty, penalized with a maximum of 20 days in jail – a period of time that is often far less than the time served by an indigent civil contemnor whose sentence may be indefinite. *See supra* p. 4, n. 2.

101. *Hughes* should protect Plaintiffs against indefinite incarceration where there is an inability to pay. In practice, however, it is widely disregarded. Plaintiffs and other indigent parents have remained in jail long after it became clear that they could not pay to secure their release. *See Ridgway*, 720 F.2d at 1414 (finding that without the assistance of counsel, an indigent contemnor is at risk of “indefinite” confinement if the trial court erroneously determines that he “has the means to comply with the court’s order”). Indigent defendants do not know about *Hughes*, and they have no lawyers to file petitions for release under it.

102. Five out of the six named Plaintiffs were jailed for months after contempt proceedings that were nominally “civil” in nature. While the purpose of civil contempt proceedings is coercive rather than punitive, for Plaintiffs and other destitute parents, the purpose of coercing payment is not served. A civil contemnor who does not have the present ability to pay does not “[carry] the keys of his prison in his own pocket.” *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 442 (1911). What is nominally a civil contempt proceeding is in fact a criminal proceeding – the defendant is not being coerced, but punished. *See In re Lawrence*, 279 F.3d 1294, 1300 (11th Cir. 2002) (“[W]hen civil contempt sanctions lose their coercive effect, they become punitive and violate the contemnor’s due process rights.”) (internal quotations omitted).

103. Without counsel to assist them, Plaintiffs and other similarly situated parents have been wrongfully incarcerated and confined to jails for long periods, despite their inability to pay for their release.²⁰

II. INCARCERATION OF DESTITUTE PARENTS FOR NONPAYMENT OF CHILD SUPPORT IS A WIDESPREAD PROBLEM IN GEORGIA.

A. Child Support Reforms Have Targeted the Indigent in Order to Recoup Government Welfare Costs.

104. In Georgia, aggressive efforts to incarcerate child support obligors are often focused on the very poorest parents, rather than those parents who have money but simply choose to dodge their responsibility to pay.

105. The State of Georgia is not alone in this respect. Federal child support reforms in the 1980s and 1990s served the goal of welfare cost recovery by seeking reimbursement of welfare costs through child support enforcement.²¹ Under federal law, if a custodial parent applies for welfare assistance from Temporary Assistance to Needy Families ("TANF"), the custodial parent must assign his or her right to collect child support to the State. *See generally* 42 U.S.C. §§ 608(a)(3), 654. Georgia law then permits the State's Division of Child Support

²⁰ The United States Supreme Court has recognized that the contempt power is uniquely "liable to abuse," as it leaves "the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." *United Mine Workers of America v. Bagwell*, 512 U.S. 821, 831 (1994).

²¹ *See generally* 42 U.S.C. § 654 (1994).

Services to file suit against a non-custodial parent whose child receives welfare assistance, in order to recoup the welfare benefits expended on the child.²²

106. Almost half the national child support debt is owed not to custodial parents, but to the government.²³ The goal of recovering welfare costs incentivizes the State to pursue collections from the poorest parents, rather than from parents who do not rely on welfare.²⁴

B. The Poorest Parents Are the Most Likely to Face Incarceration for Nonpayment of Child Support.

107. The vast majority of child support debt in the United States is owed by destitute parents who lack the means to pay.²⁵ According to the federal Office of Child Support Enforcement, 70% of child support debt is owed by non-custodial parents with no quarterly income or with annual earnings of less than \$10,000.²⁶

²² See O.C.G.A. § 19-11-7 (“Whenever any dependent minor child is receiving public assistance, the department may recover any sum of money due the dependent child. The action shall be brought in the name of the child for the use of the department.”).

²³ Rebecca May & Marguerite Roulet, Ctr. for Family Policy and Practice, *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court, and Program Practices* 10 (Jan. 2005) (“May & Roulet”), available at <http://www.cffpp.org/publications/LookAtArrests.pdf>.

²⁴ Br. of Center for Family Policy and Practice As Amicus Curiae in Supp. of Pet’r at 18, *Turner v. Rogers*, 131 S. Ct. 504 (2010) (No. 10-10), 2011 WL 141222.

²⁵ See *id.* at 16.

²⁶ See Office of Child Support Enforcement, Dep’t of Health and Human Servs., *Understanding Child Support Debt: A Guide to Exploring Child Support Debt in Your State* 4 (July 2004). See also May & Roulet at 9 (analyzing data on child support debtors).

