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Jasmine Leonard, David Chavis, Davonica Chavis, Tionoa Logan, Ashley Lewis, individually and on behalf of all similarly situated children of unconstitutionally incarcerated parents; Jeffrey Leonard, Devin Square, Craig Williams, James Thompson, Cheyanne Johnson, David Chavis, Todd Logan, Jeffrey Jones, Gary J. Davis, Cleo Merritt, Juan Cruz, Ronald Cohen, individually and on behalf of all persons similarly situated; Plaintiffs vs. Hon. Audrey P. Blackburn, JSC, Hon. F. Lee Forrester, Hon. Rosalie B. Cooper, JSC, Hon. Thomas W. Cavanaugh, Jr., JSC, Hon. Louis Locascio, JSC, individually and in their official capacity as Judges of the Superior Court, and on behalf of all Superior Court Judges of the State of New Jersey, Defendants	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MERCER COUNTY GENERAL EQUITY PART DOCKET NO. Civil Action **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (Class Action / Civil Rights)**

I. PRELIMINARY STATEMENT

1. This is a class action brought by two classes of plaintiffs. The first set of plaintiffs consists of the children of incarcerated child support obligors (hereinafter "plaintiff children.") The parents of said plaintiff children have either

(1) had release or purge amounts set based not on their ability to pay but on other impermissible factors such as the total amount of arrears owed, or completely arbitrary numbers, or (2) have been held for many days or weeks without having had any release amount set, by way of a release amount or by bail. Plaintiff children are being unconstitutionally denied their fundamental right to a meaningful and loving relationship (including physical contact outside of visits at a jail) with their incarcerated parent, and are being unconstitutionally denied to their right to financial child support. Plaintiff children are representative of a class of persons who are similarly situated.

2. The second set of plaintiffs consists of indigent child support obligors who are in arrears under child support orders entered by the Superior Court of New Jersey, Chancery Division, Family Part (hereinafter plaintiff obligors).

3. There are two sub-sets of plaintiff obligors. The first sub-set have been deprived of their physical liberty and have had release or purge amounts set based impermissible factors such as the total amount of arrears owed, rather than their present ability to satisfy all or a part of said arrears. Their incarcerations are allegedly "coercive" in that they are being incarcerated pursuant to Rule 1:10-3 until they comply with court's order and post the release amount set for them.

4. The second sub-set have been deprived of their physical liberty and have had not had a release or purge amount set at all in spite of their having been arrested days or even weeks ago, this violating their rights, including but not limited to their rights under Article I, § 11 of the Constitution of the State of New Jersey. The majority of the named plaintiffs are currently incarcerated and have been deprived of their liberty for periods ranging from five days to over three months.

3. In regard to both sets of plaintiffs, defendants' aforesaid actions are violative of the New Jersey Constitution and are part of a policy, practice or custom adopted, either formally or in fact. Plaintiffs are representative of a class of persons who are similarly situated.

3. This complaint seeks declaratory and injunctive relief under 42 U.S.C. §1983 against the judges of the Superior Court of the State of New Jersey to prevent them from engaging in practices which abridge the substantive constitutional rights of plaintiffs and all those similarly situated.

II. PARTIES

4. Plaintiffs Jasmine Leonard, David Chavis, Davonica Chavis, Tionoa Logan, and Ashley Lewis are citizens of the United States and residents of the State of New Jersey. They are the children of the plaintiff obligors who are presently incarcerated at the Mercer County Corrections Center and/or remain in arrears and therefore subject to future enforcement proceedings. The children's obligor had a purge amount set based on considerations other than his or her ability to pay same. Some of these plaintiffs are the children subject to the child support orders under which plaintiff obligors are incarcerated; others are

children who currently reside with plaintiff obligors and are not the beneficiary of a formal child support order.

5. Devin Square is a citizen of the United States and a resident of the State of New Jersey. He is presently incarcerated at the Mercer County Corrections Center in Lambertville. He has been incarcerated since September 30, 2001 (fifty four days) under Docket or Case Number CS 4212 1070A. At the hearing resulting in or reviewing his incarceration, no inquiry was made into his ability to pay all or a portion of the arrears he owes. He in fact does not have the present ability to pay anything close to the $3,500 (Three Thousand Five Hundred Dollars) release amount set by defendant Hon. Audrey P. Blackburn, JSC.

6. Craig Williams is a citizen of the United States and a resident of the State of New Jersey. He is presently incarcerated at the Mercer County Corrections Center in Lambertville. He has been incarcerated since August 30, 2001 (84 days) under an unknown Docket or Case Number. His incarceration is allegedly coercive; lasting only until he pays the $8,000 (Eight Thousand Dollars) release amount. His case has never been reviewed since his incarceration.

7. James Thompson is a citizen of the United States and a resident of the State of New Jersey. He is presently incarcerated at the Mercer County Corrections Center in Lambertville. He has been incarcerated since September 28, 2001 (57 days) under Docket or Case Number FD-11-31-91 and FD-11-3947-93. At the hearing resulting in or reviewing his incarceration, no inquiry was made into his ability to pay all or a portion of the arrears he owes. He in fact does not have the present ability to pay anything close to the $1,500 (One Thousand Five Hundred Dollars) release amount set by defendant Hon. Audrey P. Blackburn, JSC.

8. Cheyanne Johnson is a citizen of the United States and a resident of the State of New Jersey. He is presently incarcerated at the Mercer County Corrections Center in Lambertville. He has been incarcerated since November 13, 2001 (11 days) under an unknown Docket or Case Number. His incarceration is allegedly coercive; lasting only until he pays a release amount. His case has never been reviewed since his incarceration and no release amount has been set.

9. David Chavis is a citizen of the United States and a resident of the State of New Jersey. He is presently incarcerated at the Mercer County Corrections Center in Lambertville. He has been incarcerated since October 26, 2001 (28 days) under Docket or Case Number CS 4000 2800B and CS 4057 1045B. His incarceration is allegedly coercive; lasting only until he pays a release amount. His case has never been reviewed since his incarceration and no release amount has been set.

10. Todd Logan is a citizen of the United States and a resident of the State of New Jersey. He is presently incarcerated at the Mercer County Corrections Center in Lambertville. He has been incarcerated since October 3, 2001 (52 days) under Docket or Case Number FD-11-016845. His incarceration is allegedly coercive; lasting only until he pays a

release amount. No inquiry nor finding was made into his ability to pay all or a portion of the $2,000 (Two Thousand Dollars) release amount ordered.

11. Jeffrey Jones is a citizen of the United States and a resident of the State of New Jersey. He is presently incarcerated at the Mercer County Corrections Center in Lambertville. He has been incarcerated since October 5, 2001 (49 days) under Docket or Case Number FM-11-4571-90. His incarceration is allegedly coercive; lasting only until he pays a release amount. His case has never been reviewed since his incarceration and no release amount has been set.

12. Gary J. Davis is a citizen of the United States and a resident of the State of New Jersey. He is presently incarcerated at the Mercer County Corrections Center in Lambertville. He has been incarcerated since September 28, 2001 (57 days) Docket or Case Number FD-11-1483-86. His incarceration is allegedly coercive; lasting only until he pays a release amount. At the hearing resulting in or reviewing his incarceration, no inquiry nor finding was made into his ability to pay all or a portion of the $2,000 (Two Thousand Dollars) release amount ordered. Mr. Davis is the father of children aside from those for whom the child support order was entered; were he not incarcerated, he would be providing for the financial and other parenting needs of these children.

13. Cleo Merritt is a citizen of the United States and a resident of the State of New Jersey. He is presently incarcerated at the Mercer County Corrections Center in Lambertville. He has been incarcerated since October 15, 2001 (40 days) under Docket or Case Number CS 4008 6771A and CS 4086 6785B. His incarceration is allegedly coercive; lasting only until he pays a release amount. No inquiry nor finding was made into his ability to pay all or a portion of the $1,000 (One Thousand Dollars) release amount ordered.

14. Jeffrey Leonard is a citizen of the United States and a resident of the State of New Jersey. He is presently incarcerated at the Mercer County Corrections Center in Lambertville. He has been incarcerated since September 19, 2001 (65 days) under an unknown Docket or Case Number. At the hearing resulting in or reviewing his incarceration, no inquiry was made into his ability to pay all or a portion of the $500.00 (Five Hundred Dollars) release amount set by the Court.

15. Plaintiff Juan Cruz is a citizen of the United States and a resident of the State of New Jersey. He was incarcerated at the Ocean County Jail in Toms River between February 22, 2001 and March 6, 2001. At the hearing resulting in or reviewing his "coercive" incarceration, no inquiry was made into his ability to pay all or a portion of the release amount set by the Court.

16. Plaintiff Ronald Cohen is a citizen of the United States and a resident of the State of New Jersey. He was incarcerated at the Monmouth County Corrections Center in Freehold for a thirteen day period in March 2000. At the hearing resulting in or reviewing his "coercive" incarceration, no inquiry was made into his ability to pay all or a portion of the release amount set by the Court.

15. Defendants Hon. Audrey P. Blackburn, JSC (Mercer County), Hon. Rosalie B. Cooper JSC (Ocean County), Hon. Thomas W. Cavanaugh, Jr., JSC (Monmouth County), Hon. Louis Locascio, JSC (Monmouth County), are judges of the Superior Court, assigned by Order of the Supreme Court of New Jersey to the Chancery Division, Family Part. They presided over the hearings wherein plaintiffs were incarcerated and/or the hearings to review their incarceration.

16. Defendant Hon. F. Lee Forrester is a Judge of the Superior Court, assigned by Order of the Supreme Court of New Jersey to the position of the Presiding Judge of the Chancery Division, Family Part. As Presiding Judge, he is responsible for the supervision of the Family Part Judges who serve under him. Additionally, Judge Forester authorized and signed the warrants under which the plaintiffs who have no release amount set were arrested.

III. CLASS ACTION

17. The named plaintiffs bring this suit individually and, pursuant to Rule 4:32-1(a) of the Rules Governing the Courts of the State of New Jersey, on behalf of all residents of the State of New Jersey who: (1) have been, currently are, or will in the future be in arrears under support orders issued by the Chancery Division, Family Part of the Superior Court; (2) have been, currently are, or will in the future be subject to allegedly coercive incarceration as a result of their failure to pay said child support.

18. This is a proper class action under Rule 4:32-1(a) of the Rules Governing the Courts of the State of New Jersey in that, as to the class: (1) the persons affected are so numerous that joinder of all parties is impracticable; (2) there are common questions of law and fact; (3) the claims and defenses of the representative parties are representative of those of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (b)(2) the parties opposing the class plaintiffs have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief to the class as a whole.

19. Defendants Blackburn, Cooper, Cavanaugh, Jr., Locascio, and Forrester are sued individually and in their official capacities and, pursuant to Rule 4:32-1(a) of the Rules Governing the Courts of the State of New Jersey as representative parties on behalf of a defendant class consisting of all the Superior Court Judges of the State of New Jersey.

20. This is a proper class action under Rule 4:32-1(b)(1) of the Rules Governing the Courts of the State of New Jersey as the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

IV. CAUSE OF ACTION

As to plaintiff children

21. Plaintiffs Jasmine Leonard, David Chavis, Davonica Chavis, Tionoa Logan, and Ashley Lewis (hereinafter "plaintiff children") are the children of plaintiff obligors who have been, currently are, or will in the future be coercively incarcerated. Their parents have had purge amounts set based on considerations other than his ability to pay, or have been held for weeks at a time without any release amount having been set. Plaintiff children have a fundamental, constitutional right to a loving relationship (including physical contact outside of visits at a jail) with their parents. Plaintiffs are representative of a class of persons who are similarly situated.

22. Defendants' incarceration of plaintiff obligors without making findings that they have the ability to comply with the release amount established has unconstitutionally deprived plaintiff children of meaningful contact with their father. As plaintiff obligors are not able to attain their release and seek employment, said incarceration has also deprived plaintiff children of the financial child support plaintiff obligors otherwise would have provided.

As to plaintiff obligors

23. Plaintiff obligors were placed under child support orders by the Superior Court of New Jersey, Chancery Division, Family Part.

24. All said plaintiff obligors are in arrears on said obligations and were arrested as a result of their nonpayment or underpayment of support. All have either had release amounts set by defendants without regard to the ability of plaintiff obligors to pay same, or have not had release amounts set at all in spite of having been held for days or weeks.

25. Defendants' incarceration of plaintiff obligors without making a finding that each has the ability to comply with the purge amount established has unconstitutionally deprived plaintiff obligors of rights established by the Supreme Court of New Jersey. When release amounts set by the Family Part are not tied to the ability of the obligors to pay same, the incarcerations are not coercive and lack legal justification in the absence of their having been charged with a criminal offense. If the incarcerations are not coercive, the plaintiff obligors are entitled to the full panoply of constitutional protections afforded to any citizen deprived of their liberty.

26. When plaintiffs are held for days or weeks without having a release amount set at all, their substantive rights pursuant to the New Jersey Constitution, including their rights pursuant to Article I, § 11 of the New Jersey Constitution are violated.

27. (1) In establishing release amounts based on considerations other than the ability of plaintiffs to pay same under the pretense of a "coercive incarceration", (2) in incarcerating plaintiffs and not establishing a release amount nor reviewing their case for periods in excess of 24 hours, and/or (3) when depriving plaintiff children of their right to

financial and emotional support from plaintiff obligors, defendants have acted under a policy, practice or custom adopted, either formally or in fact, that serves to deprive plaintiff children and plaintiff obligors of rights guaranteed to them by the Constitution of the State of New Jersey.

WHEREFORE, plaintiffs and all those similarly situated seek judgment in their favor and against the defendants and the class they represent:

1. Declaring that the constitutional rights of plaintiffs and all those similarly situated were violated;
2. Enjoining the defendant class from establishing a purge or release amount for plaintiff obligors without first making specific findings, based on substantial and credible evidence, that plaintiff obligors have the ability to pay said release amount;
3. Requiring defendant class to immediately review the cases of all persons now incarcerated in violation of their constitutional rights as alleged herein;
4. Requiring defendant class to prospectively review the cases of all plaintiff obligors within 12 hours of their arrest or incarceration, and to set a release amount consistent with the ability of the payor to pay within that period.
4. For counsel fees and costs of suit.

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David Perry Davis, Esq.

SUPERIOR COURT OF NEW JERSEY
Appellate Division
DOCKET NO. A-5007-01T3

Jasmine Leonard, David Chavis, Davonica Chavis, Tionoa Logan, Ashley Lewis, individually and on behalf of all similarly situated children of unconstitutionally incarcerated parents; Jeffrey Leonard, Devin Square, Craig Williams, James Thompson, Cheyanne Johnson, David Chavis, Todd Logan, Jeffrey Jones, Gary J. Davis, Cleo Merritt, Juan Cruz, Ronald Cohen, individually and on behalf of all persons similarly situated; vs. Hon. Audrey P. Blackburn, AJSC, Hon. F. Lee Forrester, Hon. Rosalie B. Cooper, AJSC, Hon. Thomas W. Cavanaugh, Jr. AJSC, Hon. Louis Locascio, AJSC, individually and in their official capacity as Judges of the Superior Court, and on behalf of all Superior Court Judges of the State of New Jersey	:	Civil Action On Appeal from a Final Judgment of the Superior Court of New Jersey, Law Division, Mercer County Sat below: Hon. Linda R. Feinberg, AJSC

Appellant's Brief and Appendix

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Procedural History

On November 28, 2001, plaintiffs filed a complaint in the Chancery Division, General Equity Part, pursuant to 42 U.S.C. §1983 (The Civil Rights Act) (Pa 2-13) along with an order to show cause (Pa 14-15) and several affidavits from the named plaintiffs (Pa 52-71). The gravamen of the complaint and order to show cause was a claim that indigent child support obligors were being detained for long periods of time without an ability to pay hearing being conducted, and that the due process rights of the plaintiffs were being violated by the trial court habitually failing to make a meaningful inquiry into the ability of incarcerated obligors to pay the release amounts set.[1] Procedurally, the complaint sought class action status and counsel fees and costs pursuant to 43 U.S.C. § 1988.

The complaint was *sua sponte* transferred from the chancery division to the Law Division and the order to show cause was executed by Hon. Linda R. Feinberg, AJSC, and set down for a hearing on January 11, 2002.

On January 2, 2002, defendants filed a motion to dismiss the complaint along with opposition to plaintiffs' order to show cause (Pa 72-90). On January 9, 2002, plaintiffs filed a reply (Pa 105-124).

The Court heard oral argument on the return date (1T, Pa 236-264) and placed its decision on the record, subject to counsel submitting any additional documentation by January 16.

An Order was entered January 28, 2002, granting the majority of the substantive relief sought by plaintiffs. Specifically, the Order compelled defendants to hold initial ability to pay hearings within 72 hours of an obligor's arrest and to review said incarcerations no more than once every two weeks thereafter. While expressing grave concerns as to the sufficiency of the findings being made at said ability to pay hearings, the trial court held that it was without authority to certify the proposed defendant class and to address whether the actions of fellow trial court judges were violative of the plaintiffs' civil rights (1T 21-22 to 21-23, Pa 246). Procedurally, the court held that class action status was not appropriate (Pa 172-198).

On February 11, 2002, plaintiffs filed a motion for counsel fees and costs pursuant to 42 U.S.C. § 1988 (Pa 200-

[1] The complaint also asserted that the rights of the children of the incarcerated parents to a relationship with their parents was being infringed. As any relief granted to the parents would also address the interests of the children, that issue is not pursued on appeal.

211). Defendants opposed the motion (Pa 221-228). Plaintiffs replied to the opposition on February 28, 2002 (Pa 229-233). The Court held oral argument on March 8, 2002 (2T, Pa 265-273) and issued an order denying plaintiffs' request for counsel fees and costs on March 25, 2002.

The appeal was filed along with a motion to extend time to file same on May 31, 2002. A subsequent motion to extend the time to file this brief was granted on November 13, 2002.

Statement of Facts

Each year in New Jersey, there are over 50,000 child support enforcement hearings scheduled by county probation departments. (Pa 179). Pursuant to R. 5:7-5, the court is authorized to issue an arrest warrant for obligors who fail to appear for said hearings. If at an enforcement hearing a court determines that an obligor has the current ability to make a lump-sum payment toward support arrears, the court is authorized pursuant to R. 1:10-3 to order the coercive incarceration of the obligor until payment is made.

The incarceration itself is not challenged. It is undisputed that coercive incarceration may in some instances be an appropriate, fully constitutional method of forcing a recalcitrant but able obligor to comply with a valid child support Order. What is challenged is the violation of the plaintiffs' due process right to have a hearing reviewing their incarceration within a reasonable time period, and defendants' continuous abrogation of the law (and, therefore, plaintiff's civil rights) insofar as it requires the trial court to set a release amount actually tied to the ability to pay of the defaulting obligor.

Prior to the January 28, 2002 Order in this matter, many defaulted child support obligors were being arrested and held without review for periods that the trial court found violated due process (2T 13-23[2], Pa 272). Others were given hearings that were "ability to pay hearings" in name only and where no inquiry whatsoever was made into their ability to pay the release amount set by the court (Pa 125-160).

Beginning in September of 2001, the named plaintiffs in this matter were arrested as a result of their failure to pay court-ordered child support or for their failure to appear at an enforcement hearing (Pa). On November 23, 2001 when affidavits were executed by the plaintiffs, the named plaintiffs had been incarcerated for an average of 48 days each.[3] Half of them had

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[2] THE COURT: ... the Court did in reaching its decision and in developing the 72 hour time period, did premise its conclusion on procedural due process (2T 14-23 to 14-24, Pa 272).

[3] Summary of plaintiffs' affidavits in support of order to show cause (Pa 52-71) and transcripts of ability to pay hearings 125-160, 163-169):

Name of obligor	Arrest date	Days in jail as of filing of complaint	Review(s)	Release amount set
Jeffrey Leonard	9/19	65	2	500
Devin Square	9/30	54	1	3500

never been provided an ability to pay hearing (Pa 62-63, 66-67, 60-61).

Those who had been granted ability to pay hearings were having their incarcerations reviewed on a sporadic basis at best. Exactly how regularly the reviews occurred was a contested question below. Although a representative from the Mercer County Probation Department testified that reviews occurred every two weeks (1T 38-17 to 39-10. Pa 255), the affidavits filed by plaintiffs indicated far longer periods (Pa 52-71). At the hearing on plaintiffs' application for an order to show cause, the trial court refused to take testimony from the plaintiffs who were present in Court,[4] permitting only witnesses brought by the defense to speak.[5]

Subsequent to oral argument on January 11, on the court's invitation to supply further documentation, plaintiffs obtained and supplied transcripts from enforcement hearings involving the named plaintiffs. The testimony of the probation officers at those enforcement hearings demonstrated unequivocally that it was at least a month between reviews.[6] Nonetheless, the court found

Craig Williams	9/3	81	0	8000
James Thompson	9/28	56	1	2000
Cheyanne Johnson	11/13	10	0	None set
David Chavis	10/26	28	0	None set
Todd Logan	10/3	51	0	2000
Jeffrey Jones	10/5	49	0	None set
Gary J. Davis	9/28	56	1	2000
Cleo Merritt	10/15	39	1	1000

[4] MR. DAVIS: Judge, in the courtroom right now is Todd Logan . . . and one of the other [named] plaintiffs and, Your Honor, these people were sitting in here with -- $10,000 release amounts . . . and one has now put in 60 or 70 days. We could call him to testify if Your Honor wanted to --

THE COURT: I'm not going to take any testimony today (1T 26-14 to 27-2, Pa 249).

[5] THE COURT: . . . You have some people from probation?

MS. STOOP: I do, Your Honor.

THE COURT: I'd like to ask just a couple of questions . . . Come on up here, and Mr. Davis I'll give you an opportunity to ask any questions that you'd like, as well (1T 36-14 to 37-5, Pa 254).

[6] "This is a remand matter and Mr. Leonard was last heard before Your Honor October 11, 2001." Transcript of November 15, 2001 hearing (34 days), Pa 139.

"This is a remand hearing, Your Honor. Mr. Davis was last heard before Judge Blackburn . .

that plaintiffs were only held "for as long as two weeks" without review (1T 41-4 to 41-6, Pa 256).

Of more importance, at the "ability to pay" hearings, there was no inquiry into the ability of the defaulted obligors to pay the release amounts set by the court, thus removing the constitutional justification for a "coercive" incarceration (Pa 52-71, 125-160).

The issue of whether the plaintiffs were even incarcerated as a result of their failure to pay support was also contested below. The Mercer County Probation Department filed a certification stating[7] that "No Obligor is incarcerated for non-payment of child support without first having an ability to pay hearing" (Pa 95, ¶8 and Pa 96 ¶9) and claiming that all the named plaintiffs were being held as a result of their failure to appear, not their inability to pay the release amount set (Pa 94-96, ¶7 and 8).

When the court invited additional submissions following the hearing, plaintiffs obtained and submitted the transcripts of the Ability to Pay hearings conducted in Mercer. Each and every transcript reveals plaintiffs who were held for lengthy periods of time (well in excess of two weeks) and each hearing results in the establishment of a release amount without a scintilla of evidence that the obligor had the ability to pay same (Pa 125-160).

The Monmouth County probation department filed a similar certification stating that Ronald Cohen was arrested after failing to appear for a child support enforcement hearing scheduled by probation, and not as a result of his failure to pay child support (Pa 98). This was simply false. Plaintiffs submitted the transcript from the hearing wherein Mr. Cohen was incarcerated, which demonstrated that he was in Court that day to argue a motion *he filed* to reduce his support (Pa 164 and Pa 38) and that he was incarcerated for nonpayment, in direct contradiction to the statement that "Mr. Cohen was not incarcerated for non-payment of child support" (Pa 99 at ¶7). Mr. Cohen never failed to appear for a hearing. In spite of this indisputable evidence that the Monmouth certification was incorrect, the trial court relied on it as well.

The Ocean County certification (Pa 100-104) was edited by

. on November 15th." Transcript of December 14 2001 hearing (29 days), Pa 155.

[7] All the certifications submitted by defendants focus strongly on plaintiffs having been arrested for their failure to appear rather than for failing to pay. The transcripts from the actual Ability to Pay hearings demonstrate why each was being held (Pa 125-160) and contradict the claims made in the certifications from Probation. More importantly, this issue is completely irrelevant. The issues raised by the complaint and order to show cause are (1) whether the findings made in support of "coercive" incarceration orders are constitutionally adequate, and (2) how long it takes to have an ability to pay hearing scheduled, both initially after arrest and then to review whether the incarcerations remain "coercive"(Pa 2-13). The complaint raises no issue concerning the reason for initial arrest.

the affiant before being faxed back and submitted to the court. It does not even claim that Ocean County was only holding obligors who had failed to appear (Pa 103). Instead, the Certification actually ***admits*** the allegations of plaintiffs' Complaint that members of the plaintiff class are incarcerated without the existence of evidence that the obligors had the ability to pay, stating:

> ... The obligor ~~would~~ may be given the opportunity at this hearing to present evidence and testimony concerning his or her ability pay .... If a legitimate inability to pay is demonstrated, the Obligor ~~would~~ may not be incarcerated.[8]

Following the brief hearing on January 11, the trial Court entered an order requiring that, prospectively, all arrested child support obligors would be initially reviewed within 72 hours of their arrest and no more than every two weeks thereafter. The court "didn't dispute that" there is a problem with the adequacy of the inquiry being made at ability to pay hearings (1T 21-14, PA 246), but held that it was without authority to certify the proposed defendant class and to address the issue (1T 21-16 to 21-24, Pa 246).

Having prevailed on the central issues of the complaint, plaintiffs filed an application for counsel fees and costs. Same was denied by the court on March 25, 2002.

Plaintiffs appeal those portions of the trial court's January 28, 2002 and March 25, 2002 orders that (1) denied class action status (2) held that a trial court cannot entertain a civil rights suit where the defendant class consists of fellow trial court judges, and, (3) denied plaintiffs' application for counsel fees and costs.

[8] This statement again inverts the correct legal standard by placing the burden on the obligor to show an inability to pay a release amount.

Preliminary Statement

This Court is asked to reverse the trial court's determination that class action status was not appropriate, to certify the classes, and to make the relief ordered by the trial Court as to the timing of hearings applicable to the entire defendant class. The record before this Court also establishes that the plaintiff class has not received meaningful ability to pay hearings. This Court should order that indigent child support obligors receive a hearing that is an ability to pay hearing in more than name only.

For this Court to so order requires no factual inquiry that would take this court outside its role as a court of review.

As noted above, many of the factual findings of the trial court (as to the length of time obligors were held without a hearing and the length of time between hearings) were not based in substantial, credible evidence in the record. They were, in fact, contradicted by the record. However, even without disturbing the factual findings made below, it is urged that the trial Court was correct that a "bright-line rule" (2T 14-17, Pa 272) should exist whereby defaulted child support obligors are reviewed within 72 hours of their initial arrest and every two weeks thereafter to ensure that any incarcerations remain "coercive." As requested, the Court should have reinforced that, both at an initial enforcement hearing where incarceration is considered, and on a subsequent review, the burden is on the party seeking to incarcerate a judgment debtor to "demonstrate to the court that the judgment debtor has assets that have been secreted or otherwise placed beyond the reach of execution."[9]

As the classes should have been certified, the relief granted by the trial court on January 28, 2002 should be made applicable to the entire defendant class.

Second, the record demonstrates that the level of inquiry into the ability of plaintiffs to pay the release amounts being set was constitutionally inadequate. Again, the trial court did not find otherwise, expressing "I've reviewed those transcripts, and I have some concerns about the level of inquiry by the judges. I don't dispute that" (1T 21-14 to 21-17, Pa 246).

It is the trial court's subsequent legal conclusion that it could not entertain a class action where the defendant class consists of the named Judges "individually and in their official capacity as Judges of the Superior Court, and on behalf of all Superior Court Judges of the State of New Jersey" that is challenged herein. As discussed below, this defendant class has been certified in a great number of published cases brought under 42 U.S.C. § 1983 and, contrary to the opinion expressed below, it does not require a trial court "to act as an appellate court."

[9] In an unpublished opinion, the Appellate Division established that, "after twelve days" of incarceration, it could be presumed that a jailed obligor did not have the ability to secure his own release (Pa 41).

(1T 21-14 to 21-17, Pa 246).

Finally, this Court is asked to reverse the trial court's determination that an award of counsel fees was inappropriate. Even without addressing the issue of the certification of the classes, plaintiffs' suit resulted in the "bright line rule" of 72 hour review and review of incarcerations every two weeks thereafter, and the trial Court found that this rule was required "as a matter of procedural due process." (2T 14-23 to 14-24, Pa 272). There is a strong public policy in our State in favor of the vindication of civil rights especially when, as here, the plaintiff class by definition is indigent and otherwise unable to pursue a remedy to a civil rights violation.

☺ LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO CERTIFY THE PLAINTIFF AND DEFENDANT CLASSES.

The general rule is that findings of a trial Court are binding on appeal when supported by adequate, substantial and credible evidence. Pascale v. Pascale, 113 N.J. 20, 33, (1988) (*citing* Gallo v. Gallo, 66 N.J.Super. 1, 5, (App.Div.1961)), Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974). It is not the role of the Appellate Division to re-weigh the factual determinations of the trial court, which alone has the opportunity to view the demeanor of and judge the credibility of witnesses. Cesare v. Cesare, 154 N.J. 394, 416 (1998).

However when, as here, the issue on appeal concerns an issue of law and not a question of fact, review by the Appellate Division is de novo. Manalapan Realty v. Township Comm., 140 N.J. 366, 378 (1995).

The certification of class actions is controlled by R. 4:32-1(a), which requires that a class should be certified when the requirements of numerosity, typicality, and adequacy of the named representatives are met. The record demonstrates that the putative class satisfies each and every requirement of the Rule.

As to numerosity

Initially, as to the class, it was not disputed that, as to both the putative plaintiff and defendant class the "(1) the persons affected are so numerous that joinder of all parties is impracticable." The trial Court noted on the record that, as to a plaintiff class of defaulted child support obligors, "there are thousands and thousands of cases every year" (1T 18-8 to 18-14, Pa 245), and in its written decision that "there are over 50,000 child support enforcement hearings each year." (Pa 180-181).

A. As to numerosity of the proposed defendant class

In finding that plaintiffs had not alleged sufficient numerosity to warrant class action status, the court held that "production of transcripts from approximately ten child support enforcement hearings falls short of satisfying the numerosity requirement set forth in R. 4:32-1(a)."

The trial court erred in focusing on how many transcripts had been produced or on the number of *named* plaintiffs. When considering whether a putative plaintiff class has established numerosity, a court is to focus on the allegations of the complaint, not how many named plaintiffs had firmly established their entitlement to relief at a preliminary hearing on an order to show cause. The court's finding that there were over 50,000 hearings annually, in conjunction with a complaint naming 12 plaintiffs "individually and on behalf of all persons similarly situated" satisfies the numerosity requirement of the Rule. *See, e.g.* W.P. v. Poritz, 931 F.Supp. 1187 (D.N.J. 1996), Weiss v. York Hospital, 745 F.2d 786, 808 (3d Cir.), *certiorari denied* 105

S.Ct. 1777, 470 U.S. 1060, 84 L.Ed.2d 836 (1984).

Especially in a civil rights context, even "speculative and conclusory representations" as to the size of the class suffice as to the requirement of many. Doe v. Charleston Area Medical Center, Inc.,, 529 F.2d 638 (W.Va. 1975), Young v. Pierce, 544 F.Supp. 1010 (E.D.Tex. 1982), Jones v. Diamond, 519 F.2d 1090, 1100 (5th Cir.1975).

Plaintiffs exceeded the standard for establishing numerosity.

B. As to numerosity of the proposed defendant class

As to defendant class, the trial court noted that there were, as of January 14, 2002, "126 judges assigned to the Family Part." (Pa 181).

While it might be possible to serve each and every sitting Family Part judge individually, to establish the numerosity element, plaintiffs are not required to show that it would be "impossible" to join all members, but only that such joinder would be "difficult", "inconvenient" or "impracticable." See, e.g., W.P. v. Poritz, 931 F.Supp. 1187 (D.N.J. 1996), Weiss v. York Hospital, 745 F.2d 786, 808 (3d Cir.), *certiorari denied* 105 S.Ct. 1777, 470 U.S. 1060, 84 L.Ed.2d 836 (1984, Saldana v. City of Camden, 252 N.J.Super. 188, 193 (App.Div.1991) (potential class of 81 members sufficient to establish numerosity), Gross v. Johnson v. Johnson, 303 N.J.Super. 336 (Law.Div. 1997), Delgozzo v. Kenny, 266 N.J.Super. 169, 181, (App.Div.1993).

Moreover, where, as here, the defendants would in any case be represented by the same entity (the office of the Attorney General), a class action is the appropriate vehicle for raising a civil rights challenge to an ongoing practice. Finally, civil rights challenges to judicial practices have routinely been certified as a class in a wide variety of contexts. *See, e.g.*, Lake v. Speziale, 580 F.Supp. 1318 (D.Conn. 1984), Mastin v. Fellerhoff, 526 F.Supp. 969 (S.D.Ohio 1981), Walker v. McLain, 768 F.2d 1181 (10th Cir.App. 1985), *cert.denied*, 474 U.S. 1061, 106 S.Ct. 805, 88 L.Ed.2d 781 (1986); Sevier v. Turner, 742 F.2d 262 (6th Cir.1984), Ridgeway v. Baker, 720 F.2d 1409 (5th Cir. 1983), McKinstry v. Genesee County Circuit Judges, 669 F.Supp. 801 (E.D.Mich.1987), Johnson v. Zurz, 596 F.Supp. 39 (N.D.Ohio 1984), Young v. Whitworth, 522 F.Supp. 759 (S.D.Ohio 1981).

In its written decision, the trial court again focused on the number of named defendants, holding that "naming only five judges in three counties" was insufficient to satisfy the numerosity requirement, again ignoring that the complaint named the judges "individually and in their official capacity as Judges of the Superior Court, and on behalf of all Superior Court Judges of the State of New Jersey." (Pa 2-13).

The trial Court erred in holding that the putative defendant class did not satisfy the numerosity requirement of R. 4:32-1(a).

As to commonality

In order to be certified as a class, the complaint must allege that "there are common questions of law and fact."

R. 4:32-1(a)(2). The trial court did not address this factor as to the putative defendant class and found that it did not exist as to the putative plaintiff class.

In finding that the plaintiff class had not satisfied the commonality requirement of the Rule, the court stated "But there -- the commonality is really -- every case is fact sensitive, is different" (T18-8 to 18-12), and in its written decision: With respect to commonality, the plaintiffs acknowledge "the precise underlying facts surrounding each case may differ." As result, there is no commonality amongst the proposed plaintiff class.

When determining whether a putative class has established sufficient commonality, the focus should not be on whether there are differences between individual cases. There will always be factual differences between different cases; the question is whether the class as a whole raises "at least one common question of law or fact." Gross v. Johnson & Johnson-Merck Consumer Pharms. Co., 303 N.J.Super. 336, 342 (Law Div.1997). *See also,* In re Cadillac V8-6-4 Class Action, 93 N.J. 412 (1983), Phillip Steven Fuoco, Robert F. Williams, *Class Actions in New Jersey State Courts,* 24 *Rutgers L.J.* 737, 752 (1993).

The complaint alleged that each and every plaintiff had either been incarcerated without an ability to pay hearing at all or without having been afforded a constitutionally adequate hearing. This allegation must be accepted as true when a court is asked to certify a class, and establishes the required commonality for class certification. Delgozzo v. Kenny, 266 N.J.Super. 169, 181 (App.Div.1993)(quoting Blackie v. Barrack, 524 F.2d 891, 901 n. 17 (9th Cir.1975), *cert. denied*, 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed.2d 75 (1976)).

As to typicality

A plaintiffs claim satisfies the typicality requirement for purposes of class certification if it arises from the same event or course of conduct which has given rise to claims of other class members. In re Cadillac V8-6-4 Class Action, 93 N.J. 412, 425 (183.

The complaint alleges a course of conduct - that plaintiffs were either not granted timely ability to pay hearings, that they were not granted ability to pay hearings at all, or that, when a hearing was held, the release amount set was not tied to the ability of plaintiffs to pay same, thus depriving the resulting incarcerations of their coercive nature and removing its legal justification (Pa 2-13).

Again, at what should have been an early stage of the process, plaintiffs were entitled to every reasonable inference that could be drawn from their complaint. Delgozzo v. Kenny, 266 N.J.Super. at 181. It is respectfully suggested that, considering the transcripts, affidavits, and admissions contained in the Probation Department's certifications, plaintiffs far exceeded the minimum requirement for typicality.

As to adequacy

The last requirement of R. 4:32-1(a) is a showing that the parties will fairly and adequately represent the interests of the class. "Adequacy is presumed in New Jersey courts, and the burden is on the opposing party to demonstrate that the proposed representation will be inadequate." Delgozzo v. Kenny, 266 N.J.Super. 169, 181 (App.Div.1993).

There was no discussion as to adequacy during oral argument, and defendants written opposition asserted only:

> Plaintiffs offer only conclusory statements with no substantive proof. This also speaks to Plaintiffs' ability to represent all the members of the proposed Plaintiff Class . . . Without discovery, Plaintiffs have no evidence to support their contention that they can adequately represent the proposed Plaintiff Class. (Pa 88-89).

The trial court decision comments only briefly on adequacy, stating:

> Plaintiffs cannot simply generalize that all parents have had the same experience as the named plaintiffs. As a result, it is impossible to ascertain whether or not the representative parties will fairly and adequately represent the interests of the class (Pa 182).

The standard on these issues has been clearly established by case law. The burden to disprove adequacy was on defendants, and "[t]he court is bound to take the substantive allegations of the complaint as true". Delgozzo v. Kenny, 266 N.J.Super. 169, 181 (App.Div.1993)(quoting Blackie v. Barrack, 524 F.2d 891, 901 n. 17 (9th Cir.1975), cert. denied, 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed.2d 75 (1976)). The court is required to give plaintiffs "every favorable view" of plaintiffs' complaint and the record. Riley v. New Rapids Carpet Ctr., 61 N.J. 218, 223 (1972).

Again, in light of the transcripts, affidavits, and admissions contained in the record, it is respectfully suggested that plaintiffs far exceeded the minimum requirement for adequacy.