Only 4% of child support arrears are owed by non-custodial parents with annual incomes of more than \$40,000.²⁷

108. The amount of child support that parents must pay often outstrips their earning ability. Low income child support obligors face many barriers to employment, such as limited education, limited work skills, addictions, criminal records, and physical and mental health problems.²⁸ One study found that fewer than one in five low-income non-custodial fathers have full-time, year-round work.²⁹ Another study showed that 50 percent of non-custodial parents in the child support enforcement system earned incomes that placed them below the poverty level.³⁰

109. Many low-income parents have accumulated huge child support arrearages, in part because courts have ordered them to make monthly payments that exceed their economic means. Courts setting child support orders often “impute” to unemployed or underemployed parents the ability to earn minimum

²⁷ *Id.*

²⁸ Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J. L. & Pub. Pol'y 95, 105-106 (2008).

²⁹ *See id.* at 106.

³⁰ Janet Rehnquist, U.S. Dep't of Health & Human Servs., *Child Support for Children on TANF* 6 (2002).

wage for a 40-hour work week.³¹ Imputing income in such a manner may vastly overestimate the parent's ability to pay if the person cannot find a job or can only find part-time employment. In addition, because poor parents cannot afford lawyers, courts rarely lower support orders when circumstances warrant, such as when a parent loses a job. Although Georgia's child support guidelines allow for a low-income deviation, O.C.G.A. § 19-6-15(i)(2)(B), most indigent parents are not aware of this potential deviation without the assistance of a lawyer.³²

110. In addition, an inability to find work in the current economy may contribute to an indigent parent's inability to pay child support. As of December 2010, Georgia had a double-digit unemployment rate of 10.2 percent.³³ In certain areas in north and south Georgia, unemployment rates have soared to as high as 22 percent.³⁴ Without steady employment, indigent parents face significant challenges to meeting payment obligations.

³¹ See Patterson, *supra* note 28, at 95; Br. of Center for Family Policy and Practice, *supra* note 24, at 11-12.

³² Even a person eligible for a low-income deviation must pay a minimum amount of \$100 per month for one child and at least \$50 per month for each additional child, see O.C.G.A. § 19-6-15(i)(2)(B)(v), an amount that may constitute a disproportionate share of, or exceed, the indigent parent's income.

³³ See Ga. Dep't of Labor, Georgia Labor Force Estimates, Dec. 2010, *available at* <http://www.dol.state.ga.us/pdf/pr/laborforce.pdf>.

³⁴ See Ga. Dep't of Labor, County Labor Force Estimates, Dec. 2010, *available at* <http://www.dol.state.ga.us/pdf/pr/laborforce.pdf>. (stating that the unemployment rate was 14.6% in Ben Hill County; 17.9% in Chattahoochee County; 13.1% in Cook County; 16.5% in Coffee County; 22.3% in Hancock County; and 17.9% in Jenkins County).

111. Faced with a system in which child support awards are set beyond the parent's ability to pay and monthly payments are often not adjusted to account for changes in circumstances, many indigent parents are sent to jail for falling behind in their child support obligations.

C. Denying Counsel to Indigent Child Support Obligors Produces Fundamentally Unfair Results and Harms Parents, Families, and the State.

112. Incarcerating parents who cannot meet their child support obligations imposes harmful consequences on the parent, his or her children, and the state. A parent who is sent to jail is unable to provide any support or assistance to his or her children and often loses his or her job as a result of the imprisonment. *See, e.g., Sevier*, 742 F.2d at 265-66.

113. The imprisonment of an indigent parent can also have serious effects on the parent's children and family relationships.³⁵ Many jails do not permit children to visit, so indigent parents do not see their children for the duration of their confinement for contempt. Imprisonment may sever the parent-child

³⁵ *See* Patterson, *supra* note 28, at 126; Br. Amici Curiae of the Nat'l Assoc. of Crim. Defense Lawyers, et al. in Supp. of Pet'r at 20-21, *Turner v. Rogers*, 131 S. Ct. 504 (2010) (No. 10-10).

relationship and deprive children of the emotional and psychological support of their parents.³⁶

114. Jailing indigent parents who cannot afford to make child support payments also imposes a burden on the State. Imprisoning 526 parents in Georgia jails at \$35 per day costs taxpayers \$18,375 per day.

115. Data from Georgia jails further reveals significant racial disparities in the number of whites and nonwhites incarcerated for failure to pay child support.³⁷ For example, as of June 2010, in Richmond County, one hundred percent of jailed contemnors were black; in Bibb County, eighty-nine percent of jailed contemnors were black; and in Muscogee County, eighty-nine percent of jailed contemnors were black. African Americans made up one hundred percent of jailed contemnors in other counties including Johnson, Jones, McDuffie, Ware, and Worth counties. In June 2010, there were 1.43 times more blacks than whites incarcerated in Georgia jails for failure to pay child support.

³⁶ See, e.g., Jeffrey Rosenberg & W. Bradford Wilcox, U.S. Dep't of Health & Human Servs., *The Importance of Fathers in the Healthy Development of Children* 11-13 (2006), available at <http://www.childwelfare.gov/pubs/usermanuals/fatherhood/fatherhood.pdf>.

³⁷ The statistics cited in this paragraph come from jail dockets and rosters provided by Georgia sheriffs to undersigned counsel in response to a June 2010 Open Records Act request.

III. AN INDIGENT LITIGANT FACING INCARCERATION IS ENTITLED TO APPOINTMENT OF COUNSEL.

116. In civil contempt proceedings, the State may not incarcerate the accused contemnor without advising him of his right to representation by counsel and appointing him an attorney if he is unable to afford his own. *See* U.S. Const. amend VI, XIV; Ga. Const. art. I, ¶ I, II, XIV.

117. Georgia's policy of denying counsel to indigent child support contemnors who face incarceration is at odds with the decisions of the vast majority of courts that have examined this issue around the country.

118. The United States Courts of Appeals for the Second, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits have each held that an indigent defendant facing the prospect of incarceration in a civil contempt proceeding has a right to appointed counsel.³⁸ The Eleventh Circuit Court of Appeals has acknowledged that "[t]he right to counsel exists" in a civil contempt proceeding "if the litigant may lose his physical liberty." *McAnlis*, 721 F.2d at 337.

³⁸ *See In re Di Bella*, 518 F.2d 955, 959 (2d Cir. 1975); *In re Kilgo*, 484 F.2d 1215, 1221 (4th Cir. 1973); *Ridgway v. Baker*, 720 F.2d 1409, 1413-15 (5th Cir. 1983); *Sevier v. Turner*, 742 F.2d 262, 267 (6th Cir. 1984); *United States v. Anderson*, 553 F.2d 1154, 1155-1156 (8th Cir. 1977); *In re Grand Jury Proceedings*, 468 F.2d 1368, 1369 (9th Cir. 1972); *Walker v. McLain*, 768 F.2d 1181, 1185 (10th Cir. 1985).

119. Fifteen state courts of last resort have likewise concluded that an indigent person must be advised of his right to appointed counsel at a civil contempt proceeding that could lead to incarceration.³⁹

120. The Georgia and federal constitutions similarly compel this Court to find a right to counsel on behalf of indigent parents who are sentenced to jail for inability to pay child support.

121. Under both the Georgia and federal constitutions, indigent defendants must be afforded the right to counsel in civil cases where necessary to satisfy the due process guarantee of “fundamental fairness” in judicial proceedings. *See Lassiter*, 452 U.S. at 24-25, 33 (requirement of “fundamental fairness” demands a presumption in favor of a right to counsel when a litigant “may be deprived of his physical liberty”); *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1359 (N.D. Ga. 2005) (concluding that the due process clause of the Georgia Constitution requires appointed counsel in civil foster care deprivation and

³⁹ See *Otton v. Zaborac*, 525 P.2d 537, 538-539 (Alaska 1974); *People v. Lucero*, 584 P.2d 1208, 1214 (Colo. 1978); *Black v. Div. of Child Support Enforcement*, 686 A.2d 164, 168 (Del. 1996); *Sanders v. Shephard*, 645 N.E.2d 900, 906 (Ill. 1994); *McNabb v. Osmundson*, 315 N.W.2d 9, 11-14 (Iowa 1982); *Rutherford v. Rutherford*, 464 A.2d 228, 234-237 (Md. 1983); *Mead v. Batchlor*, 460 N.W.2d 493, 496-504 (Mich. 1990); *Allen v. Sheriff of Lancaster County*, 511 N.W.2d 125, 127 (Neb. 1994), overruled on other grounds by *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 684 (Apr. 16, 2010); *Pasqua v. Council*, 892 A.2d 663, 671-674 (N.J. 2006); *McBride v. McBride*, 431 S.E.2d 14, 19 (N.C. 1993); *Peters-Riemers v. Riemers*, 663 N.W.2d 657, 664-665 (N.D. 2003); *Wold Family Farms, Inc. v. Heartland Organic Foods, Inc.*, 661 N.W.2d 719, 724-725 (S.D. 2003), overruled on other grounds by *Sazama v. State ex rel. Muilenberg*, 729 N.W.2d 335, 343 (S.D. 2007); *Choiniere v. Brooks*, 660 A.2d 289, 289 (Vt. 1995); *Tetro v. Tetro*, 544 P.2d 17, 19 (Wash. 1975); *Ferris v. State ex rel. Maass*, 249 N.W.2d 789, 791 (Wis. 1977).

termination of parental rights proceedings). *See also Vaughn v. Rutledge*, 462 S.E.2d 132, 133 (Ga. 1995) (recognizing limited due process right to counsel in probation revocation proceedings where necessary to achieve “fundamental fairness”); *Brown v. Diaz*, 361 S.E.2d 490, 492 (Ga. Ct. App. 1987) (stating that the appointment of counsel to represent an indigent prisoner in a civil rights case may be necessary where “it is shown that the denial of proper representation will result in fundamental unfairness impinging upon the inmate’s due process rights, or that circumstances of the case may make the presence of counsel necessary.”).⁴⁰