As to 4:32-1(b)

Finally, R. 4:32-1(b) requires that, in addition to satisfying the four requirements discussed above, a putative class must satisfy at least one of the requirements contained in subsection (b) of the Rule. Plaintiffs maintain that they satisfy *all* of the provisions contained in 4:32-1(b), not simply one of requirements. Certainly, plaintiffs met the standard that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

The complaint alleged that the plaintiff class had either

been incarcerated without an ability to pay hearing at all or without having been afforded a constitutionally adequate hearing. The trial Court did not address section (b)(2), presumably as it found that proceeding as a class action was not appropriate under 4:32-1(a).

This is a question of law, not fact. In view of the allegations of the complaint and the proofs thus far adduced, it is respectfully suggested that R. 4:32-1(b) was satisfied.

II. THE TRIAL COURT ERRED IN HOLDING THAT IT WAS WITHOUT AUTHORITY TO ENTERTAIN A CIVIL RIGHTS SUIT NAMING THE JUDGES OF THE SUPERIOR COURT AS DEFENDANTS.

The trial Court held that it was without authority to address the adequacy of ability to pay hearings as doing so would require the court to sit as an appellate court over fellow trial court judges:

> MR. DAVIS: ... Your Honor indicated that each one of these must include a fact sensitive case-by-case inquiry of the ability to pay. These hearings are 30 seconds each. The transcripts are two pages each.
> THE COURT: Yes, but let me ask you this. I've reviewed those transcripts, and I have some concerns about the level of inquiry by the judges. I don't dispute that. But, I'm not an appellate court. I'm not an appellate court. And, I don't know what authority that I have to look at that and say that the judge misapplied the law .... because I don't believe that I have the authority to look at that transcript and say, I am going to reverse the -- I don't have the authority, I'm not an appellate court. (T21-8 to 21-23).

The trial Court was not being asked to sit as a court of review in any of the other matters involving the named plaintiffs. Plaintiffs conceded that this would clearly be asking the trial Court to exceed its authority.

Leonard et al v. Blackburn et al MER-L-3761-01, is a completely *collateral* matter to any of the cases involving the named plaintiffs. The trial Court did have the authority to address a civil rights complaint for injunctive and declarative relief. Collateral suits challenging ongoing court practices are a commonplace method of bringing a civil rights challenge and judges are routinely certified as a class. *See, e.g.,* Lake v. Speziale, 580 F.Supp. 1318 (D.Conn.1984), Mastin v. Fellerhoff, 526 F.Supp. 969 (S.D.Ohio 1981), Walker v. McLain, 768 F.2d 1181 (10th Cir.App. 1985), *cert. denied*, 474 U.S. 1061, 106 S.Ct. 805, 88 L.Ed.2d 781 (1986); Sevier v. Turner, 742 F.2d 262 (6th Cir.1984), Ridgeway v. Baker, 720 F.2d 1409 (5th Cir. 1983), McKinstry v. Genesee County Circuit Judges, 669 F.Supp. 801 (E.D.Mich.1987), Johnson v. Zurz, 596 F.Supp. 39 (N.D.Ohio 1984), Young v. Whitworth, 522 F.Supp. 759 (S.D.Ohio 1981).

Almost parenthetically, it should be noted that this matter could not be filed in federal court as there are pending proceedings as to the named plaintiffs which would require the district court to abstain under Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

Even if there were no pending proceedings, there is presently an unpublished opinion holding that the mere existence of UIFSA and the family court contempt process warrants abstention from any issue regarding the enforcement of child

support. Anne Pasqua, et al v. Hon. Gerald Council, Civil Action No. 00CV-2418, Third Circuit Docket No. 01-2735.[10]

Plaintiffs had no choice but to bring this matter in state court; for the trial Court to hold that it could not address the civil rights issues raised in the complaint literally leaves the plaintiffs with no forum to press their claim.

[10] Oral argument in the Third Circuit Court of Appeals was held in April of 2002, but no decision has been issued.

III. THE TRIAL COURT ERRED IN FAILING TO AWARD COUNSEL FEES AS PLAINTIFFS "PREVAILED" AS THAT TERM HAS BEEN DEFINED BY THE NEW JERSEY SUPREME COURT AND NO "SPECIAL CIRCUMSTANCES" EXISTED TO REBUT THE STRONG PRESUMPTION THAT A PREVAILING 42 USC § 1983 PLAINTIFF IS ENTITLED TO COUNSEL FEES AND COSTS.

Once a plaintiff in a civil rights action "is successful on any significant issue," fees are ordinarily granted as a matter of course "unless special circumstances would make the award unjust." Stockton v. Rhulen, 302 N.J.Super. 236, 241 (App. Div. 1997), *citing* Frank's Chicken House v. Mayor and Council, 208 N.J.Super. 542, 545 (App.Div.1986), African Council v. Hadge, 255 N.J.Super. 4, 11-12, (App.Div.1992). Both the United States and New Jersey Supreme Courts have held that "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" Bolyard v. Berman, 274 N.J.Super. 565 (App.Div. 1994), *citing* Hensley v. Eckerhart, 461 U.S. 424, 429, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). *See also,* Gregg v. Township Comm., 232 N.J.Super. 34, 39 (App.Div. 1989).

In Gregg v. Township Comm., 232 N.J.Super. 34, 39 (App.Div. 1989), the Appellate Division held "it was the intent of Congress in enacting section 1988 to require an award of fees in all but exceptional cases in order to encourage litigants to vindicate civil rights violations.... Thus, unless the trial judge advances a viable reason for the denial of fees, a denial must be reversed."

The trial Court's January 28, 2002 Order held, in relevant part, "...it is further ordered that Plaintiffs' application for declaratory judgment is PARTIALLY GRANTED..." The Order then imposed a new requirement that all defaulted child support obligors be reviewed within 72 hours of their arrest and every two weeks thereafter. In the matter before the court, the trial judge did not advance any exceptional circumstances warranting the denial of plaintiffs' subsequent application for counsel fees and reimbursement of the out-of-pocket costs.

In denying plaintiffs' application for counsel fees, the court found that plaintiffs had not prevailed under the two-pronged test set forth by the New Jersey Supreme Court in Singer v. State, 495 N.J. 487 (1984). The record below unequivocally demonstrates that both prongs of Singer were satisfied, that no exceptional circumstances existed, and, therefore, plaintiffs request for reasonable counsel fees and reimbursement of out-of-pocket costs should have been granted.

1. Plaintiffs satisfied the first prong of Singer v. State

The first prong of Singer requires a plaintiff to demonstrate a nexus between the litigation and the relief ultimately achieved, "meaning that plaintiffs' case was a necessary and important factor in achieving the relief granted."

(2T 11-XX to 11-XX), Singer v. State, 495 N.J. at 495 *quoting* Nadeau v. Helgemoe, 581 F.2d. 275, (1st Cir. 1978).

The transcript from oral argument is somewhat confusing on this point. The trial Court makes contradictory findings, first concluding that "plaintiffs have failed to satisfy the first prong of Singer." (2T 12-XX to 12-XX). To support this legal conclusion, the trial court found that "the named defendants did not deviate from established procedure." (2T).

Initially, neither prong of the Singer test requires a trial court to determine if a court deviated from established procedure. The complaint in this matter claimed that the established procedure (whereby defaulted child support obligors were held for weeks or months without being afforded an ability to pay hearing) was violative of due process (Pa 2-13). The trial court apparently agreed, ordering that due process required that an initial ability to pay hearing occur within 72 hours, and that reviews of coercive incarcerations occur at least every two weeks thereafter (Pa 170-171).

The issue was not whether defendants had deviated from the established procedure, it was whether the established procedure comported with due process. In granting the relief sought by plaintiffs and imposing the 72 hour review rule as a matter of due process, the court found that the "established procedure" was improper. The named defendants "compliance with the standard procedure" was irrelevant.

In direct contradiction to its conclusion that plaintiffs failed to satisfy the first prong of Singer, the court held:

> It is undisputed that as to Mercer County, the litigation filed by the plaintiffs changed the timing of the hearings for those obligors arrested in Mercer County on failure to appear warrants. As a result, there is a nexus between the litigation and the relief ultimately achieved (2T).

The court correctly found that "there is a nexus between the litigation and the relief ultimately achieved." This finding, (the only finding that the record supports) satisfies the first prong of Singer and requires reversal of the court's contrary legal conclusion.

2. Plaintiffs satisfied the second prong of Singer v. State

The second prong of Singer requires that, to be awarded counsel fees and costs, the plaintiffs "must establish that the relief granted had some basis in law." Singer at 419. In this matter, the Complaint was brought under the Civil Rights Act, 42 USC § 1983 and asserted a violation of the due process clause (Pa 2-13).

When granting plaintiffs' request that the court address the failure of the defendants to schedule ability to pay hearings within a reasonable time following a defaulted obligors arrest, the court relied on plaintiffs' due process rights:

Prior to this decision, there was no rule or court rule, or any other regulation that set forth those specific requirements and although the court did in reaching its decision and in developing the 72 hour time period, did premise its conclusion on procedural due process. (2T).

The court correctly found that the court's ruling was "premised on procedural due process." This finding, (the only finding that the record supports) satisfies the second prong of Singer and requires reversal of the court's contrary legal conclusion.

Both prongs of Singer having thus been satisfied, and no exceptional circumstances having even been alleged to justify the denial of plaintiffs' application, this Court should reverse the lower Court's denial of plaintiffs' reasonable request for counsel fees and reimbursement of out-of-pocket costs. Gregg v. Township Comm., 232 N.J.Super. 34, 39 (App.Div. 1989), Stockton v. Rhulen, 302 N.J.Super. 236, 241 (App. Div. 1997), *citing* Frank's Chicken House v. Mayor and Council, 208 N.J.Super. 542, 545 (App.Div.1986), African Council v. Hadge, 255 N.J.Super. 4, 11-12, (App.Div.1992).

IV. IF ANY ISSUE IS REMANDED, THIS MATTER SHOULD BE HEARD BY A DIFFERENT JUDGE

While not strictly a matter of disqualification, the appellate court has the authority to direct on a remand by it that a different judge consider the matter in order to preserve the appearance of a fair and unprejudiced hearing. See, e.g., Carmichael v. Bryan, 310 N.J. Super. 34, 49, (App. Div. 1998). Although not as a result of a full and fair hearing, the lower Court made findings that indicate that a "fresh judicial examination." is warranted. *See* R. 1:12-1(f).

In In re Baby M., 109 N.J. 396, 463, (1988), reversing 217 N.J.Super. 313, (Ch. Div. 1987), the Supreme Court cited the trial judge's "potential 'commitment to its findings'" to support a determination that a different should hear a matter on remand. The Appellate Division also has remanded cases to be heard by a different judge on several occasions. See, e.g., P.T., A.T. and H.T. v.M.S., 325 N.J.Super. 193, 222 (App. Div. 1999); New Jersey Division of Youth and Family Services. v. A.W., 103 N.J. 591, 617, (1986); J.L. v. J.F., 317 N.J.Super. 418, 438, (App. Div. 1999); Carmichael v. Bryan, 310 N.J.Super. 34, 49 (App.Div.1998).

It is respectfully requested that, in light of the trial court's potential commitment to its findings, that (should any issue in this matter be remanded), same should be heard by a different judge.

Conclusion

For the reasons stated herein, this Court should reverse those portions of the trial court's January 28, 2002 and March 25, 2002 orders that (1) denied class action status (2) held that a trial court cannot entertain a civil rights suit where the defendant class consists of fellow trial court judges, and (3) denied plaintiffs' application for counsel fees and costs.

Respectfully submitted,

David Perry Davis, Esq.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MERCER COUNTY, NEW JERSEY
DOCKET NO. MER-L-3761-01
A.D. #_____

JASMINE LEONARD, et al.)
)
Plaintiffs) TRANSCRIPT
) OF
-v-) HEARING
)
AUDREY P. BLACKBURN,)
et al.)
)
Defendants.)

Place: Mercer County Courthouse
175 South Broad Street
Trenton, NJ 08650

Date: January 11, 2002

BEFORE:

HON. LINDA R. FEINBERG, J.S.C.

TRANSCRIPT ORDERED BY:

DAVID PERRY DAVIS, ESQ. (Law Office of David Perry Davis)

APPEARANCES:

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THE COURT: Good morning. Please be seated. All right the case -- the first case will be Leonard v. Blackburn. It's MER-L-3767-01, and good morning. Counsel, your appearances for the record?

MR. DAVIS: Good morning, Judge. David Perry Davis on behalf of the putative plaintiff class.

THE COURT: Thank you.

MS. STOOP: Good morning, Your Honor. Deputy Attorney General Barbara Stoop here representing all of the judicial defendants.

THE COURT: Thank you. Counsel, I'm going to place on the record the facts in this case so sit back and let me set forth the procedural history. Then I will give you sort of my tentative feelings and give you an opportunity argue.

This matter comes before the Court by way of an order to show cause filed by the plaintiffs, Jasmine Leonard, David Chavez, Devonica Chavez, Tiana Logan and Ashley Lewis, and plaintiffs Jeffrey Leonard, Devon Square, Craig Williams, James Thompson, Cheyanne Johnson, David Chavez, Todd Logan, Jeffrey Jones, Gary Davis, Cleo Merritt, and also Jawan Cruz and Ronald Cohn are listed on a number of the papers, but are really not specifically identified as plaintiffs. And that matter was filed on November 28th of 2001. On that date the Court signed an order to show cause requiring the defendants to show cause today, January 11th, why an order should not be entered, 1) certifying the proposed plaintiff class, 2) certifying the proposed defendant class, 3) enjoining the defendant class from incarcerating any member of plaintiff class absent a showing based on substantial and credible evidence that said plaintiff has the ability to pay the release amount for granting a preliminary injunction compelling defendants to immediately release all currently incarcerated plaintiffs pending an Ability to Pay Hearing, or in the alternative to conduct an appropriate Ability to Pay Hearing within 24 hours. The application is opposed.

The first set of plaintiffs in this matter consists of Jasmine Leonard, David Chavez, Devonica Chavez, Tiana Logan and Ashley Louis, plaintiff children, the children of incarcerated child support obligors. The second set of plaintiffs consists of Jeffrey Leonard, Devon Square, Craig Williams, James Thompson, Cheyanne Johnson, David Chavez, Todd Logan, Jeffrey Jones, Gary J. Davis and Cleo Merritt, who are the plaintiff obligors.

On November 28th of 2001, both sets of plaintiffs filed a complaint and order to show cause seeking declaratory and injunctive relief against the defendants Honorable Audrey P. Blackburn, Honorable F. Lee Forrester, presiding judge of the family part of Mercer County, the Honorable Rosalie Cooper, and the Honorable Thomas Cavanagh, and the Honorable Louis Locascio, collectively referred to as "Defendant Judges" to prevent them from engaging in practices which allegedly abridge the constitutional rights

of plaintiff. Judge Blackburn and Forrester are Superior Court Judges in Mercer County; Rosalie Cooper is a Superior Court Judge in Ocean County; and Thomas Cavanagh and Louis Locascio are Superior Court Judges in Monmouth County.

Plaintiffs assert that the parents of plaintiff children have been incarcerated by Defendant Judges and had either, 1) had release or purge amount set based not on their ability to pay, but on other impermissible factors such as the total amount of arrearages owed or completely arbitrary numbers, or 2) have been held for many days or weeks without having had any release amount set by way of a release amount or by bail.

According to plaintiffs, plaintiffs' children have be unconstitutionally denied their fundamental right to a meaningful relationship with their incarcerated parent and have been denied their right to financial child support. Plaintiffs also assert that the plaintiff obligors incarcerated by defendants have either, 1) had release or purge amount set based not on their ability to pay, but on other impermissible factors such as the total amount of arrearages owed or arbitrary numbers, or have been held for many days or weeks without having had any release amount set by way of a release amount or by bail.

More specifically, plaintiffs assert the following regarding each plaintiff obligor: 1) plaintiff obligor Devon Square does not have the present ability to pay the $3,500 release amount set by Judge Blackburn, and allegedly no inquiry was made regarding the ability of said plaintiff to pay; 2) plaintiff obligor Criag Williams has not been reviewed since August of 2001 and that his release amount is 8,000 which he cannot pay. Plaintiff obligor James Thompson does not have the present ability to pay the $1,500 release amount set by Judge Blackburn, and allegedly no inquiry was made regarding his ability to pay; 4) plaintiff obligor Cheyanne Johnson, case has not been reviewed since November of 2001, and he remains unable to pay child support arrearages. I'm not going to list all of the parties, but the allegation is the same for all of the plaintiff obligors.

Plaintiff asserts that the obligors who have had their release amounts based not on their ability to pay, but on other impermissible factors, have been deprived of their physical liberty. In addition, plaintiffs assert that if they are incarcerated for a period in excess of 24 hours without having a hearing, they have been deprived of their constitutional rights.

Plaintiffs seek judgment in favor and against the defendants declaring that the constitutional rights of plaintiffs and all of those that are similarly situated have been violated; enjoining the defendant class from establishing a purge or a release amount for plaintiff obligors without first making specific findings based on substantial and credible evidence that plaintiff obligors have the ability to pay; 3) requiring the defendant class to

immediately review all persons now incarcerated in violation of their constitutional rights; 4) requiring defendant class to prospectively review the cases of all plaintiff obligors within 12 hours of their arrest or incarceration, and set an amount -- release amount consistent with the ability of the payor to pay; and for counsel fees and costs.

In addition, plaintiff contends that this is a proper class action suit and should be certified consistent with Rule 4:32-1(a). Plaintiffs allege that the requirements under the rule have been satisfied. Specifically, plaintiffs contend that the standard for establishing the numerosity requirement is traditionally relaxed when seeking injunctive or declaratory relief. According to plaintiffs, the relaxed standard, coupled with the vast number of individuals like said plaintiffs has satisfied the requirement. And, also, the plaintiffs allege that the other requirements set forth in 4:32 have been satisfied.

On January 2nd of 2002, defendants filed a motion to dismiss. In support of the motion, the defendants contend that the allegations that are set forth in the complaint are incorrect and inaccurate. Defendants dispute that the plaintiff obligors were incarcerated for non-payment of child support without first being given an Ability to Pay Hearing. According to the defendants, the plaintiff obligors were incarcerated for their failure to appear at scheduled Ability to Pay Hearings and that they are in on-compliance of the court order. In addition, defendants indicate that purge amount set for plaintiffs release is akin to a fine for their failure to appear, and it is not necessary under the current system for the court to assess an ability to pay.

Defendants further dispute that the defendants Cavanagh and Locascio of Monmouth County were in any way involved in any of the plaintiffs' cases. Apparently, according the defendant, the case of Mr. Cohn was actually presided over by Judge Hayser who, interestingly enough, is now sitting in Mercer.

Defendants also contend that plaintiffs have failed to demonstrate any entitlement to injunctive relief. Defendants submit that plaintiffs have failed to make a preliminary showing of a reasonable probability of success on the merits, and that most of the information contained in the plaintiffs' moving papers are based on incorrect and inaccurate facts.

Lastly, the defendants contend that plaintiffs have failed to establish any entitlement to class certification for either the plaintiff or defendant class. Defendants specifically represent that the plaintiff class are minors and unable to bring such litigation without proper authority, and also that the request for class certification is premature because of the motion now before the Court to dismiss. Additionally, the defendants assert that the plaintiffs have failed to satisfy the requirements that are

set forth in Rule 4:32.