122. In *Lassiter*, the Court held that “fundamental fairness” did not require a categorical right to counsel at a parental termination hearing at which the defendant’s liberty was not at stake. *Lassiter*, 452 U.S. at 25-27, 33. Where a defendant faces incarceration, however, *Lassiter* held that the right to counsel is presumed,⁴¹ and then weighed that presumption against the three traditional due process factors:

⁴⁰ Over thirty years ago, before *Lassiter*, the Supreme Court of Georgia stated in a 4-paragraph opinion that a trial court did not err “in failing to inquire whether [a child support contemnor] was entitled to counsel” because the proceeding was “civil” and did not implicate the Sixth Amendment right to counsel. *Adkins v. Adkins*, 248 S.E.2d 646, 646 (Ga. 1978). *Lassiter* and subsequent decisions make it clear that *Adkins* was wrongly decided.

⁴¹ In so concluding the Supreme Court recognized that it is the defendant’s interest in personal freedom, and not simply the Sixth Amendment’s guarantee of counsel in criminal cases, that triggers the right to appointed counsel. *See id.* at 25. *See also In re Gault*, 387 U.S. 1, 41 (1967) (holding that “the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed,” the juvenile has a right to appointed counsel even though proceedings may be styled “civil” and not “criminal.”); *Vitek v. Jones*, 445

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *Lassiter*, 452 U.S. at 27.

123. Application of the traditional due process factors here demonstrates that appointment of counsel is required under state and federal law.

124. First, Plaintiffs' private interest in avoiding incarceration is significant. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). "[T]he interest in being free from physical detention by one's own government" is "the most elemental of liberty interests." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529-530 (2004); *see also Jones v. United States*, 463 U.S. 354, 361 (1983) ("It is clear that commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection" (internal quotation marks omitted)).⁴²

Acknowledging a defendant's strong interest in physical liberty, Georgia courts

U.S. 480, 497 (1980) (concluding in plurality opinion that an indigent prisoner is entitled to appointed counsel before being involuntarily transferred for treatment to a state mental hospital).

⁴² *Cf. Jackson v. State*, 572 S.E.2d 60, 61 (Ga. Ct. App. 2002) (finding no right to counsel where defendant was fined for speeding since defendant's "liberty is not in jeopardy").

have recognized a right to counsel in criminal contempt cases in which defendants were jailed for just hours or days.⁴³

125. The second *Mathews* factor also supports the conclusion that due process requires appointment of counsel for an indigent parent who faces incarceration in a child support contempt proceeding. Significant evidence suggests that alleged contemnors frequently have inability-to-pay defenses. The inability-to-pay defense may involve complex factual and legal issues and procedural hurdles. The risk that a defendant will erroneously be found in civil contempt and incarcerated without the assistance of counsel – even if he is destitute and cannot pay – is substantial.

126. Weighed against Plaintiffs' liberty interest and the risk of erroneous incarceration, the government's countervailing interests are minimal. While the State has an interest in enforcing child support orders, it secures no benefit from jailing an impoverished parent. Imprisoning a parent who is too poor to pay in no way advances the State's interest in securing payment of child support. In fact, the period of incarceration makes it less, rather than more, likely that the parent will be

⁴³ Criminal contemnors in Georgia enjoy the right to counsel, even though they may not be incarcerated for over 20 days. See O.C.G.A. § 15-6-8. For example, in *McDaniel v. State*, 414 S.E.2d 536, 539 (Ga. Ct. App. 1992), a witness in a divorce trial was held in contempt and sentenced to five days in jail after she allegedly spoke to a juror. The witness's conviction was reversed because she was compelled to represent herself, and thus was denied "minimum requirements of due process" in violation of the Georgia Constitution. *Id.* See also *Merritt*, 583 S.E.2d at 285 (grand juror held in contempt could not be sentenced to 48 hours in jail without being afforded the right to counsel).

able to pay child support.⁴⁴ Meanwhile, the State incurs the substantial expense of confinement. The government's interest ultimately favors the right to counsel so that it may ensure that only those parents with an ability to pay are confined for civil contempt.

127. Thus, all three *Mathews* factors favor the Plaintiffs. The traditional due process factors easily confirm *Lassiter's* presumption that Plaintiffs may not be jailed without being afforded the right to counsel.

128. Georgia courts have recognized a right to counsel even in cases in which defendants face no incarceration.⁴⁵ It does not stand to reason that the Georgia Constitution's due process clause should require counsel in these cases but deny counsel to Plaintiffs and others who spend months languishing in jail following civil contempt proceedings.

⁴⁴ See Patterson, *supra* note 28 at 126 ("During the term of imprisonment, the contemnor is largely disabled from generating the income necessary for payment of child support Furthermore, imprisonment causes some contemnors to lose jobs from which wage withholding was providing or could have provided some level of support.").

⁴⁵ See *Barnes v. State*, 570 S.E.2d 277, 279 (Ga. 2002) (holding that the right to counsel attached where a traffic court defendant received a sentence of probation); *Ham v. State*, 705 S.E.2d 301, 302 (Ga. Ct. App. 2010) (reversing conviction where defendant convicted of speeding and sentenced to probation did not waive the right to counsel).

CLASS ACTION ALLEGATIONS

129. Plaintiffs bring this action as class representatives under O.C.G.A. § 9-11-23, on behalf of themselves and all persons similarly situated.

130. The class Plaintiffs seek to represent consists of all indigent parents in Georgia who are: (1) currently being incarcerated for nonpayment or underpayment of child support following a contempt proceeding at which they were not afforded the right to counsel; or (2) facing the imminent threat of future incarceration in Georgia, without counsel, for nonpayment or underpayment of court-ordered child support.

131. Plaintiffs meet the requirements of O.C.G.A. § 9-11-23(a) in that:

- a. The members of the class are so numerous that joinder of all members is impracticable. Currently, there are hundreds of indigent unrepresented parents who are incarcerated solely for nonpayment or underpayment of child support, and hundreds more, perhaps thousands, who face incarceration, without counsel, for their inability to pay make child support payments;
- b. The policies and practices challenged in this action apply equally to Plaintiffs and all members of the proposed class. Accordingly, the claims asserted by the members constituting the proposed class raise common

questions of law and fact that will predominate over individual questions of law or fact;

- c. Plaintiffs assert claims that are typical of claims that members of the proposed class have against Defendants; and
- d. Plaintiffs and their counsel will adequately represent the interests of all members of the proposed class. The named Plaintiffs do not have any interests that would conflict with members of the class, and Plaintiffs' counsel have the experience and resources necessary to adequately represent all members of the proposed class.

132. Plaintiffs meet the requirements of O.C.G.A. § 9-11-23(b) in that:

- a. A class action is a superior and necessary form for resolving the issues raised by this Complaint because the Defendants' actions have resulted in the incarceration of indigent accused contemnors without due process and the complete denial of their right to counsel, making appropriate declaratory and prospective injunctive relief against the Defendants with respect to all members of the class.
- b. Because the actions on the part of the Defendant have denied Plaintiffs the right to counsel and because Plaintiffs are indigent and do not have alternative access to representation, the remedies available at law are both

unavailing and unavailable. Thus, class members will suffer substantial and irreparable injury.

133. Plaintiffs Miller, Davis, Hendrix, and Wooten have been subject to special violations of their rights perpetrated, respectively, by the Rome Office of Child Support (Miller) and the Alapaha Office of Child Support (Davis, Hendrix, Wooten). Plaintiffs may, at a later date, file an amended complaint asserting additional claims on behalf of these plaintiffs and subclasses of similarly situated persons.

CLAIMS FOR RELIEF

COUNT ONE

DENIAL OF THE RIGHT TO COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

(Asserted pursuant to 42 U.S.C. § 1983 by all Plaintiffs and all Persons Similarly
Situated against all Defendants)

134. The allegations of the foregoing paragraphs are incorporated herein as if set forth in full.

135. The Sixth and Fourteenth Amendments of the United States Constitution guarantee an indigent child support obligor the right to appointed counsel at a contempt proceeding that results in his incarceration.

136. The State of Georgia's policy and practice of incarcerating Plaintiffs and denying them the right to counsel violates the Sixth and Fourteenth

Amendments to the United States Constitution. *See* U.S. Const. amend. VI, XIV; *Lassiter*, 452 U.S. at 25 (recognizing that a right to counsel exists in civil cases “where the litigant may lose his physical liberty if he loses the litigation”); *McAnlis*, 721 F.2d at 337 (acknowledging that “[t]he right to counsel exists” in a civil contempt proceeding “if the litigant may lose his physical liberty if he loses the litigation.”).

137. By their actions, inactions, customs, and practices alleged herein, Defendants, acting under color of state law, have caused Plaintiffs and other similarly situated persons to be incarcerated in violation of the right to counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, as enforced through 42 U.S.C. § 1983 and other applicable law.

138. As a direct and proximate result of the State’s failure to provide counsel at civil child support contempt proceedings that could lead to a loss of liberty, Plaintiffs were wrongfully deprived of their liberty.

139. Each Defendant personally participated in the actions or failures to act, or implicitly authorized, approved, or knowingly acquiesced or failed to remedy the wrongs at issue.

140. Absent this Court’s intervention, Defendants will continue to violate Plaintiffs’ rights in the manner described herein.