Let me give you some of my tentative thoughts. Number one, there is a process in New Jersey when individuals fail to pay child support. There are a number of cases, Pierce v. Pierce, the Saltzman case that all stand for the proposition that when a defendant fails to pay child support, the court -- the probation department has the authority to initiate an action to enforce litigant's rights, under Rule 1:10-3. They send out a notice directing the obligor to appear in court. That notice is sent by regular and certified mail, and that's consistent with the court rule. Based on the certifications from Ocean, Mercer and Monmouth County, if the court is satisfied that the obligor has received notice -- and I assume that the court reviews the green return receipt card to verify service -- if the court is satisfied that the obligor has received notice and the obligor has not appeared, the court will issue a warrant for the defendant's arrest, not for the -- any other reason other than the fact that obligor has failed to appear. That process is the appropriate process. That is the process defined by court rule, affirmed by a number of court cases, and that's a rule that's been in place for probably well over two decades.

In this particular case, Mr. Davis, who is representing the plaintiffs, allege that the defendants were incarcerated for their failure to pay child support and that the court did not conduct an Ability to Pay Hearing. According to the representation of the State, all of these obligors were arrested and held because they failed to appear at the hearing. I don't really think that's probably in dispute, that they were -- Mr. Davis, you don't dispute that.

MR. DAVIS: No, Judge.

THE COURT: So, we have a situation here where an obligor -- a child support amount has been set -- an obligor has not paid child support, probation department has initiated a 1:10-3 action, and the defendant has failed to appear. The defendant is then arrested. He's arrested, he's held, and brought before the court at various times. In one of the counties -- I don't know if it's Ocean or Monmouth -- the defendant is generally brought before the court the next day. In one of the other counties, the defendant is brought before the court generally within three to four days. So, in two of the counties that are involved -- not Mercer, Ocean and Monmouth -- the hearing on the failure to appear occurs either the next day or within four days. In Mercer County, those hearings on the failure to appear occur apparently twice a month on Thursday. I believe it's either the first and third, or second and fourth Thursday of every month.

I am not satisfied -- and I'm giving you my tentative thoughts -- and certainly these are my tentative thoughts, and certainly counsel should argue because I've been known to change my mind -- I don't think this is a

class-action suit under 4:32. These defendants and these plaintiffs, more specifically the plaintiffs, are individuals who have very different facts and very different cases and don't fall within the parameters of 4:32. Second, the process that was followed in all of these cases in terms of brining in an obligor is established both by court rule and by case law, and an individual obligor who feels that their particular case has been handled inappropriately does have a mechanism of appeal. In fact, the plaintiffs apparently have filed appeals in a number of cases. In the Cruz case -- Cruz is not a plaintiff in this action, but Cruz filed an appeal. Mr. Cohn is not a plaintiff in this case, but filed an appeal. Mr. Tolbert is not a plaintiff in this case, but filed an appeal. Mr. Weinstein is not a plaintiff in this case, but filed an appeal. Mr. Logan is a plaintiff in this case and filed an appeal, and Mr. Davis is a plaintiff in this case and filed an appeal.

If a individual obligor feels that an individual judge has not properly conducted a child support enforcement hearing and that the judge has not complied with the standards in Pierce and the clear requirement that there be an Ability to Pay Hearing -- and the court has to make specific findings -- that obligor, like the obligors who have already filed appeals, have the right to initiate an appeal. That decision is a final decision. It's appealable to the Appellate Division, and the obligor has relief available.

I don't think it's my role as judge of the Superior Court -- I am not an Appellate Division judge -- to look at the transcripts of child support hearings and pass on whether a particular judge handled that hearing properly. I would indicate for the record that I have a number of transcripts that were submitted by Mr. Davis -- Poldwalk (phonetic) -- I have that transcript. That individual's not a plaintiff. Mr. Cohn is not a plaintiff. Mr. Vincent is not a plaintiff. Mr. Tolbert is not a plaintiff. Mr. Cruz is not a plaintiff, and Mr. Sweeney. There are some plaintiffs where I do have the transcripts -- of Mr. Leonard, of Devon Square, of James Thompson, of Todd Logan, and of Gary Davis. Mr. Logan filed an appeal and Mr. Davis filed an appeal. So, there are Mr. Leonard, Mr. Square and Mr. Thompson and Mr. Merritt -- I have that transcript -- so, I have four transcripts of four plaintiffs in this case, and I don't believe it's my role to look at those transcripts and to pass on whether or not the judge in those cases properly conducted an Ability to Pay Hearing. It really is an issue for an appellate court, and certainly there have been appeals -- and I'd have to indicate that there are hundreds, perhaps thousands, of child support hearings conducted throughout the State of New Jersey because of the large number of children who are being supported as a result of a divorce or parents who are not married, living separate and there is child support owed. So, I am not convinced at this point that this is

appropriate under 4:32, and I'm not convinced that it's appropriate for me to review the findings of another judge.

The one issue I am concerned about, however -- the one issue that raises some questions to the Court is the issue of when these hearings are held. When a -- and I know what the argument is -- the argument is -- and it's the argument that I would make if I was in the position of the Deputy Attorney General, and Ms. Stoop has made this argument -- that there's a difference, that these are individuals -- actually there's two classes of individuals -- there are those individuals who have failed to appear for their hearing and a warrant has been issued, and Ms. Stoop, the Deputy Attorney General, would argue that that's different than an Ability to Pay Hearing. These are people who have failed to appear in court, and there in a different status. There are also those people who have failed to appear who have warrants on other things, and the position is there's no need to bring that -- there are actually two classes; those people who have failed to appear, and the only reason that they're being held is because of their failure to appear, that's one class. Then there is another class of people who have failed to appear, but they've got warrants against them, and having been a judge long enough I know that, you know, often times when you pick a defendant up and you run him through the computer, there are other things. And, I think the policy has been -- and I don't particularly have any problems with this position -- that if you have a defendant who's been picked up on a Failure to Appear Warrant for failure to pay child support, and that defendant has other warrants, that there's really no urgency to have that obligor brought before the court for a hearing when that defendant's going to be held on other things, and it's probably a criminal matter.

But, I am somewhat troubled by the notion that a person who has failed to appear, and there's nothing else holding that defendant, that if that person would have to wait potentially two weeks to come before the court. I am concerned about that. And, I know that Mr. Davis suggests that the court adopt the standard set forth in Rule 3:4-1 -- I believe that's the rule -- where criminal defendants where bail has not been set are required to come before the court within 12 hours. I'm not convinced that that's the proper standard, 12 hours. But, my sense is that a person who's been picked up on a Failure to Appear Warrant and has no other detainers, that person should be brought before the court within a reasonable period of time. And, my sense is that it probably should be within 72 hours. It probably should be within 72 hours. Now, that's a number I've -- you could say that I've arbitrarily taken it, but I have given some thought to it particularly in light of the fact that if a person is picked up on Friday that that -- it's impossible to have probation and all the other people available to participate in a hearing over the weekend. It's just logistically -- and because of the failure to appear, I

think there is some justification for waiting a certain period of time, and I think 72 hours is probably the right period of time because that encompasses if you pick somebody up on a Friday that the hearing would be on Monday.

So, that's where I am right now. I do have some concerns about not having a hearing for a period of two weeks, and I would indicate that that is apparently the practice in Mercer County. It may very well be the practice in other counties. I don't know whether that is the practice.

And, then there is the issue of review hearings. In other words, once you have a defendant who appears in court on a Failure to Appear Warrant -- you pick him up on a Friday, you bring him to court -- or her, although most of these cases involve men, there certainly are women also who have child support obligations -- when you bring that obligor to court on Monday morning, and then you have an Ability to Pay Hearing, which clearly the Ability to Pay Hearing has to involve a very fact sensitive specific inquiry as to the ability of this obligor to pay, and that's the case law. And, there's an established remedy if an obligor feels that they have not been treated properly. And, I don't even have any problem in the context of an order saying very specifically what the standard is. But, it would seem to me that there should be some sort of standardized review of these cases, and that it probably should be every two weeks because circumstances may change. You may have an obligor who a court decides that they have the ability to pay $1,500 and in two weeks the obligor comes back and says to the judge, judge I've tried hard and I have $1,000. I think there should be some type of a review after two weeks. I don't think that that's unreasonable. And, it's interesting because I did -- I contacted a judge in criminal to find out whether they review bails, you know, how do they review bails in criminal? And, apparently, they don't review the bails unless there's a motion to review bail. But, I think that child support's a little different. I don't know if we need to put the onus on the child support obligor to file a motion. I just think probably there's something to be said for bringing an obligor back in a
two-week period to review his or her status. Economic circumstances change, and I think that's probably an appropriate period of time to review.

So, those are my initial thoughts. I have read every affidavit and every certification. With reference to the four plaintiffs who have not filed appeals to which I have transcripts for, I would encompass them within the 72 hour review, and those are -- actually I would encompass all of the plaintiffs that have been identified by Mr. Davis -- I think there's ten of them -- who have not filed an appeal -- I would encompass them within the 72 hour review. So, those are my initial thoughts. Mr. Davis?

MR. DAVIS: Judge, taking in order -- initially,

Your Honor has indicated that you don't feel this is a -- an appropriate class-action. Well, Your Honor didn't give any reasons. Perhaps I can ask this as a question and then respond. There are requirements of numerosity, technicality, commonality --

THE COURT: But there -- the commonality is really -- every case is fact sensitive, is different. I don't think there is numerosity. You've identified -- there are thousands and thousands of cases every year, and you've extracted or identified a very small number. There's no evidence before the Court that this is something that involves a large number of individuals.

MR. DAVIS: Judge, initially, in a civil rights context, the Third Circuit has certified a class of one when there's a credible allegation that civil rights are being violated, a class of one. Here we have at least ten. Your Honor, each one of these plaintiff's civil rights was violated. That's indisputable because there are reversals from the Appellate Division. I'm not asking you to review the trial court, I'm asking you to see the pattern that is going on, and the pattern is the consistent failure at the Ability to Pay Hearing to make any inquiry into the assets that are available -- any. Your Honor --

THE COURT: The Appellate Division has made a decision in a few cases. There are thousands of cases every year to which there are no appeals.

MR. DAVIS: Judge, the Appellate Division has ruled in 100 percent of the appeals brought, and there are now eight summary reversals from 12 respected appellate judge, all of whom -- at this point, Judge, it's a two-page standard form. If Your Honor looks at the later reversals, they see these coming, they just issue the standard form that says there was no inquiry made in the assets of obligor, the order incarcerating him is, therefore, reversed. Your Honor has copies --

THE COURT: Well, you know, there are cases in civil cases where probably judges have a different opinion about verbal threshold. Do you then join all plaintiffs who have filed lawsuits in the Civil Division who because of judge's perhaps misapplication of the verbal threshold, do you certify that as a class?

MR. DAVIS: Judge, we're not talking about somebody's "right to pursue pain and suffering" from an automobile accident, we're talking about liberty. We're talking about the second most severe punishment outside of death that the State can impose on a person. Every constitutional protection has to be honored when you're talking about taking somebody's liberty away. Judge, I want to pursue this, but just very quickly, as far as the commonality, I cited case law, Vargas v. Calabrese, 634 F.Supp. 910 from the Third Circuit that says there must be some questions of law or fact in common, some. And, that emphasis -- the, either the bold or the italics, is in the original case. Some -- we don't have to have exact.

Obviously, you're not going to have --

THE COURT: The four standards that are articulated in 4:32 and the three other criteria that are specified in the second part of the rule are collective. They're not either, or. You need to have all of them. And, I don't know how you convince the Court that there's numerosity.

MR. DAVIS: Judge, there was 53,000 child support enforcement hearings last year. In a civil rights context as I indicated, a class of one, and I'll provide that case to the Court if it would be helpful. But we have at least ten. We have ten people that sat, some of whom for 45 days, the longest one for 93 days without any kind of review of his child support obligation. That's a person that had I believe four children. Those children were deprived not only of the financial child support that this person could have provided if they had been out and working, they were provided (sic) of the love and companionship that every child's entitled to.

THE COURT: All right. I don't want to hear about the love and companionship; these are also people who blatantly failed to pay child support. But, I'll let the State respond and, if you want reasons, I have a tentative write-up. I'd be happy to set forth the reasons.

MR. DAVIS: Judge, I would ask the Court to more carefully scrutinize the transcripts that were presented. Your Honor indicated that each one of these must include a fact sensitive case-by-case inquiry of the ability to pay. These hearings are 30 seconds each. The transcripts are two pages each.

THE COURT: Yes, but let me ask you this. I've reviewed those transcripts, and I have some concerns about the level of inquiry by the judges. I don't dispute that. But, I'm not an appellate court. I'm not an appellate court. And, I don't know what authority that I have to look at that and say that the judge misapplied the law. As a result -- I mean, because of the concerns by the Court and -- my initial impression is to encompass those individuals within the 72 hour review in order to deal with that, because I don't believe that I have the authority to look at that transcript and say, I am going to reverse the -- I don't have the authority, I'm not an appellate court.

MR. DAVIS: I'm not asking you to, Judge.

THE COURT: I mean -- yes.

MR. DAVIS: I'm very clearly not asking you to.

THE COURT: So, that my thought in terms of how the court deals with what may be potentially a problem is to require that those individuals -- and I have the transcript of four of the plaintiffs. There are certain plaintiffs that you've listed who have not appealed that I don't have the transcript for, but I would include those plaintiffs, as well, within a 72 hour review.

MR. DAVIS: Judge, it sounds like Your Honor's granting relief as to the plaintiff class at least as to one of the areas of relief sought which is a more quick review.

Judge, from my own personal knowledge I can represent that in Middlesex they do it every single day that court is in session. Ocean -- different counties do it two or three times. Mercer is among --

THE COURT: That's not before me. I don't have -- I mean --

MR. DAVIS: Your Honor, if I can clarify that the point you have stated several times that you -- you're not an appellate court, and I'm not asking you to be one. What I'm asking you to do is to look at the overwhelming evidence presented before you -- and, Judge, as an officer of the court, this is every transcript I have and every transcript is wrong. I'm asking you to look at the fact that it --

THE COURT: Well, I don't know whether every transcript is wrong. You have appealed a number of cases. There are one, two, three, four, five, six appeals.

MR. DAVIS: Eight, Judge.

THE COURT: Now, there are thousands and thousands of child support hearings every year in the State of New Jersey, and I would suspect that there would be a number of appeals and that there would be a number of individuals who would prevail on appeal. That happens in child support cases. It happens in divorce cases. It happens in termination of rights. It happens in a number of cases.

MR. DAVIS: Judge, in most appeals it's not 100 percent reversal rate. I think the present reversal rate on average is 28 percent.

THE COURT: Yes, but I don't know how many other appeals have been filed. You've given me six appeals where you have prevailed. There may have been hundreds of other appeals where there weren't --

MR. DAVIS: Judge, just for the record, I see my reply brief sitting on the bench, and Your Honor has referred to some of the attachments in the exhibits, but none of the arguments that are contained in the reply brief.

THE COURT: I've read -- well --

MR. DAVIS: I'm sure -- you haven't just -- you haven't referred to them in any way, Judge, and --

THE COURT: I've referred to each and every one. I don't know how far you want me to go.

MR. DAVIS: Okay. Judge --

THE COURT: What other argument do you have? Tell -- give me your best argument on when a person should be reviewed once they've been picked up on a Failure to Appear Warrant.

MR. DAVIS: Judge, I want to be clear for the record that there's no challenge to the present procedure of picking somebody up who fails to appear who was properly noticed. That's not challenged

THE COURT: All right. So what does the court do? You've got a defendant who has been served. There is proof of service with a green return receipt card, you have a defendant. What's your reaction to the practice of having a review hearing twice a month?

MR. DAVIS: Judge, I would submit that that is long. If the criminal standard of 12 hours, which I understand may not be appropriate, that this person -- there is evidence that they failed to appear -- it's not a criminal standard --

THE COURT: What's your reaction to a 72 hour review hearing?

MR. DAVIS: That would certainly, Judge -- I mean, that's adequate. I believe that that's appropriate especially if you consider -- I would think it should be done every day the court is in session, and that will sometimes necessitate a 72 hour if there's a holiday weekend. But, Judge --

THE COURT: What's your position on once a determination has been made as to brining that obligor back to court?

MR. DAVIS: Judge, the focus of this complaint is what happens at those hearings. They shouldn't be brought back --

THE COURT: Well, you've also asked the Court -- you've also asked the Court to require that there be a hearing within a certain period of time.

MR. DAVIS: That's correct, Judge.

THE COURT: That's one of the things that you're seeking relief on. And, so I'm asking you, what's your position on bringing a obligor back to court every two weeks?

MR. DAVIS: If there is evidence that that person has the ability to pay -- and that's the point that we're going light on here, Judge, that I want to focus on -- if there's evidence that person has the ability to pay, review them every two weeks and see if they have decided that they will write the check. What I'm concerned about, Judge, is the people who are in jail right now who can't write the check, who don't have the money, who don't have the assets who are sitting here on open-ended civil commitments --

THE COURT: But, those individuals can effectuate an appeal.

MR. DAVIS: Judge, how can they effectuate an appeal? That's why this is a class action. I went down to the jail because I was -- I've been retained on eight -- on six cases -- two of these were pro bono -- on six cases where I went down to the jail and I spoke with the person and I got them out. The last case, who is not a named plaintiff, a man named Ronald Sweeney -- when I went down to the jail to visit him -- they now have all the child support obligors in one area -- and I learned that the system is still the way it was a year and a half ago, which surprised me -- that all of these people are sitting in here. Judge, in the courtroom right now is Todd Logan --

THE COURT: I --

MR. DAVIS: -- and one of the other plaintiffs and, Your Honor, these people were sitting in here with -- $10,000 release amounts. They don't have it, and it's

wrong, and it's a violation of their civil rights.
THE COURT: But, they're now out. They filed an appeal, and --
MR. DAVIS: Jude, one of them filed an appeal, Judge, the other one has now put in 60 or 70 days. We could call him to testify if Your Honor wanted to --
THE COURT: I'm not going to take any testimony today.
MR. DAVIS: I understand you don't want to, but these are people that were deprived for their liberty for -- the longest was 93 days. Judge Council stated on the record and it's quoted in our reply brief, "I have people who have sat in jail for six months owing me a few thousand dollars." That's stated by Judge Council, and that is wrong. That is a violation of the civil rights of these people.
THE COURT: I don't have that -- do I have that transcript?
MR. DAVIS: Yes, you -- no, Judge -- yes, you do, Judge. That is Ray Tolbert, and I can tell you that that --
THE COURT: Ray Tolbert -- all right. Don't -- don't -- I have --
MR. DAVIS: I can tell you which exhibit number it is, Judge.
THE COURT: Well, that's -- okay.
MR. DAVIS: Judge, these people have a civil right not to be incarcerated "coercively" if they don't have the ability to pay. And, I'm not asking Your Honor to review any one of these individual -- to sit as a court of review for Judge Hayser or Judge Blackburn or Judge Kelly, but what Your Honor needs to see here is that there is a pattern, and it's an ongoing pattern. Judge, I'm a sole practitioner. I don't have the resources to get a thousand transcripts. What I've presented you, I've testified as an officer of the court, is every transcript I've had. I have yet to see an Ability to Pay Hearing -- no that's not true -- I've seen very few Ability to Pay Hearings where the person had the ability and they were appropriately incarcerated.
THE COURT: Well, you haven't reviewed all the transcripts of the many thousands of child support hearings.
MR. DAVIS: Judge --
THE COURT: All right. I understand your argument. Let me hear from the other side. React to his -- to Mr. Davis's request for class action certification.
MS. STOOP: Your Honor, obviously, I find it completely inappropriate not only for the reasons that Your Honor has stated, but in reviewing Mr. Davis's reply brief, I realized that Mr. Davis makes a statement at the end, "It is the system that is being challenged, not the character of any of the defendants, named or otherwise." And, the relief that Mr. Davis is seeking -- he's named the wrong -- the wrong defendants, Your Honor. Suing Superior Court judges in order to try to get this system changed, is not appropriate. The Superior Court judges don't establish policy for the judicial system of New Jersey. That is left

to the Administrative Office of the Courts, otherwise known as the AOC. If Mr. Davis is looking for a change in the system, he should be suing or bring to court the AOC, not six Superior Court judges.

As you pointed out, in addition, naming six Superior Court judges and throwing out transcripts from a very small number of hearings is inappropriate to support a class action suit. So, not only has he named the wrong defendants, including by the way Judge Locascio and Judge Cavanagh in Monmouth who never even dealt with any of these plaintiffs' incarcerations, he's also trying to bring a class action suit based on an infinitesimal number of cases, which is inappropriate under the requirements of the rule.

THE COURT: Do you know how many child support cases are heard every year in New Jersey?

MS. STOOP: I would hate to even guess, Your Honor.

THE COURT: There's probably at least 30,000, but I don't know that for a fact. But, anyway, go on.

MS. STOOP: So, he's -- number one, he's named the wrong party to try to gain the relief that he is seeking. He is -- has -- he has alleged inadequate hearings, but in reviewing the transcripts that he did supply, I think it's difficult for him to show that every judge is not inquiring because if you look at the transcripts some of the judges do indeed ask about, do you have a job, you know, did you have a job, how long did you work, when did you stop -- this kind of thing. Perhaps Mr. Davis finds that inadequate, but there was not a lack of any kind of inquiry in many of these transcripts as to a person's ability to come up with some kind of payment.

As you had mentioned, Your Honor, just as an aside, the children that he is trying to bring in as plaintiff class is completely inappropriate. Minors are not permitted to bring a lawsuit unless they have some kind of authority or authority figure representing them or looking after their interests. And, this is not present in this case.

That really is basically what I would argue in addition to the arguments Your Honor has already made regarding the class action.

THE COURT: Now, let me ask you this. You've heard the Court's comments with reference to the concern when an individual is brought back on a failure to appear --

MS. STOOP: Yes.

THE COURT: -- and in trying to structure a time period that might be appropriate, I've come up with this concept of 72 hours and then a two-week review thereafter. What's your reaction to that?

MS. STOOP: Well, my initial reaction, Your Honor, to the two-week review is that it's my understanding that in Mercer County this is what occurs.

THE COURT: They're doing that --

MS. STOOP: They're doing that.

THE COURT: Yes, but not the initial one --

MS. STOOP: No, not the --
THE COURT: I'm concerned about the initial -- right.
MS. STOOP: That's correct. The initial one -- it's my understanding that -- and I have to plead -- I'm just learning this as we go along, Judge --
THE COURT: Okay, but -- right, but there are --
MS. STOOP: -- but, it's my -- oh, I'm sorry.
THE COURT: There are -- are there people here --
MS. STOOP: Yes, Your Honor.
THE COURT: -- from any of the counties? Okay. It's my understanding that people are brought in -- that they do hearings twice a month -- so, if somebody's brought in on a failure to appear and they just had a hearing, that person could sit for another 14 days. That's my understanding.
MS. STOOP: My understanding, Your Honor, may be a little different. My understanding is that on the first -- and I have people out here from probation waiting to answer any questions you might have, Your Honor --
THE COURT: All right. Well, I'd like to know what --
MS. STOOP: It's my understanding that on the first and third Thursdays there are videotaped interviews with people at the jail, and then there are in addition to that official hearings before the court on the second and fourth Thursday of the month.
THE COURT: Right, but they're not seeing a judge potentially for 14 days?
MS. STOOP: That's correct. They would be interviewed by a court official of some kind on the first and --
THE COURT: A probation person, I assume.
MS. STOOP: -- on the first and the third.
THE COURT: Because I know that often times the Probation Department will try to negotiate and try to see if they can resolve the matter.
MS. STOOP: As far as the 72 hour -- as the 72 hour --
THE COURT: Hearing --
MS. STOOP: -- limitation period is concerned, I'm not quite sure how to address that. The -- my problem is that I'm trying to represent three -- at this point, people from three separate counties who do things in three different ways.
THE COURT: In one of the counties, they bring the person in the next day according to the certification.
MR. DAVIS: Middlesex, Judge.
MS. STOOP: I believe that was Middlesex County, Your Honor.
MR. DAVIS: I'm not sure if she had a certification, but I know that in Middlesex they bring them in every day -- every morning that the court --
THE COURT: Okay. Well, I don't have Middlesex. I

only have Monmouth, Mercer and Ocean. Those are the only counties that are involved in this. But, here we go, in Ocean County, it's the next business day or the next -- usually the next business day, so that's Ocean. And Monmouth must be -- they say four days. Okay, that's --

MS. STOOP: The only problem I see with --

THE COURT: It's the other way around? Okay, let me see what we've got here. This is Ocean County. This is a little confusion (sic). If the obligor does not pay the purge amount, he or she will remain incarcerated until the next court day, which is usually the next business day. Therefore, the longest possible period of time that an obligor would be incarcerated on his Failure to Appear Warrant is three non-business days.

MS. STOOP: I think they mean like a holiday weekend, Your Honor.

UNIDENTIFIED SPEAKER: That's Ocean.

THE COURT: Yes, that's Ocean.

UNIDENTIFIED SPEAKER: I --

THE COURT: Now, I think -- is Carpenter from Monmouth?

MS. STOOP: Carpenter is from Monmouth County.

THE COURT: Oh, okay, Carpenter is from Monmouth. So, Monmouth is generally one day, and Ocean County -- thank you -- Ocean County is four days, the longest possible period of time, because they review in Ocean Tuesday, Wednesday and Thursday.

MS. STOOP: Yes. The only problem that I see as a possible problem, Your Honor, is the availability of court personnel. As I'm sure you're well aware, Family Court is very, very busy.

THE COURT: Well, but -- yes, I understand that, but that's still no excuse for not -- to have somebody sit in jail for 14 days before being brought before the court. I know the argument that's made is that it's a failure to appear so that they've sort of given up --

MS. STOOP: Right, we waited for them, Your Honor. They didn't show up.

THE COURT: I understand.

MS. STOOP: We gave them the opportunity to come in and talk to us --

THE COURT: I understand that, but --

MS. STOOP: -- and they thumbed their nose.

THE COURT: Even somebody picked up on a warrant in a criminal case goes before the court before 14 days. It would seem that somebody on a child support should be brought before the court sooner than that, it would seem to me.

MS. STOOP: I guess -- I guess, Your Honor, what I would say would be that I understand Your Honor's concern and that they -- that these obligors be brought within a reasonable period of time. I'm just not sure what the reasonable period of time would be given the --

THE COURT: Well, let me --

MS. STOOP: -- the court situation.
THE COURT: Yes, well, I'm more concerned about the rights of the obligors than I am about the resources of the court because I think that that's a significant issue. My sense is that this may be something that the Family Practice Committee should be taking a look at and making a recommendation to the Supreme Court, and perhaps what the Court should do is set a 72 hour review standard subject to this matter being considered by the Family Practice Committee and recommendations being made to the Supreme Court.
MS. STOOP: May I ask, Your Honor, I just want to make sure that I'm clear. When you're speaking about the 72 hour window, you're addressing that solely to people who are picked up --
THE COURT: Picked up on a warrant.
MS. STOOP: -- only on failure to appear charges --
THE COURT: And only in those --
MS. STOOP: -- and do not have other --
THE COURT: Other -- that's correct, that's correct.
MS. STOOP: My other concern, then, is notification and whether or not the Family Part would be notified in a timely manner.
THE COURT: Well, the jail would just notify the Family Court. That's -- that happens all the time. That happens all the time. You have some people from probation?
MS. STOOP: I do, Your Honor.
THE COURT: I'd like to ask just a couple of questions.
MS. STOOP: May I go and get them, Your Honor?
THE COURT: Yes, please.
(Pause)
MS. STOOP: Your Honor, this is Ms. Nancy Desaw (phonetic).
THE COURT: Yes.
MS. STOOP: -- who's a supervisor of the Bench Warrant Unit and Ms. Cynthia Vanek (phonetic) who is the Assistant Probation Officer in charge of child support enforcement.
THE COURT: All right. I just have a couple questions. Come on up here, and Mr. Davis I'll give you an opportunity to ask any questions that you'd like, as well. I just want to get some information.
MS. STOOP: Where would you like them Your Honor?
THE COURT: They can just come right up here.
MS. STOOP: Thank you, Your Honor.
MR. DAVIS: We have a seat for them, Judge, if they'd like it.
THE COURT: Pardon me?
MR. DAVIS: We have a seat for them if they'd like it. Judge, I would prefer if they're in front of a microphone.

THE COURT: Yes, I'm going to have them sit right here. Ms. Vanek, why don't you go to the microphone right here?
MS. VANEK: Sure.
THE COURT: And, I'm just going to ask you a -- these are just procedural questions.
MS. VANEK: Sure.
THE COURT: I have -- when a defendant -- when an obligor is picked up on a -- let me swear you in first. I don't want to take a lot of testimony, I -- these are just procedural questions, but let me swear you in. Will you raise your right hand?
C Y N T H I A V A N E K, DEFENSE WITNESS, SWORN
N A N C Y D E S A W, DEFENSE WITNESS, SWORN
THE WITNESS: Yes, I do.
THE COURT: And, your full name?
THE WITNESS: Cynthia Vanek.
THE COURT: And, your full name?
THE WITNESS: Nancy Desaw.
EXAMINATION BY THE COURT:
Q Ms. Vanek, you're employed by the Probation Department?
A Yes, I am.
Q And, how long have you been with the Probation Department?
A Twenty-six years.
Q Okay. When an obligor is picked up on a Failure to Appear Warrant and that person is held, it's my understanding that it's -- the hearings are held twice a month before a judge, is that correct?
A That's correct, that's correct.
Q Is that the first and third or second and fourth Thursday?
A Second and fourth Thursday.
Q So, if a defendant were picked up -- if the hearings were today at let's say nine o'clock in the morning, and an obligor was picked up this afternoon, it's possible that that obligor wouldn't see a judge for 14 days?
A That's correct.
Q Is that correct?
A Um-hum.
Q Okay. And, you have video conferences on the --
A Conferencing --
Q -- first and third Thursday?
A First and third of each month.
Q What does that entail?
A We have an investigator from the bench warrant, they appear and they ask the obligor a series of questions. We have a form here with all the questions on it if you need to know the questions.
Q That's just a dialogue between somebody from probation and the obligor, correct?
AYes.
Q Okay. Now, when the obligor who's picked up this

afternoon is not going to have that hearing for two weeks, when that person goes before the judge, that hearing is in the context of why didn't you appear, and then I guess there's a review of their ability to pay the child support amount?
A That's correct.
Q So, it's really two-fold; why didn't you come to court, and then there is, I guess, an Ability to Pay Hearing?
A Um-hum.
Q Is that correct?
A I would say so, yes.
Q Okay. All right. Do you have any questions because she's a -- Ms. Vanek has established what I thought was the case, and just so that you know, my concern is having an obligor sit for two weeks without going before a judge. When that -- let me ask you this -- when the failure to appear person is picked up, and they have that hearing in two weeks, is that person reviewed again two weeks later?
A The obligor is picked up --
Q The obligor is picked up --
A We have the video conferencing before he --
Q Well, let's assume he's picked up, there's a hearing today -- hearings are today. Let's assume that we're having hearings the -- what's the date today -- this is the second Friday of the month?
UNIDENTIFIED SPEAKER: The eleventh.
Q Today's the eleventh. It's the second Friday of the month. Let's assume that in Mercer County you have hearings the second and fourth Friday of the month, and we've now had our hearing for those individuals who were entitled to hearings, but we've picked up somebody this afternoon who failed to appear --
A Um-hum.
Q -- on a requirement to come to court. They're not going to have -- go before a judge for two weeks, correct?
A That's correct.
Q Okay. Now, they're going to have their video conference next week --
A Right.
Q -- with the Probation Department, and the purpose of that is to update information?
A Yes.
Q -- so, that you can then provide information to the court when you go before the judge?
A Correct.
Q Okay. Now, you -- this person's had their hearing two weeks from now, which is the 25th.
A Um-hum.
Q Is that person going to be seen again? When is that person going to be seen again?
A If the person is remanded?
Q Yes.
A In two weeks.

Q In two weeks -- so the first hearing potentially is two weeks, and then the next hearing is two weeks. Okay. And, how do we know whether those people are being reviewed in two weeks? There's a representation that those people are not being reviewed.
A We keep a tracking record of everyone that has appeared in court and if they're remanded. Everything's kept on a data base.
Q Okay. And, are there defendants who are picked up -- excuse me, please -- I don't want -- not you. You're pointing, you're talking -- no talking -- no pointing, no talking. Be seated. Now, I lost where I am.
MR. DAVIS: You were asking about how long they're held with prior -- in between reviews, Judge.
THE COURT: All right, that's right.
Q Now, are there individual obligors who are picked up and have detainers for other things?
A Yes, there are.
Q Okay. And, is there a different standard for review for those individuals?
A Yes, there are.
Q Okay. And, if a person -- if all the other detainers are taken care of, is there a way that you know so you can bring that person to court?
A Yes. The Bench Warrant Supervisor, Nancy Desaw, keeps in close contact with the jail.
Q So, she would know when a person is being released --
A Right.
Q -- or when they're eligible for release?
A Um-hum.
Q Is that correct?
A Definitely, yes.
Q All right. Do you have any questions of Ms. Vanek?
MR. DAVIS: Judge, briefly.
CROSS EXAMINATION BY MR. DAVIS:
Q You indicated that you've worked for Probation for 26 years?
A Um-hum.
THE COURT: You're going to have to say yes or no.
A Oh, I'm sorry. Yes.
Q How long -- what's your capacity been for 26 years, have you been in the same position?
A No. I started as an investigator, promoted to probation officer, to senior probation officer, to supervising probation officer, to assistant chief.
Q Okay. So, you're now the assistant chief?
A Um-hum. In child support, yes.
Q Okay. Now, you've testified that people are reviewed every two weeks?
A That's correct.
Q Let me ask you this. Do you personally attend the hearings for judges -- set release amounts for child support

violators?
A Do I personally attend? No, I do not.
Q Okay.
A We have a court liaison that attends the hearings.
Q Okay. Then, what's the basis of your knowledge that they're reviewed every two weeks after they're remanded to the jail?
A The basis of my knowledge is I oversee the entire division, and I meet with my supervisors on a monthly basis, and we go over procedures.
Q So, it's just from a procedural standpoint, it isn't that you see orders in individual cases? That's not within --
A Do I see orders in individual cases? No, I do not.
Q Okay. How many hearings would you estimate have occurred, how many child support enforcement hearings where somebody was remanded to the jail in the -- say in the time that you've been in your present position?
THE COURT: Let's do it on a -- how many child support hearings are held every month?
THE WITNESS: Just for the -- you mean jail cases, correct?
MR. DAVIS: Jail cases.
THE WITNESS: We're speaking of --
THE COURT: No, all enforcement hearings.
THE WITNESS: All enforcement hearings?
THE COURT: All enforcement hearings?
THE WITNESS: There's 350 a month just for enforcement hearings, and then with the jail cases vary. And, they can be --
THE COURT: So, 350 a month, so there's over say about four or 5,000 a year?
THE WITNESS: Um-hum.
THE COURT: Is that correct?
THE WITNESS: Yes, that's correct.
Q And, how many of those are jail cases?
A Jail cases, I'd say approximately about 15 a hearing, so maybe 30 a month. Does that sound correct to you, approximately?
MS. DESAW: In some instances.
A In some instances -- it varies.
MS. DESAW: It varies.
THE COURT: About 30 a month? All right.
THE WITNESS: It varies.
THE COURT: So, maybe 500 a year?
THE WITNESS: Yeah.
THE COURT: Four or 500 a year? All right.
Q In those jail cases, does each of the defendants -- are they asked how much of a release amount can you pay?
A The judge asks --
Q They are asked that?
A I believe so.
MS. DESAW: Excuse me -- yes --
THE COURT: I don't -- no, no. They don't -- they

can't testify. She's not at the hearings. How does she know what the judge might -- and I want to go -- my question was about the two weeks. I wanted to verify the two weeks. I don't want to get too far from this.

Q Would you be -- let me ask you one other question before I ask you that one. You said that a data base is maintained by probation?

A Um-hum. That's correct.

Q And, is that a -- do you know whether or not that's a duty that's imposed on probation by statute or by the Administrative Office of the Courts? Who has determined that probation --

A We have prepared that on our own just as a tracking system.

Q And, according to this tracking system somebody is flagged every two weeks and brought back to court if they're being held solely on a child support warrant?

A We try to --

Q Or -- I'm sorry, on an inability to pay a release amount?

A We check our -- yes, we check the cases every two weeks to make sure, you know, if they're still in there, you know, what the status is of the case --

Q And, how many people are --

A -- and update our records.

Q If you know, approximately how many people are in the jail right now as -- who were not able or have not paid the release amount that was set?

A Nancy would know that. I do not know that amount.

THE COURT: I'm not going to allow that. Quite frankly, I called her for a very limited purpose and if you want to question her with reference to the two weeks or the review that's fine. I don't want to go beyond. I've got a full motion calendar this morning. Do you have any other questions with her with reference to the issues that I raised, with reference to the two weeks and the review?

Q Would you be surprised to hear that Judge Council told somebody that he was going to leave them in for six months if they didn't pay $10,000?

THE COURT: That's absolutely inappropriate to ask this witness that question.

Q Okay. Have you ever heard of the court -- does the court always follow the two-week remand rule, or do judges sometimes set their own?

A No, we follow that.

Q And, you have no knowledge of anybody ever being sent for six months?

A No.

THE COURT: They may have been held, but they've got other detainers?

THE WITNESS: Yes.

Q Without other detainers, with absolutely nothing else holding them?

A Not to my knowledge.

Q How -- what is the longest that you've ever heard of a person being kept in a jail for failure to pay a release amount?
A Six weeks, the longest -- that's what I've heard.
THE COURT: Six weeks? All right.
Q Not 73 days -- you've never heard of --
THE COURT: All right.
MR. DAVIS: I'm sorry, Judge.
THE COURT: Once again, I don't want to go -- all right. Thank you, thank you. All right. Anything else from the attorney general's position?
MS. STOOP: Excuse me.
THE COURT: You were talking about the class. I had asked you about the -- your response to a 72 hour rule that would require probation to bring a person before the court within 72 hours rather than two weeks and having other reviews for two weeks. You've now had the benefit of hearing some review of procedures from Mercer County. Anything you want to add to what you indicated before?
MS. STOOP: No, I don't think so, Your Honor. I think I would just reiterate that a reasonable period, I think, is understandable based on what Your Honor has said. I think it's just a problem determining what a reasonable time period would be based on logistical problems as much as anything else, Your Honor.
THE COURT: All right.
MR. DAVIS: Judge, I would like to briefly close if I have that opportunity?
THE COURT: Sure, absolutely.
MR. DAVIS: First, Judge, if I can inquire -- is Your Honor certifying the defendant class if you're going to impose the 72 hour rule on judges across the State?
THE COURT: If I impose a 72 hour rule, that certainly would impact Monmouth County, Ocean County, and Mercer County.
MR. DAVIS: Judge, are people in Essex County less worthy or do they have less rights?
THE COURT: Well, to the extent that this -- if I issue a written opinion that's published, it -- I don't know the impact on other counties, quite frankly.
MR. DAVIS: Judge, at least as to class certification, I would ask that Your Honor order that probation produce a list of how many people are presently in the jail. I think that that impacts directly on whether or not there is sufficient numerosity if that's what Your Honor is denying defendant class status on.
THE COURT: You've -- go on.
MS. STOOP: I would object, Your Honor. As I tried to point out earlier, the defendant class cannot be certified because they are not the correct plaintiff -- I mean -- I'm sorry, the correct defendant in this. The named defendants, the five judges who are named here, represent only three counties in the State, and they are not the policy makers for the judicial system in the State of New

Jersey. They are inappropriate defendants for the relief that Mr. Davis is seeking.

MR. DAVIS: Judge, if I may very briefly -- there is no --

THE COURT: And all of them had Ability to Pay Hearings. The representation or challenge by counsel is that the judge didn't handle the hearing properly.

MS. STOOP: Correct. He is only challenging the adequacy of --

THE COURT: Of the findings --

MS. STOOP: -- these five judges, and that is far from what is required for a class certification.

MR. DAVIS: Judge, initially, if I can address --

THE COURT: Anything further before --

MR. DAVIS: Yes, Judge, I'll --

THE COURT: I can give you about three minutes, and I've got to move on.

MR. DAVIS: I'll do this as quickly as possible, Judge. I don't want to give the transcriber a nightmare, though. Judges Locascio and Cavanagh did not commit any acts as to the list of plaintiffs that committed the acts as to the plaintiff class. There's transcripts that demonstrate that. As to whether the AOC or the judges are responsible and are the proper defendants, it is -- the duty is on the judges. The duty is on the judiciary to hold these hearings correctly and to not violate the civil rights of the obligors that come before them. Minors, Judge, have civil rights. They can't contract, they can't sue in a contract, but there are plenty of cases all the way up to the United States Supreme Court -- I'm sorry, I didn't write the cite down -- but the black arm bands during the Vietnam War, that was a case that was brought by minors to the United States Supreme Court in their own name. It's only in a contract action that you have to do it through an adult.

Judge, let me finish -- first of all, I know right now unless they were released yesterday at their hearings, Samuel Tucker and James Pool are two people right now in the jail with multi-thousand dollar release amounts who don't have it. I don't know which judge reviewed them -- I guess I'm going from here to the --

THE COURT: They may have been -- who's to say that the judge didn't properly conduct an Ability to Pay Hearing?

MR. DAVIS: Judge, finally, let me close with this, and I realize it's a loaded statement, if I were to show you a dozen transcripts from around the State where judges were saying to people, you're African-American so I'm going to throw you in jail, how many of those would you need before you would say, this is a violation --

THE COURT: That's totally -- why are you saying that? There's no --

MR. DAVIS: Because it is a violation of civil rights.

THE COURT: But, there's no evidence that that occurred in this case.

MR. DAVIS: Judge --
THE COURT: If you want to argue a particular premise or proposition in this courtroom --
MR. DAVIS: Yes --
THE COURT: for -- in this particular case, don't give me examples that are not part of the record.
MR. DAVIS: Judge, it's a perfect analogy.
THE COURT: It's not a perfect analogy.
MR. DAVIS: I'm not saying that that's what happened, although ten of the 11 plaintiffs do happen to be African-American, that' not what I'm -- the premise that I'm bringing now, that's for a later day. But, what I'm saying, Judge, is if I show you egregious violations of civil rights from the trial court, how many do you need before you decide it's a class action, Judge?
THE COURT: All right. Mr. Davis, thank you. Thank you. All right, let me indicate for the record, I think I'm going to -- I'm sort of tempted to issue an opinion today from the bench, but there have been a number of issues raised, and I think I want to take some time, outline the arguments that have been made, particularly the class. I'm going to give you my tentative thoughts right now.
As I indicated before, I am not satisfied that there's been a proper showing of class certification for a host of reasons. There's no showing, really, of commonality. Each case is fact sensitive and different. There's not showing of numerosity. There are thousands and thousands of child support hearings every year. The other standards that are articulated in 4:32, I can mention them now, but I've got a whole courtroom of people, and I've got to be done today by 12:30 and it's now a quarter after ten. But in a written opinion I will outline the four factors in 4:32 and the three additional factors that are the second part of the rule because I'm not satisfied that there is a class as to the plaintiff or the defendant.
With reference to the court reviewing these particular cases and making any findings, I have some concerns from some of the transcripts, and as a result of that I think there's some propriety of the Court ordering that the persons who are plaintiffs in these cases who have not filed an appeal because of the question as to whether they had a hearing within 72 hours -- order that those cases be reviewed. I am not going to serve as an Appellate Court in this case.
The one issue that's been raised by counsel that does cause me some concern is the possibility of an obligor who is picked up in Mercer County on a day that hearings have been held, and that person is picked up after these hearings and would have to wait for 14 days. My initial thoughts are that anybody picked up on a Failure to Appear Warrant should go before a judge within 72 hours. That judge should address the issue of the failure to appear and the ability to pay and go through all the standards that are

part of established case law under Pierce v. Pierce and Saltzman v. Saltzman, and that those obligors be subject to another review every two weeks that they remain incarcerated. Now, I don't know what other counties do, but my intention would be to write an opinion and to distribute it to counsel and probably submit this for publication because I think it's an issue that's significant enough, that's important enough that every obligor have the right to have a hearing within 72 hours. And, I would also indicate that I will leave the record open until Wednesday, so if either Mr. Davis or Ms. Stoop wants to supplement the record and convince me as to any issue which is before the Court, I will give you until Wednesday. I would generally give you longer, but quite frankly I think it's important to move this matter forward rather than to delay. So, I will give you until Wednesday. My hope would be to issue a written opinion probably on Friday or perhaps the following Monday. All right.

MR. DAVIS: Judge, I want the Court to be aware that I am going to seek emergent review, obviously not now until next Wednesday because it's now become interlocutory -- but before

THE COURT: You can -- you can file whatever relief you want.

MR. DAVIS: I understand, Judge. I just -- I wanted the Court to be aware of that before you wrote a written opinion that might be subject to --

THE COURT: Mr. Davis, you take whatever action you think is appropriate.

MR. DAVIS: Of course, Judge.

THE COURT: I'm going to make my findings and put them in writing under Rule 1:7-4 --

MR. DAVIS: Thank you, Judge.

THE COURT: If you want to file an appeal or take emergent relief, certainly you have the right to do that.

MR. DAVIS: Of course, Judge.

THE COURT: Thank you.

MS. STOOP: Thank you, Your Honor.

* * * * *

C E R T I F I C A T I O N

I, DENISE M. O'DONNELL, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number CI7-02-LRF, index number from 01 to 4657, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded, to the best of my ability.

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MERCER COUNTY, NEW JERSEY
DOCKET NO. MER-L-3761-01
A.D. #_____

JASMINE LEONARD, et al.,
Plaintiffs,
v
HONORABLE AUDREY BLACKBURN, et al.,
Defendants.

TRANSCRIPT OF TELEPHONE MOTION HEARING

Place: Mercer County Courthouse
175 South Broad Street
Trenton, NJ 08650

Date: March 8, 2002

BEFORE:

HON. LINDA R. FEINBERG, A.J.S.C.

TRANSCRIPT ORDERED BY:

DAVID PERRY DAVIS, ESQ.

APPEARANCES:

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BARBARA STOOP, ESQ. Deputy Attorney General
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(TELEPHONE CONFERENCE)

THE COURT: Hello?

MR. DAVIS: Hi.

THE COURT: Hi.

MR. DAVIS: Good afternoon.

THE COURT: Good afternoon. Let me, we're on

the record, let me put this on the record. This is the matter of Leonard versus Blackburn, it's MER-L-3761-01 and the Deputy Attorney General has just walked in. And, counsel, your appearance for the record.

MR. DAVIS: David Perry Davis on behalf of the plaintiffs, Judge.

THE COURT: All right. And Deputy Attorney General?

MS. STOOP: And, Deputy Attorney General Barbara Stoop on behalf of the judicial defendants.

THE COURT: Counsel, I gave you the opportunity to proceed by telephone. Can you hear me?

MR. DAVIS: Yes, I can, Judge.

THE COURT: Did you hear the Deputy Attorney General?

MR. DAVIS: Yes, I heard Ms. Stoop, Judge.

THE COURT: Okay. If you have any problems during the course of your appearance by telephone let me know and I'll make sure -- you shouldn't have any problem hearing me because I have the machine right in front of me but if you have any problems hearing the Deputy Attorney General let me know.

Let me place on the record the procedural history, give the parties an opportunity to argue and then I'll issue my opinion. Just as background, please you can have a seat.

MS. STOOP: Thank you.

THE COURT: On November 28 of 2001, plaintiffs filed a complaint and order to show cause naming five superior court judges as defendants. In pertinent part, the complaint alleged one, that an inadequate inquiry was being made by judges into the ability of child support obligors to pay child support obligations prior to their incarceration and two, that incarcerated child support obligors were being held for inappropriate periods without a judicial review.

Subsequent thereto, the Court established a briefing schedule and counsel appeared for oral argument on January 11th of 2002. On January 28th, of 2002, the Court entered an order that provided, and I'll read that, Plaintiffs' application for class certification for both defendant class and plaintiff class is denied. Two, plaintiffs' application for injunctive relief being moot is denied. Three, plaintiffs' application for declaratory judgment is partially granted in that the Court directs the counties named in the complaint to take steps to ensure that a child support obligor is afforded an appearance before the court no later than 72 hours after being detained on a failure to appear warrant and is further afforded subsequent reviews every two weeks thereafter while incarcerated. And four, all other applications and motions are denied and this

matter is closed.

On February 14th of 2002, citing the right to relief pursuant to Rule 1:13-1 and Rule 4:49-2, counsel for the plaintiffs filed and application seeking counsel fees and costs as a prevailing party. To advance this claim, plaintiffs rely on the provisions of 42 U.S.C.A. Section 1988. Counsel seeks an award of counsel fees and costs in the amount of $21,934.95.

Defendants oppose the award of counsel fees and costs. Defendants allege that the plaintiffs do not qualify as prevailing parties. To support this position, the defendants contend that the plaintiffs did not prevail on the application to change or modify the decisions reached by the judges named in the litigation and that the Court specifically refused to grant any substantive relief on the merits of any of the pending cases. Furthermore, defendants' challenge the notion advanced by the plaintiffs that they are prevailing parties, based on the limited determination by the Court to require hearings within 72 hours of those obligors apprehended on failure to appear warrants.

Finally, defendants' assert that the amount of attorneys fees sought is unreasonable based on the straightforward and narrow issues presented to the Court.

This is an application, in essence, I don't really consider it to be a 1:13-1 application, it's really, in essence, a 4:49-2 motion for reconsideration. And Mr. Davis, this is an application filed by you and I'll give you the opportunity now to present your arguments.

MR. DAVIS: Judge, initially, procedurally, I believe that until I prevail on the litigation, or at least until I believed I prevailed, I didn't have the ability to file an application for fees and I think that the order declaring that I prevailed was prerequisite to filing that motion. But procedurally, it's an application under 1:13 as an omitted issue, or 4:49-2, as a motion for reconsideration. I believe the issue is properly before the Court on any one of those three.

THE COURT: Well, I'm going to consider it on the merits.

MR. DAVIS: Okay. Judge, under the case law that's set down and quoted in the brief that I submitted, so long as I had prevailed on any significant issue in the litigation, I have prevailed as far as the counsel fee determination is concerned and I will submit that the Court's ruling, the text of the order saying that it's partially granted, is sufficient for the Court to determine that I have prevailed.

It's a low test because there's a strong public policy toward enforcing civil rights and that a prevailing party should not have to have incurred counsel fees, or that counsel fees should not be incurred and not compensated when there is a finding that civil rights violations were implicated and, clearly, I understand that there was a remaining, I don't know if it's a factual dispute at this point, but there wasn't much of a hearing on the issue of whether or not it was two weeks or 93 days that the plaintiff, at least one of the plaintiff's, was held without review. But, for the point of this motion, even to say if it was two weeks, the Court has determined that that was too long.

In the transcript from oral argument on January 11th, Your Honor cited that that was a due process violation and issued an order that has been circulated to all the presiding judges, or the assignment judges, throughout the state and those situations have now been changed. I think that that's a pretty significant change and that certainly qualifies under the low threshold for having prevailed, as the plaintiffs having prevailed in the litigation, and, therefore, we're entitled to counsel fees.

As to the reasonableness of the fees, if Your Honor was to determine that I had only prevailed on some of the issues, I understand that the fees can be adjusted to the portion that I prevailed on and I understand that the State argued that as well in their brief, but the Court is not reaching that issue as it's determining that I haven't prevailed at all under the test and, obviously, I disagree with that and I rely primarily on the arguments that are in my brief.

THE COURT: All right, thank you, counsel. Ms. Stoop, how do you respond to that?

MS. STOOP: Well, initially, Your Honor, I would like to address a couple of the points that were set forth in the reply brief from plaintiffs' counsel. One of them was that since the State had not specifically addressed the cost issue that he should automatically be awarded costs and I think clearly, if we oppose attorneys fees, we oppose costs being paid for the same reasons that we would oppose attorneys fees.

Also, the plaintiff alleged the Court did not hold that there was an absence of cognizable claims for these plaintiffs and I would refer the plaintiffs counsel to the Court's opinion at Page 20 where this is precisely what the Court said, that there was, despite an absence of cognizable claims on the part of these plaintiffs.

Also, I would like to make clear that the defendants did not concede at any time that the

plaintiffs prevailed in this matter. I pointed out the reasons why in my brief and I think it was clear as to that part of the State's position, Your Honor, so I won't go into it again. It is our position that they did not prevail and since they did not prevail, they are not entitled to attorneys fees or costs. If you have any questions, I'd be glad to address those.

THE COURT: All right, thank you. In rendering its decision in this matter, the Court considered and rejected the application for counsel fees and costs. I would indicate for the record that the Court was very much aware of the standard for the award of counsel fees and as part of reaching its decision, in fact, made an affirmative finding not to award counsel fees, but if there was any question as to why the reasoning for that, hopefully, the reasoning will be cleared this afternoon.

Specifically, paragraph four of the order that was entered on January 28th, of 2002, provided that all other applications and motions are denied. There was one other application, I believe, that was made and that was an application to proceed as an indigent. That was denied and an order was entered as well and when the Court entered its final decision, it incorporated not only the motion for counsel fees and denied that, but also wanted to make it clear that that prior motion to proceed as an indigent was also denied.

I would indicate for the record that in seeking the award of counsel fees and costs, that plaintiffs rely on Rule 4:42-9 (sic) and the Civil Rights Attorneys Fee Award Act, 42 U.S.C.A. Section 1988. Rule 4:42-9 authorizes the Court to award counsel fees and I quote "In all cases where counsel fees are permitted by statute". As we all know, the award of counsel fees is relatively rare, there are specific provisions under 4:42-9, if they are permitted by statute and those cases are relatively the exception rather than the rule.

The Civil Rights Attorneys Fee Award Act, 42 U.S.C.A. Section 1988, provides that in any action or proceeding to enforce a provision of a particular civil rights statute, the award of attorneys fees is at the discretion of the Court.

In order to become entitled to an award of attorneys fees under the awards act, there must be a threshold showing by a prevailing party, of not only a deprivation of a protectable right, but also some action by defendant under color of state law that causes that deprivation of that right. That's 42 U.S.C.A. Section 1983. Flagg Brothers, Inc., versus Brooks, 436 U.S. 149, 98 Sup. Ct. 1729, 56 L.Ed.2nd 185, Edickels versus SH Crescent Company, 398 U.S.

144, (1970).

The New Jersey Supreme Court has adopted a two prong test to determine whether a party prevailed for purposes of the award of attorneys fees pursuant to 42 U.S.C. Section 1988 and that's Singer versus State, 495 N.J. 487 (1984).

First, the plaintiff must demonstrate, and I quote "A factual nexus between plaintiffs litigation and the relief ultimately achieved", meaning that plaintiff's case was a necessary and important factor in achieving the relief granted. And that's in Singer 495 quoting Nadow versus Heljwo, 581 F.2d. 275, 1st Cir. 1978.

Second, the plaintiff must show, and I quote "that the relief ultimately secured by plaintiffs had a basis in law" meaning that the relief plaintiff received was required by law.

As noted, the first prong requires an applicant seeking counsel fees to demonstrate a factual nexus between plaintiff litigation and the relief ultimately achieved.

In the case at bar, this court held and I quote "Based on the record before the court, the defendant judges followed the standard operating procedures approved by the rules in each of the child support matters. All the obligors failed to make child support payments for an extended period of time and were summoned to court. After adequate notice of the hearings each of the plaintiffs failed to attend scheduled hearings and the court issued bench warrants. Once arrested, the plaintiffs were incarcerated and scheduled for the next available child support enforcement hearings.

In light of the aforementioned facts the Court is satisfied that the named defendants did not deviate from established procedure. It is clear that in each case a bench warrant was issued for the failure of an obligor to appear at a properly noticed child support enforcement hearing." And that's from the Court's opinion, Pages 17 to 18.

As to the adequacy of the inquiries by the five named judges in the handling of child support enforcement hearings, the Court made no finding. Recognizing the fact sensitive nature of child support enforcement hearings, this Court held that any prayer for relief concerning the adequacy of an inquiry made by a particular judge, should be made to an appellate court and not to a judge of the Superior Court by way of order to show cause. The Court refused to rule on whether or not the five named judges made adequate inquiries of child support obligors in conducting the ability to pay hearings.

For both of the issues that I've just mentioned and that is compliant with court rules and

the adequacy of the inquiries, which is really the first argument raised by plaintiff, plaintiffs have failed to satisfy the first prong of Singer. There was no finding of a violation under the Civil Rights Act and no proof that the litigation brought on behalf of plaintiffs case, was a necessary and important factor in achieving a particular result because it did not achieve any specific result.

Finally, the litigation initiated by the plaintiffs asserted that incarcerated child support obligors were being held for inappropriate periods without a review of their incarceration. Relying on the provisions of Rule 3:4-1, plaintiffs sought a finding by the court that child support obligors held on failure to appear warrants, should be brought before the court within 12 hours of their arrest. The Court rejected this position but directed that the three counties named in the complaint schedule these hearings within 72 hours of arrest.

The Court notes that in both Ocean and Monmouth Counties, obligors were brought before the court within a 72 hour period. The remaining county, Mercer, did not. Despite allegations that some of the named defendants did not receive hearings, the record establishes that all of the delinquent obligors were scheduled for hearings on the second and fourth Thursday of each month.

It is undisputed that as to Mercer County, the litigation filed by the plaintiffs changed the timing of the hearings for those obligors arrested in Mercer County on failure to appear warrants. As a result, there is a nexus between the litigation and the relief ultimately achieved.

While the litigation changed the timing of hearings in Mercer County, there is no law, rule or regulation that requires child support obligors, detained on failure to appear warrants, to come before a court within 72 hours of being detained. Searching to establish a fair and reasonable time period for the scheduling of child support enforcement hearings when delinquent defendant obligors are arrested for the failure to appear, the Court adopted a bright line standard of 72 hours.