COUNT TWO

DENIAL OF THE RIGHT TO COUNSEL IN VIOLATION OF ART. I, § I, ¶ I AND XIV OF THE GEORGIA CONSTITUTION

(Asserted by all Plaintiffs and all Persons Similarly Situated
against all Defendants)

141. The allegations of the foregoing paragraphs are incorporated herein as if set forth in full.

142. Article I, Section I, Paragraphs I and XIV of the Georgia Constitution guarantee an indigent child support obligor the right to appointed counsel at a contempt proceeding that results in his incarceration.

143. The State of Georgia's policy and practice of incarcerating Plaintiffs and denying them the right to counsel violates Article I, Section I, Paragraphs I and XIV of the Georgia Constitution. *See also Merritt*, 583 S.E.2d at 284 (holding that the right to counsel "applies to a contempt hearing that . . . results in a sentence of imprisonment.").

144. By their actions, inactions, customs, and practices alleged herein, Defendants, acting under color of state law, have caused Plaintiffs and other similarly situated persons to be incarcerated in violation of the right to counsel guaranteed by Article I, Section I, Paragraphs I and XIV of the Georgia Constitution.

145. As a direct and proximate result of the State's failure to provide counsel at civil child support contempt proceedings that lead to a loss of liberty, Plaintiffs were wrongfully deprived of their liberty.

146. Each Defendant either personally participated in the actions or failures to act, or implicitly authorized, approved, or knowingly acquiesced or failed to remedy the wrongs at issue.

147. Absent this Court's intervention, Defendants will continue to violate Plaintiffs' rights in the manner described herein.

COUNT THREE

IMPRISONMENT FOR DEBT IN VIOLATION OF ART. I § I, ¶ XXIII OF THE GEORGIA CONSTITUTION

(Asserted by all named Plaintiffs against all Defendants)

148. The allegations of the foregoing paragraphs are incorporated herein as if set forth in full.

149. Article I, Section I, Paragraph XXIII of the Georgia Constitution states: "[t]here shall be no imprisonment for debt." While the State may incarcerate a parent for "willfully" refusing to pay child support, *see Ensley v. Ensley*, 238 S.E.2d at 922-23, the State may not jail an indigent parent simply because he is too poor to pay his child support debt. *See Corriher v. McElroy*, 76 S.E.2d 782, 783 (Ga. 1953) (holding that "[w]e do not allow imprisonment for debt

in this State” and finding incarceration improper where a parent was “unable to pay” full child support obligation due to his poverty).

150. By effectuating the incarceration of indigent Plaintiffs solely due to their inability to pay child support, the Defendants have violated Ga. Const. art. I, § I, ¶ XXIII.

151. As a direct and proximate result of the State’s actions and inactions as described herein, Plaintiffs were wrongfully deprived of their liberty.

152. Each Defendant either personally participated in the actions or failures to act, or implicitly authorized, approved, or knowingly acquiesced or failed to remedy the wrongs at issue.

153. Absent this Court’s intervention, Defendants will continue to violate Plaintiffs’ rights in the manner described herein.

COUNT FOUR

DENIAL OF DUE PROCESS AND EQUAL PROTECTION IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION I, PARAGRAPHS I AND II OF THE GEORGIA CONSTITUTION

(Asserted by Plaintiff Randy Miller against Defendants Deal, Reese, Horton, and Broome in their Official Capacities)

154. The allegations of the foregoing paragraphs are incorporated herein as if set forth in full.

155. Plaintiff Miller's child support case is under the jurisdiction of the Rome Child Support Office. Plaintiff Miller has been subject to special violations of his constitutional rights in the following respects.

156. Mr. Miller was sentenced to a term of incarceration in a work release center, without counsel, pursuant to O.C.G.A. § 15-1-4, a *criminal* contempt statute.⁴⁶ Although courts must appoint counsel in criminal contempt cases,⁴⁷ Plaintiff Miller was sentenced to 90-120 days in a work release center at a hearing at which he was not afforded the right to counsel.

157. In addition, the Rome Office of Child Support refuses to permit jailed parents to be released from incarceration, even when they cannot pay their purge fees. The Rome Office of Child Support recently issued a notice to "inmates being held in the Floyd County Jail for non-payment of child support" in which it

⁴⁶ O.C.G.A. § 15-1-4 is titled "Powers of Courts to Punish for Contempt." Subsection (a) of the statute permits courts to "inflict summary *punishment* for contempt of court" in cases of "disobedience" to any lawful order or command of the court. O.C.G.A. § 15-1-4(a) (2011) (emphasis added). Subsection (c) of the statute permits courts to order a "term of confinement" in a work release center where a person violates an order to pay child support. O.C.G.A. § 15-1-4(c).

⁴⁷ See *Holt v. Virginia*, 381 U.S. 131, 136 (1965) (stating that due process and the Sixth amendment guaranteed attorneys charged with contempt the right to be represented by counsel); *In re Oliver*, 333 U.S. 257, 275 (1948) ("[D]ue process of law . . . requires that one charged with contempt of court . . . [has] the right to be represented by counsel . . ."). The Court in *In re Oliver* further explained that "[t]he narrow exception to these due process requirements includes only charges of . . . [direct criminal contempt that occurred in the presence of the judge, in which] immediate punishment is essential to prevent 'demoralization of the court's authority before the public.'" *Id.* at 275.

announced its intent to keep indigent defendants in custody in violation of *Hughes v. Dep't of Human Res.*, 502 S.E.2d 233 (Ga. 1998). The notice stated:

It has come to my attention that certain information has circulated at the jail stating that: "Under Georgia law, a person, who is being held in jail for non-payment of child support, must be released when it is clear that the person in jail does not have the money to pay the purge fee." [I]n Floyd County, you will not be released for your inability to pay your purge, because you can go to the Work Release Center and get a job and pay your child support.

158. Conditioning a person's liberty on his ability to pay is prohibited by the due process and equal protection clauses of the state and federal constitutions. *See Bearden v. Georgia*, 461 U.S. 660 (1983); *Tate v. Short*, 401 U.S. 395 (1971). The Georgia Court of Appeals, moreover, has expressly stated that a trial court has "no authority to place [an already jailed defendant] in a work release program" when the jailed defendant "lacked the ability to purge himself." *Gallaher v. Breaux*, 650 S.E.2d 313, 316 (Ga. Ct. App. 2007) ("Once [the parent] established his inability to pay, the trial court had no authority to continue his incarceration and thus no authority to confine him in a diversion center or to place him in a work release program under O.C.G.A. 15-1-4(c).").

159. Mr. Miller was incarcerated without counsel and kept in custody long after it became clear that he lacked the means to pay for his release, in violation of the due process and equal protection clauses in the state and federal constitutions.

160. As a direct and proximate result of the Defendants' wrongful actions and practices, Plaintiff Miller was wrongfully deprived of his liberty.

161. Defendants either personally participated in the actions or failures to act, or implicitly authorized, approved, or knowingly acquiesced or failed to remedy the wrongs at issue.

162. Absent this Court's intervention, Defendants will continue to violate Plaintiffs' rights in the manner described herein.

COUNT FIVE

DENIAL OF DUE PROCESS AND EQUAL PROTECTION IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION I, PARAGRAPH I OF THE GEORGIA CONSTITUTION

(Asserted by Plaintiffs Davis, Hendrix, and Wooten against Defendants Deal, Reese, Horton, and Smith in their Official Capacities)

163. The allegations of the foregoing paragraphs are incorporated herein as if set forth in full.

164. Plaintiffs Davis, Hendrix, and Wooten have child support cases under the jurisdiction of the Alapaha Child Support Office.

165. Plaintiffs Davis, Hendrix, and Wooten have been subject to special violations of their constitutional rights in the following respects.

166. First, Defendants have deprived Plaintiffs of the due process of law and meaningful access to the courts by causing arrest warrants to be issued against Plaintiffs without sufficient judicial review or approval. Specifically, in cases in which contempt orders have been issued at some point in the past, agents in the

Alapaha Child Support Office routinely procure arrest warrants from the sheriff's office solely on the basis of untested affidavits sworn by child support personnel.

167. Second, Defendants have deprived Plaintiffs of the due process of law and meaningful access to the courts by permitting state child support agents to control the date on which child support obligors are released from jail. In the Alapaha Circuit, a parent who has been jailed for contempt of a child support order is not considered for release from jail until his or her case is placed by a child support agent on the child support court calendar. Thus, the length of a particular parent's jail term is dependent upon the whim of the child support agent assigned to his or her case. Agents exercise their power to schedule possible release dates in an arbitrary and capricious fashion, leading to widely disparate terms of incarceration for the same alleged conduct.

168. As a direct and proximate result of the Defendants' wrongful actions and practices, Plaintiffs Davis, Hendrix, and Wooten have been wrongfully deprived of their liberty.

169. Defendants either personally participated in the actions or failures to act, or implicitly authorized, approved, or knowingly acquiesced or failed to remedy the wrongs at issue.

170. Absent this Court's intervention, Defendants will continue to violate Plaintiffs' rights in the manner described herein.

LITIGATION EXPENSES

(Asserted by All Plaintiffs and class members against all Defendants)

171. Each and every allegation of the Complaint is incorporated herein as if fully set forth in full.

172. Plaintiffs are entitled to recover their expenses of litigation, including reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988 and state law, and their costs pursuant to O.C.G.A. § 9-4-9.