Prior to this decision, there was no rule or court rule, or any other regulation that set forth those specific requirements and although the Court did in reaching its decision and in developing the 72 hour time period, did premise its conclusion on procedural due process.

The Court is not satisfied that the plaintiffs have met or satisfied the second prong of Singer to qualify them as prevailing parties. As a result, the motion for reconsideration under 4:49-2 to established that the Court erred, or overlooked, or under 1:13-1,

this Court is satisfied that the application should be denied.

All right, very well. Thank you.

MR. DAVIS: Thank you, Judge.

THE COURT: Thank you, bye-bye now.

MS. STOOP: Thank you.

*****

CERTIFICATION

I, ELAINE HOWELL, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on Tape No. CI27-02-LRF, Index 769 to 1270, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded, and to the best of my ability.

_____ Date:
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January 16, 2002

Hon. Linda R. Feinberg, A.J.S.C.
Superior Court of New Jersey
175 South Broad Street
Trenton, NJ 08650-0068
Via Fax: 609-633-0746

Re: Leonard, et al v. Blackburn, et al
Docket No. MER-L-3761-01

Dear Judge Feinberg:

Please accept this letter brief in lieu of a more formal submission in response to the Court's invitation for the parties to supplement their pleadings.

As to class certification of plaintiff-obligors

I. As to numerosity:

1. The Court's Ruling:

THE COURT: ... I don't think there is numerosity. You've identified -- there are thousands and thousands of cases every year, and you've extracted or identified a very small number. There's no evidence before the Court that this is something that involves a large number of individuals. (T18-8 to 18-14).

2. The applicable law:

Where, as here, only declarative and injunctive relief is sought, the standard for establishing the numerosity requirement for class certification has traditionally been significantly relaxed. To establish the numerosity element,plaintiffs are notrequired to show that it would be "impossible" to join all members, but only that such joinder would be "difficult", "inconvenient" or "impracticable." See, e.g., W.P. v. Poritz, 931 F.Supp. 1187 (D.N.J. 1996), Weiss v. York Hospital, 745 F.2d 786, 808 (3d Cir.), *certiorari denied* 105 S.Ct. 1777, 470 U.S. 1060, 84 L.Ed.2d 836 (1984). Even "speculative and conclusory representations" as to the size of the class suffice as to the requirement of many. Doe v. Charleston Area Medical Center, Inc.,, 529 F.2d 638 (W.Va. 1975), Young v. Pierce, 544 F.Supp. 1010 (E.D.Tex. 1982) (Plaintiffs' reply brief at 17-18).

Courts have held that the numerosity requirement, may be more liberally construed in civil rights cases in which injunctive relief is sought. See, e.g., Jones v. Diamond, 519 F.2d 1090, 1100 (5th Cir.1975).

In addition to the law set forth in plaintiffs' reply brief, the Court is respectfully referred to the following additional cases, all of which reaffirm the above law. Saldana v. City of Camden, 252 N.J.Super. 188, 193 (App.Div.1991) (potential class of 81 members sufficient to establish numerosity), Gross v. Johnson v. Johnson, 303 N.J.Super. 336 (Law.Div. 1997), Delgozzo v. Kenny, 266 N.J.Super. 169, 181, (App.Div.1993).

3. The facts in the record thus far:

The complaint alleges that a routine, unconstitutional practice of setting release amounts based on factors other than the ability of the obligor to pay same has emerged at enforcement hearings. It is the allegations of the complaint that the Court must focus on, not the evidence in the record at this early stage of the proceedings (*See point II infra on commonality*). However, even if the Court focuses on the evidence in the record, the numerosity requirement was satisfied by the testimony adduced at the January 11 hearing. According to Ms. VanEk and Ms. Desaw, there are (in Mercer County alone) about 350 enforcement hearings and 30 jail cases per month (T38-3 to 38-4 & T44-17 to 45-24).

There are twenty-one counties in New Jersey. Assuming Mercer County is average, the testimony of Ms. VanEk and Ms. DeSaw would indicate a total of approximately 100,000 enforcement hearing, and over 9,000 citizens "coercively" incarcerated per year.

If the allegations of plaintiffs' complaint are accepted as true, as they must be at this juncture, these numbers more than satisfy the numerosity requirement.

II. As to commonality

1. The Court's ruling:

THE COURT: But there -- the commonality is really -- every case is fact sensitive, is different (T18-8 to 18-12).

2. The law:

The focus of the complaint in this matter is that a common practice has evolved that violates plaintiffs' civil rights. On January 11, the court focused on what had been proved as far as commonality rather than focusing on the allegations of the complaint. The Court referred to the transcripts that had been produced in support of the allegations and weighed them evidentially as to whether they supported the allegation that the lack of meaningful ability to pay hearings is a statewide problem (*see, e.g.,* T13-9 to

13-12, 28-7 to 27-8). The Court concluded that an insufficient showing had been made as to commonality because there are thousands of child support enforcement hearings and plaintiffs had provided only sixteen transcripts and six[11] appellate reversals. (T22-5 to 23-10). The underlying assumption of this ruling is that the remaining hearings would not support plaintiffs' allegations or that there was a burden on plaintiffs to prove their entire case on a motion for class certification

In sum, plaintiffs application appears to have been denied because all they did was prove beyond any doubt that the allegations as to each and every named plaintiff was true and that the situation was ongoing in at least Ocean County. To certify the class, the Court would have required plaintiffs to prove that the allegations were true as to the entire class of tens of thousands.[12]

It is respectfully suggested that this was error. On a motion for class certification, "[t]he court is bound to take the substantive allegations of the complaint as true". Delgozzo v. Kenny, 266 N.J.Super. 169, 181 (App.Div.1993)(quoting Blackie v. Barrack, 524 F.2d 891, 901 n. 17 (9th Cir.1975), *cert. denied*, 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed.2d 75 (1976)). The court is required to give plaintiffs "every favorable view" of plaintiffs' complaint and the record. Riley v. New Rapids Carpet Ctr., 61 N.J. 218, 223 (1972). The applicable legal standard was inverted at the January 11 hearing when the court held that the substantive allegations had not been sufficiently proved. Plaintiffs provided far more than the average putative class and exceeded the standard.

The required "common nucleus of operative fact and law" is found in the proven facts that each member of the plaintiff class was (1) incarcerated as a result of their nonpayment or underpayment of child support, (2) subjected to a "coercive" incarceration without a constitutionally adequate "Ability to Pay" hearing, or (1) was incarcerated as a result of their failure to appear for an enforcement hearing nonpayment and was (2) held for an inappropriate amount of time prior to any review of their incarceration occurring.

3. The Facts:

---

[11] As was disclosed in plaintiffs' reply brief, there have actually been eight reversals, not six. There were only six reversals as of the filing of plaintiffs' complaint in this matter.

[12] It should be stressed that plaintiffs are seeking only an injunction; not a complete and final adjudication on the merits. Those judges who are properly applying the law would be unaffected by such an injunction and therefore would not be damaged by it in any way.

Although it was the centerpiece of plaintiffs' argument as to the facts, the Court on January 11 did not so much as reference the certification from Ocean County wherein Michelle Tierney admits the substantive allegations of the complaint are true. During oral argument, the attorney for defendants also ignored this certification, stating "naming six Superior Court judges and throwing out transcripts from a very small number of hearings is inappropriate to support a class action suit." (T29-3 to 29-6).

It is respectfully submitted that the Ocean County certification is dispositive on this issue. Ms. Tierney, the assistant chief of child support enforcement for Ocean County, states "... If a legitimate inability to pay is demonstrated, the Obligor ~~would~~ ***may*** not be incarcerated."[13] (Exhibit Y with plaintiffs' Reply Brief). If an obligor without the ability to pay "may not" be incarcerated, she also "may" be incarcerated - in violation of the constitution and laws of our state. What more could possibly be asked from plaintiffs beyond an incriminating admission of this magnitude?

If the answer to that query is further proof as to the case of the named plaintiffs, the transcripts and orders indisputably provide that proof. The Constitutional rights of each and every named plaintiff were openly violated; none of them were granted so much as a pretense of an actual "Ability to Pay" hearing.

III. As to typicality, adequacy of representative.

No law was provided to the Court in opposition to that provided by plaintiffs and there was no discussion of this issue during oral argument. It is respectfully submitted that these requirements were met.

[13] Also relevant to all the certifications provided by defendants is that the legal standard for the showing of an ability to pay was inverted. The burden is not on the obligor, it is on the party seeking incarceration. Accordingly, each and every certification submitted by defendants contains an admission of plaintiffs' allegation that the hearings are not being properly conducted. *See, e.g.* unpublished opinions and published case law and Court Rules referenced therein.

As to class certification of plaintiff children

In their opposition, and again at oral argument, defendants asserted that a minor cannot bring a civil rights action in their own name (T30-7 to 30-10). No legal citation nor support was provided for this proposition as none exists. While children cannot contract, they remain "persons" under the Constitution and are free to pursue their civil rights, under their own names, through the court. *See, e.g.,* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (Minor students permitted to wear armbands in protest of Vietnam policies), In re Rebecca H., 227 Cal.App. 3d 825, (Cal.App. 1991), In Interest of J.A.T., 590 So.2d 524, 16 Fla. L. Weekly D3065 (Fla.App. 1991), In re Rebecca K., 101 Wash.App. 309, 2 P.3d 501 (Wash.App. Div. 3, Jun 20, 2000).

The only comment the court made as to the merits of certifying the class of plaintiff-children was "I don't want to hear about the love and companionship; these are also people who blatantly failed to pay child support." (T21-1 to 21-3).

There is no correlation in the law between parenting time, parental love, and the payment of financial child support. The two are separate and distinct entities. A parent cannot avoid a child support obligation by surrendering her parental rights, and vice-versa. Martinetti v. Hickman, 261 N.J.Super. 508 (App.Div. 1993), R.H. v. M.K., 254 N.J.Super. 480 (Ch.Div. 1991).[14]

As to certification of the defendant class

On January 11, the Court noted that it had carefully scrutinized the transcripts and recognized that there was problem with the adequacy of the "Ability to Pay" hearings:

MR. DAVIS: ... Your Honor indicated that each one of these must include a fact sensitive case-by-case inquiry of the ability to pay. These hearings are 30 seconds each. The transcripts are two pages each.

THE COURT: Yes, but let me ask you this. I've reviewed those transcripts, and I have some concerns about the level of inquiry by the judges. I don't dispute that. But, I'm not an appellate court. I'm not an appellate court. And, I don't know what authority that I have to look at that and say that the judge misapplied the law .... because I don't believe that I have the authority to look at

[14] Perhaps more importantly, in the overwhelming majority of the cases involving the named plaintiffs herein and improperly incarcerated obligors generally, (i.e. those who live in perpetual poverty in our inner cities) the money is not owed to the custodial parent but to social services (see transcripts supplied with reply brief).

that transcript and say, I am going to reverse the -- I don't have the authority, I'm not an appellate court. (T21-8 to 21-23).

This Court is not being asked to sit as a court of review in the matter of McClean versus Leonard, FD-11-2011-95, nor Janeil Crawley v. Jeffrey Leonard, FD-03-1611-93 nor Daneen Billingsly v. James Thompson, FD-11-3947-93 nor any of the other matters involving the named plaintiffs. Plaintiffs agree with the Court's analysis that this would clearly be asking this Court to exceed its authority.

That said, it should be stressed that Leonard et al v. Blackburn et al MER-L-3761-01, is a completely *collateral* matter. This Court absolutely has both the authority and the duty to address a civil rights complaint for injunctive and declarative relief, and judges have no immunity to a complaint that is not seeking monetary damages. Were it possible to sue "the system" as a nameless entity, plaintiffs would have done so. It should again be stressed that the published case law and the individual appellate reversals are obviously having no effect on the system.

Collateral suits challenging ongoing court practices are a commonplace method of bringing a civil rights challenge and judges are routinely certified as a class. *See, e.g.,* Lake v. Speziale, 580 F.Supp. 1318 (D.Conn.1984), Mastin v. Fellerhoff, 526 F.Supp. 969 (S.D.Ohio 1981), Walker v. McLain, 768 F.2d 1181 (10th Cir.App. 1985), *cert. denied*, 474 U.S. 1061, 106 S.Ct. 805, 88 L.Ed.2d 781 (1986); Sevier v. Turner, 742 F.2d 262 (6th Cir.1984), Ridgeway v. Baker, 720 F.2d 1409 (5th Cir. 1983), McKinstry v. Genesee County Circuit Judges, 669 F.Supp. 801 (E.D.Mich.1987), Johnson v. Zurz, 596 F.Supp. 39 (N.D.Ohio 1984), Young v. Whitworth, 522 F.Supp. 759 (S.D.Ohio 1981).

Almost parenthetically, it should be noted that this matter could not be filed in federal court as there are pending proceedings as to the named plaintiffs which would require the district court to abstain under Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Even if there were no pending proceedings, there is presently an unpublished opinion holding that the mere existence of UIFSA and the family court contempt process warrants abstention. Anne Pasqua, et al v. Hon. Gerald Council, Civil Action No. 00CV-2418, Third Circuit Docket No. 01-2735.[15] Plaintiffs had no choice but to bring this matter in state court.

As to 72 hour review of persons not subject to detainer

[15] Oral argument in the Third Circuit Court of Appeals is pending for early this Spring.

On January 11, the Court ruled that "a person who's been picked up on a Failure to Appear Warrant and has no other detainers, that person should be brought before the court within . . . 72 hours" (T15-13 to 15-18). In it's colloquy with the representatives from probation, the court discussed having child support obligors subject to detainers reviewed within 72 hours of said detainers being lifted (T42-20 to 42-24).

Although there does not appear to be a statute requiring this (it may be an administrative rule), the procedure is that municipalities will not review a prisoner held on a county warrant until said warrant is satisfied. If the probation department waits for municipal detainers[16] to be removed, the child support incarceration will never be reviewed by the Probation Department. The county warrant or detainer for child support must be addressed first. In other words, all persons arrested (or subject to detainer) as a result of their nonpayment or underpayment of child support or following a failure to appear at an enforcement hearing should be reviewed within 72 hours, regardless of the existence of other detainers.

As to defendants supplemental arguments

In their response brief, defendants provided three claims in opposition to plaintiffs' application. Initially, they claimed that no one was incarcerated in the State for nonpayment or underpayment of child support. This claim was not pursued at oral argument and was not referred to in the court's decision.

Second, the State claimed that two of the six named defendants had not conducted proceedings as to any of the named plaintiffs. Plaintiffs replied that said defendant had committed the acts complained of as to the plaintiff class and there was no requirement that every named defendant "line up" with a named plaintiff. No rebuttal to this argument was presented at oral argument.

Finally, the State claimed that the complaint itself had to be dismissed with prejudice because plaintiffs had not established (prior to any discovery, trial, hearings, etc) they were entitled to injunctive relief.

During oral argument, the State for the first time raised the issue of whether the complaint should have also named the Administrative Office of the Courts as a defendant, at least as to the issue of the amount of time an obligor is held before review (and between reviews if she or he remains incarcerated to determine if the incarceration is still serving a legitimate coercive goal). (T28-22 to 29-1).

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[16] as opposed to county detainers, which apparently are not held pending the resolution of a child support detainer.

While plaintiffs maintain that the ultimate responsibility rests with the judiciary, it is respectfully suggested that, should the Court find merit to the defendants argument in this regard, plaintiffs should be permitted to amend their complaint.[17]

As to ongoing emergent circumstances

As the court is reading this, Perry Rhodes, a thirty-seven year old impoverished African American Trenton resident, sits in the Mercer County Corrections Center. He has been incarcerated since before Christmas (December 4), unable to produce the $400.00 release amount set for him, unable to earn money, unable to spend time with either Perry Rhodes Jr. (the child subject to the child support order at issue), nor Anthony Rhodes, his 18 month old son from his subsequent marriage. Both Anthony and Perry Junior are being deprived of non financial child support from their father, who spent significant time with both his sons. There was no showing at the hearing that Mr. Rhodes had $400.00 to obtain his release and, frankly, the idea that someone would stay in jail for nine weeks if they had the ability to post $400 and go free is absurd. Mr. Rhodes is, in a word, typical of the hundreds of incarcerated child support obligors whose civil rights were completely disregarded.

If Mr. Rhodes had $1000 and his release amount was more than $1000, he could retain this office for an emergent appeal and be released. This is the system that exists and will continue to exist if the court declines to address this matter as a class action. The concept of "justice for sale" should be offensive to the Court.

It is beyond debate that child support orders need to be enforced. The threat of incarceration is unfortunately necessary in some cases and would remain an inspiration to those who would selfishly and contemptuously disregard their financial obligations to their children while having the ability to comply with the Court's Orders. But the present system of open-ended "coercive" incarcerations for months on end accomplishes nothing, targets those most vulnerable in our society, and in the process does great harm to the obligors, their children, and the laws and Constitution of our state.

Conclusion

For the above reasons, this Court should certify the classes and grant the requested injunctions.

Respectfully submitted,

[17] Naming the AOC as defendants would also open the issue of damages, which has thus far not been pursued.

David Perry Davis, Esq.

Proof of Service

Joell Zahn, of full age, hereby certifies as follows:

1. I am a paralegal employed by the Law Office of David Perry Davis, attorney for in this matter.

2. On this date, I caused a copy of the enclosed supplemental letter brief and this Proof of Service to be served upon the following:

1.	Barbara Stoop, DAG, Esq. Office of the Attorney General Division of Law 25 Market Street Trenton NJ 08625 By Hand delivery

3. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

_____
Joell Zahn

DATED: **January 16, 2002**

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MERCER COUNTY, NEW JERSEY
DOCKET NO. MER-L-3761-01
A.D. #_____

JASMINE LEONARD, et al.)
)
Plaintiffs) TRANSCRIPT
) OF
-v-) HEARING
)
AUDREY P. BLACKBURN,)
et al.)
)
Defendants.)

Place: Mercer County Courthouse
175 South Broad Street
Trenton, NJ 08650

Date: January 11, 2002

BEFORE:

HON. LINDA R. FEINBERG, J.S.C.

TRANSCRIPT ORDERED BY:

DAVID PERRY DAVIS, ESQ. (Law Office of David Perry Davis)

APPEARANCES:

DAVID PERRY DAVIS, ESQ. (Law Office of David Perry Davis)
Attorney for the Plaintiffs

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Audio Operator, M. Bethea

I N D E X

THE COURT: Good morning. Please be seated. All right the case -- the first case will be Leonard v. Blackburn. It's MER-L-3767-01, and good morning. Counsel, your appearances for the record?

MR. DAVIS: Good morning, Judge. David Perry Davis on behalf of the putative plaintiff class.

THE COURT: Thank you.

MS. STOOP: Good morning, Your Honor. Deputy Attorney General Barbara Stoop here representing all of the judicial defendants.

THE COURT: Thank you. Counsel, I'm going to place on the record the facts in this case so sit back and let me set forth the procedural history. Then I will give you sort of my tentative feelings and give you an opportunity argue.

This matter comes before the Court by way of an order to show cause filed by the plaintiffs, Jasmine Leonard, David Chavez, Devonica Chavez, Tiana Logan and Ashley Lewis, and plaintiffs Jeffrey Leonard, Devon Square, Craig Williams, James Thompson, Cheyanne Johnson, David Chavez, Todd Logan, Jeffrey Jones, Gary Davis, Cleo Merritt, and also Jawan Cruz and Ronald Cohn are listed on a number of the papers, but are really not specifically identified as plaintiffs. And that matter was filed on November 28th of 2001. On that date the Court signed an order to show cause requiring the defendants to show cause today, January 11th, why an order should not be entered, 1) certifying the proposed plaintiff class, 2) certifying the proposed defendant class, 3) enjoining the defendant class from incarcerating any member of plaintiff class absent a showing based on substantial and credible evidence that said plaintiff has the ability to pay the release amount for granting a preliminary injunction compelling defendants to immediately release all currently incarcerated plaintiffs pending an Ability to Pay Hearing, or in the alternative to conduct an appropriate Ability to Pay Hearing within 24 hours. The application is opposed.

The first set of plaintiffs in this matter consists of Jasmine Leonard, David Chavez, Devonica Chavez, Tiana Logan and Ashley Louis, plaintiff children, the children of incarcerated child support obligors. The second set of plaintiffs consists of Jeffrey Leonard, Devon Square, Craig Williams, James Thompson, Cheyanne Johnson, David Chavez, Todd Logan, Jeffrey Jones, Gary J. Davis and Cleo Merritt, who are the plaintiff obligors.

On November 28th of 2001, both sets of plaintiffs filed a complaint and order to show cause seeking declaratory and injunctive relief against the defendants Honorable Audrey P. Blackburn, Honorable F. Lee Forrester, presiding judge of the family part of Mercer County, the Honorable Rosalie Cooper, and the Honorable Thomas Cavanagh, and the Honorable Louis Locascio, collectively referred to as "Defendant Judges" to prevent them from engaging in

practices which allegedly abridge the constitutional rights of plaintiff. Judge Blackburn and Forrester are Superior Court Judges in Mercer County; Rosalie Cooper is a Superior Court Judge in Ocean County; and Thomas Cavanagh and Louis Locascio are Superior Court Judges in Monmouth County.

Plaintiffs assert that the parents of plaintiff children have been incarcerated by Defendant Judges and had either, 1) had release or purge amount set based not on their ability to pay, but on other impermissible factors such as the total amount of arrearages owed or completely arbitrary numbers, or 2) have been held for many days or weeks without having had any release amount set by way of a release amount or by bail.

According to plaintiffs, plaintiffs' children have be unconstitutionally denied their fundamental right to a meaningful relationship with their incarcerated parent and have been denied their right to financial child support. Plaintiffs also assert that the plaintiff obligors incarcerated by defendants have either, 1) had release or purge amount set based not on their ability to pay, but on other impermissible factors such as the total amount of arrearages owed or arbitrary numbers, or have been held for many days or weeks without having had any release amount set by way of a release amount or by bail.

More specifically, plaintiffs assert the following regarding each plaintiff obligor: 1) plaintiff obligor Devon Square does not have the present ability to pay the $3,500 release amount set by Judge Blackburn, and allegedly no inquiry was made regarding the ability of said plaintiff to pay; 2) plaintiff obligor Criag Williams has not been reviewed since August of 2001 and that his release amount is 8,000 which he cannot pay. Plaintiff obligor James Thompson does not have the present ability to pay the $1,500 release amount set by Judge Blackburn, and allegedly no inquiry was made regarding his ability to pay; 4) plaintiff obligor Cheyanne Johnson, case has not been reviewed since November of 2001, and he remains unable to pay child support arrearages. I'm not going to list all of the parties, but the allegation is the same for all of the plaintiff obligors.

Plaintiff asserts that the obligors who have had their release amounts based not on their ability to pay, but on other impermissible factors, have been deprived of their physical liberty. In addition, plaintiffs assert that if they are incarcerated for a period in excess of 24 hours without having a hearing, they have been deprived of their constitutional rights.

Plaintiffs seek judgment in favor and against the defendants declaring that the constitutional rights of plaintiffs and all of those that are similarly situated have been violated; enjoining the defendant class from establishing a purge or a release amount for plaintiff obligors without first making specific findings based on

substantial and credible evidence that plaintiff obligors have the ability to pay; 3) requiring the defendant class to immediately review all persons now incarcerated in violation of their constitutional rights; 4) requiring defendant class to prospectively review the cases of all plaintiff obligors within 12 hours of their arrest or incarceration, and set an amount -- release amount consistent with the ability of the payor to pay; and for counsel fees and costs.

In addition, plaintiff contends that this is a proper class action suit and should be certified consistent with Rule 4:32-1(a). Plaintiffs allege that the requirements under the rule have been satisfied. Specifically, plaintiffs contend that the standard for establishing the numerosity requirement is traditionally relaxed when seeking injunctive or declaratory relief. According to plaintiffs, the relaxed standard, coupled with the vast number of individuals like said plaintiffs has satisfied the requirement. And, also, the plaintiffs allege that the other requirements set forth in 4:32 have been satisfied.

On January 2nd of 2002, defendants filed a motion to dismiss. In support of the motion, the defendants contend that the allegations that are set forth in the complaint are incorrect and inaccurate. Defendants dispute that the plaintiff obligors were incarcerated for non-payment of child support without first being given an Ability to Pay Hearing. According to the defendants, the plaintiff obligors were incarcerated for their failure to appear at scheduled Ability to Pay Hearings and that they are in on-compliance of the court order. In addition, defendants indicate that purge amount set for plaintiffs release is akin to a fine for their failure to appear, and it is not necessary under the current system for the court to assess an ability to pay.

Defendants further dispute that the defendants Cavanagh and Locascio of Monmouth County were in any way involved in any of the plaintiffs' cases. Apparently, according the defendant, the case of Mr. Cohn was actually presided over by Judge Hayser who, interestingly enough, is now sitting in Mercer.

Defendants also contend that plaintiffs have failed to demonstrate any entitlement to injunctive relief. Defendants submit that plaintiffs have failed to make a preliminary showing of a reasonable probability of success on the merits, and that most of the information contained in the plaintiffs' moving papers are based on incorrect and inaccurate facts.

Lastly, the defendants contend that plaintiffs have failed to establish any entitlement to class certification for either the plaintiff or defendant class. Defendants specifically represent that the plaintiff class are minors and unable to bring such litigation without proper authority, and also that the request for class

certification is premature because of the motion now before the Court to dismiss. Additionally, the defendants assert that the plaintiffs have failed to satisfy the requirements that are set forth in Rule 4:32.

Let me give you some of my tentative thoughts. Number one, there is a process in New Jersey when individuals fail to pay child support. There are a number of cases, Pierce v. Pierce, the Saltzman case that all stand for the proposition that when a defendant fails to pay child support, the court -- the probation department has the authority to initiate an action to enforce litigant's rights, under Rule 1:10-3. They send out a notice directing the obligor to appear in court. That notice is sent by regular and certified mail, and that's consistent with the court rule. Based on the certifications from Ocean, Mercer and Monmouth County, if the court is satisfied that the obligor has received notice -- and I assume that the court reviews the green return receipt card to verify service -- if the court is satisfied that the obligor has received notice and the obligor has not appeared, the court will issue a warrant for the defendant's arrest, not for the -- any other reason other than the fact that obligor has failed to appear. That process is the appropriate process. That is the process defined by court rule, affirmed by a number of court cases, and that's a rule that's been in place for probably well over two decades.

In this particular case, Mr. Davis, who is representing the plaintiffs, allege that the defendants were incarcerated for their failure to pay child support and that the court did not conduct an Ability to Pay Hearing. According to the representation of the State, all of these obligors were arrested and held because they failed to appear at the hearing. I don't really think that's probably in dispute, that they were -- Mr. Davis, you don't dispute that.

MR. DAVIS: No, Judge.

THE COURT: So, we have a situation here where an obligor -- a child support amount has been set -- an obligor has not paid child support, probation department has initiated a 1:10-3 action, and the defendant has failed to appear. The defendant is then arrested. He's arrested, he's held, and brought before the court at various times. In one of the counties -- I don't know if it's Ocean or Monmouth -- the defendant is generally brought before the court the next day. In one of the other counties, the defendant is brought before the court generally within three to four days. So, in two of the counties that are involved -- not Mercer, Ocean and Monmouth -- the hearing on the failure to appear occurs either the next day or within four days. In Mercer County, those hearings on the failure to appear occur apparently twice a month on Thursday. I believe it's either the first and third, or second and fourth Thursday of every month.

I am not satisfied -- and I'm giving you my tentative thoughts -- and certainly these are my tentative thoughts, and certainly counsel should argue because I've been known to change my mind -- I don't think this is a class-action suit under 4:32. These defendants and these plaintiffs, more specifically the plaintiffs, are individuals who have very different facts and very different cases and don't fall within the parameters of 4:32. Second, the process that was followed in all of these cases in terms of brining in an obligor is established both by court rule and by case law, and an individual obligor who feels that their particular case has been handled inappropriately does have a mechanism of appeal. In fact, the plaintiffs apparently have filed appeals in a number of cases. In the Cruz case -- Cruz is not a plaintiff in this action, but Cruz filed an appeal. Mr. Cohn is not a plaintiff in this case, but filed an appeal. Mr. Tolbert is not a plaintiff in this case, but filed an appeal. Mr. Weinstein is not a plaintiff in this case, but filed an appeal. Mr. Logan is a plaintiff in this case and filed an appeal, and Mr. Davis is a plaintiff in this case and filed an appeal.

If a individual obligor feels that an individual judge has not properly conducted a child support enforcement hearing and that the judge has not complied with the standards in Pierce and the clear requirement that there be an Ability to Pay Hearing -- and the court has to make specific findings -- that obligor, like the obligors who have already filed appeals, have the right to initiate an appeal. That decision is a final decision. It's appealable to the Appellate Division, and the obligor has relief available.

I don't think it's my role as judge of the Superior Court -- I am not an Appellate Division judge -- to look at the transcripts of child support hearings and pass on whether a particular judge handled that hearing properly. I would indicate for the record that I have a number of transcripts that were submitted by Mr. Davis -- Poldwalk (phonetic) -- I have that transcript. That individual's not a plaintiff. Mr. Cohn is not a plaintiff. Mr. Vincent is not a plaintiff. Mr. Tolbert is not a plaintiff. Mr. Cruz is not a plaintiff, and Mr. Sweeney. There are some plaintiffs where I do have the transcripts -- of Mr. Leonard, of Devon Square, of James Thompson, of Todd Logan, and of Gary Davis. Mr. Logan filed an appeal and Mr. Davis filed an appeal. So, there are Mr. Leonard, Mr. Square and Mr. Thompson and Mr. Merritt -- I have that transcript -- so, I have four transcripts of four plaintiffs in this case, and I don't believe it's my role to look at those transcripts and to pass on whether or not the judge in those cases properly conducted an Ability to Pay Hearing. It really is an issue for an appellate court, and certainly there have been appeals -- and I'd have to indicate that there are hundreds, perhaps thousands, of child support

hearings conducted throughout the State of New Jersey because of the large number of children who are being supported as a result of a divorce or parents who are not married, living separate and there is child support owed. So, I am not convinced at this point that this is appropriate under 4:32, and I'm not convinced that it's appropriate for me to review the findings of another judge.

The one issue I am concerned about, however -- the one issue that raises some questions to the Court is the issue of when these hearings are held. When a -- and I know what the argument is -- the argument is -- and it's the argument that I would make if I was in the position of the Deputy Attorney General, and Ms. Stoop has made this argument -- that there's a difference, that these are individuals -- actually there's two classes of individuals -- there are those individuals who have failed to appear for their hearing and a warrant has been issued, and Ms. Stoop, the Deputy Attorney General, would argue that that's different than an Ability to Pay Hearing. These are people who have failed to appear in court, and there in a different status. There are also those people who have failed to appear who have warrants on other things, and the position is there's no need to bring that -- there are actually two classes; those people who have failed to appear, and the only reason that they're being held is because of their failure to appear, that's one class. Then there is another class of people who have failed to appear, but they've got warrants against them, and having been a judge long enough I know that, you know, often times when you pick a defendant up and you run him through the computer, there are other things. And, I think the policy has been -- and I don't particularly have any problems with this position -- that if you have a defendant who's been picked up on a Failure to Appear Warrant for failure to pay child support, and that defendant has other warrants, that there's really no urgency to have that obligor brought before the court for a hearing when that defendant's going to be held on other things, and it's probably a criminal matter.

But, I am somewhat troubled by the notion that a person who has failed to appear, and there's nothing else holding that defendant, that if that person would have to wait potentially two weeks to come before the court. I am concerned about that. And, I know that Mr. Davis suggests that the court adopt the standard set forth in Rule 3:4-1 -- I believe that's the rule -- where criminal defendants where bail has not been set are required to come before the court within 12 hours. I'm not convinced that that's the proper standard, 12 hours. But, my sense is that a person who's been picked up on a Failure to Appear Warrant and has no other detainers, that person should be brought before the court within a reasonable period of time. And, my sense is that it probably should be within 72 hours. It probably should be within 72 hours. Now, that's a number I've -- you

could say that I've arbitrarily taken it, but I have given some thought to it particularly in light of the fact that if a person is picked up on Friday that that -- it's impossible to have probation and all the other people available to participate in a hearing over the weekend. It's just logistically -- and because of the failure to appear, I think there is some justification for waiting a certain period of time, and I think 72 hours is probably the right period of time because that encompasses if you pick somebody up on a Friday that the hearing would be on Monday.

So, that's where I am right now. I do have some concerns about not having a hearing for a period of two weeks, and I would indicate that that is apparently the practice in Mercer County. It may very well be the practice in other counties. I don't know whether that is the practice.

And, then there is the issue of review hearings. In other words, once you have a defendant who appears in court on a Failure to Appear Warrant -- you pick him up on a Friday, you bring him to court -- or her, although most of these cases involve men, there certainly are women also who have child support obligations -- when you bring that obligor to court on Monday morning, and then you have an Ability to Pay Hearing, which clearly the Ability to Pay Hearing has to involve a very fact sensitive specific inquiry as to the ability of this obligor to pay, and that's the case law. And, there's an established remedy if an obligor feels that they have not been treated properly. And, I don't even have any problem in the context of an order saying very specifically what the standard is. But, it would seem to me that there should be some sort of standardized review of these cases, and that it probably should be every two weeks because circumstances may change. You may have an obligor who a court decides that they have the ability to pay $1,500 and in two weeks the obligor comes back and says to the judge, judge I've tried hard and I have $1,000. I think there should be some type of a review after two weeks. I don't think that that's unreasonable. And, it's interesting because I did -- I contacted a judge in criminal to find out whether they review bails, you know, how do they review bails in criminal? And, apparently, they don't review the bails unless there's a motion to review bail. But, I think that child support's a little different. I don't know if we need to put the onus on the child support obligor to file a motion. I just think probably there's something to be said for bringing an obligor back in a
two-week period to review his or her status. Economic circumstances change, and I think that's probably an appropriate period of time to review.

So, those are my initial thoughts. I have read every affidavit and every certification. With reference to the four plaintiffs who have not filed appeals to which I

have transcripts for, I would encompass them within the 72 hour review, and those are -- actually I would encompass all of the plaintiffs that have been identified by Mr. Davis -- I think there's ten of them -- who have not filed an appeal -- I would encompass them within the 72 hour review. So, those are my initial thoughts. Mr. Davis?

MR. DAVIS: Judge, taking in order -- initially, Your Honor has indicated that you don't feel this is a -- an appropriate class-action. Well, Your Honor didn't give any reasons. Perhaps I can ask this as a question and then respond. There are requirements of numerosity, technicality, commonality --

THE COURT: But there -- the commonality is really -- every case is fact sensitive, is different. I don't think there is numerosity. You've identified -- there are thousands and thousands of cases every year, and you've extracted or identified a very small number. There's no evidence before the Court that this is something that involves a large number of individuals.

MR. DAVIS: Judge, initially, in a civil rights context, the Third Circuit has certified a class of one when there's a credible allegation that civil rights are being violated, a class of one. Here we have at least ten. Your Honor, each one of these plaintiff's civil rights was violated. That's indisputable because there are reversals from the Appellate Division. I'm not asking you to review the trial court, I'm asking you to see the pattern that is going on, and the pattern is the consistent failure at the Ability to Pay Hearing to make any inquiry into the assets that are available -- any. Your Honor --

THE COURT: The Appellate Division has made a decision in a few cases. There are thousands of cases every year to which there are no appeals.

MR. DAVIS: Judge, the Appellate Division has ruled in 100 percent of the appeals brought, and there are now eight summary reversals from 12 respected appellate judge, all of whom -- at this point, Judge, it's a two-page standard form. If Your Honor looks at the later reversals, they see these coming, they just issue the standard form that says there was no inquiry made in the assets of obligor, the order incarcerating him is, therefore, reversed. Your Honor has copies --

THE COURT: Well, you know, there are cases in civil cases where probably judges have a different opinion about verbal threshold. Do you then join all plaintiffs who have filed lawsuits in the Civil Division who because of judge's perhaps misapplication of the verbal threshold, do you certify that as a class?

MR. DAVIS: Judge, we're not talking about somebody's "right to pursue pain and suffering" from an automobile accident, we're talking about liberty. We're talking about the second most severe punishment outside of death that the State can impose on a person. Every

constitutional protection has to be honored when you're talking about taking somebody's liberty away. Judge, I want to pursue this, but just very quickly, as far as the commonality, I cited case law, Vargas v. Calabrese, 634 F.Supp. 910 from the Third Circuit that says there must be some questions of law or fact in common, some. And, that emphasis -- the, either the bold or the italics, is in the original case. Some -- we don't have to have exact. Obviously, you're not going to have --

THE COURT: The four standards that are articulated in 4:32 and the three other criteria that are specified in the second part of the rule are collective. They're not either, or. You need to have all of them. And, I don't know how you convince the Court that there's numerosity.

MR. DAVIS: Judge, there was 53,000 child support enforcement hearings last year. In a civil rights context as I indicated, a class of one, and I'll provide that case to the Court if it would be helpful. But we have at least ten. We have ten people that sat, some of whom for 45 days, the longest one for 93 days without any kind of review of his child support obligation. That's a person that had I believe four children. Those children were deprived not only of the financial child support that this person could have provided if they had been out and working, they were provided (sic) of the love and companionship that every child's entitled to.

THE COURT: All right. I don't want to hear about the love and companionship; these are also people who blatantly failed to pay child support. But, I'll let the State respond and, if you want reasons, I have a tentative write-up. I'd be happy to set forth the reasons.

MR. DAVIS: Judge, I would ask the Court to more carefully scrutinize the transcripts that were presented. Your Honor indicated that each one of these must include a fact sensitive case-by-case inquiry of the ability to pay. These hearings are 30 seconds each. The transcripts are two pages each.

THE COURT: Yes, but let me ask you this. I've reviewed those transcripts, and I have some concerns about the level of inquiry by the judges. I don't dispute that. But, I'm not an appellate court. I'm not an appellate court. And, I don't know what authority that I have to look at that and say that the judge misapplied the law. As a result -- I mean, because of the concerns by the Court and -- my initial impression is to encompass those individuals within the 72 hour review in order to deal with that, because I don't believe that I have the authority to look at that transcript and say, I am going to reverse the -- I don't have the authority, I'm not an appellate court.

MR. DAVIS: I'm not asking you to, Judge.

THE COURT: I mean -- yes.

MR. DAVIS: I'm very clearly not asking you to.

THE COURT: So, that my thought