PRAYER FOR RELIEF

WHEREFORE, based on the foregoing, Plaintiffs respectfully pray that this Court grant the following:

- A. Certify the case as a class action under O.C.G.A. § 9-11-23;
- B. Enjoin all persons within the scope of an injunction under O.C.G.A. § 9-11-65(d) from incarcerating Plaintiffs in their child support cases until such time as counsel is in fact provided to each Plaintiff;
- C. Grant preliminary and permanent injunctive relief under 42 U.S.C. § 1983 and O.C.G.A. § 9-5-1, *et seq.*, requiring Defendants to provide counsel to Plaintiffs and other indigent parents who face incarceration for nonpayment of child support, as required by the U.S. and Georgia Constitutions;
- D. Order appropriate further systemwide remedial relief to ensure Defendants' future compliance with their legal and constitutional obligations to Plaintiffs;

E. Declare that:

1. Defendants have deprived Plaintiffs and persons similarly situated of their constitutional right to counsel in the manner stated herein, resulting in harm and a continuing threat of harm to these persons;
2. Parents facing actual incarceration at enforcement proceedings for non-compliance with child support obligations must be advised of their right to counsel;
3. A constitutionally compliant system of providing indigent defense requires the State to provide counsel to indigent parents before they may be incarcerated pursuant to a child support contempt order;
4. If a constitutionally compliant system for appointing counsel to Plaintiffs and other similarly situated persons is not established within 30 days of the Court's Order, that Plaintiffs have been denied due process of law;

F. Award costs and attorneys' fees as permitted by 42 U.S.C. § 1988 and state law;

G. Order that nonparties subject to this ruling be notified;

H. Grant Plaintiffs such other relief as the Court deems just, necessary and proper.

Respectfully submitted this 22nd day of March, 2011.

Sarah Geraghty
Georgia Bar No. 291393
Gerald Weber
Georgia Bar No. 744878
Atteeyah Hollie
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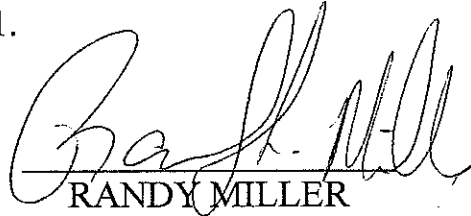
Attorneys for Plaintiffs

By: Sarah Geraghty

VERIFICATION

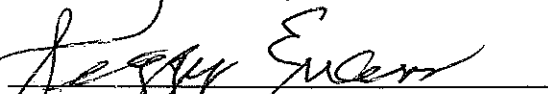
I, Randy Miller, do hereby swear and affirm under penalty of perjury that I have reviewed the forgoing document and that the factual information contained therein is true and correct.

This 03 day of MARCH, 2011.


RANDY MILLER

Sworn to and subscribed before me

This 3 day of March, 2011

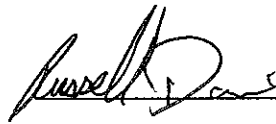

Notary Public

My Commission expires: 4/14/2014

VERIFICATION

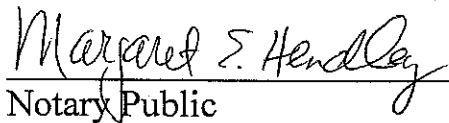
I, Russell DAVIS, do hereby swear and affirm under penalty of perjury that
I have reviewed the forgoing document and that the factual information contained
therein is true and correct.

This 25 day of FEB, 2011.



Sworn to and subscribed before me

This 25th day of February, 2011


Notary Public

My Commission expires: 02/08/2013

VERIFICATION

I, L. Hadley, do hereby swear and affirm under penalty of perjury that
I have reviewed the forgoing document and that the factual information contained
therein is true and correct.

This 24 day of February, 2011.

Lance Hendrix
Lance Hendrix

Sworn to and subscribed before me

This 24 day of February, 2011

Lance Hendrix
Notary Public

My Commission expires: 2-28-13

VERIFICATION

I, Ronald Wooten, do hereby swear and affirm under penalty of perjury that

I have reviewed the forgoing document and that the factual information contained therein is true and correct.

This 24 day of Feb, 2011.

Ronald Wooten

Sworn to and subscribed before me

This 24 day of Feb., 2011

S. Catlett
Notary Public



My Commission expires: 8/15/2011

VERIFICATION

I, Gregory Carswell, do hereby swear and affirm under penalty of perjury that I have reviewed the forgoing document and that the factual information contained therein is true and correct.

This 15 day of March, 2011.

Gregory Carswell
GREGORY CARSWELL

Sworn to and subscribed before me

This 15 day of Mar., 2011

Jennie L. Hodges
Notary Public

My Commission expires: 1-20-2014

VERIFICATION

I, Joe Hunter, do hereby swear and affirm under penalty of perjury that I have reviewed the forgoing document and that the factual information contained therein is true and correct.

This 16 day of March, 2011.

Joe Hunter
JOE HUNTER

Sworn to and subscribed before me

This 16 day of March, 2011

Gretchen F. Tallent
Notary Public

My Commission expires:

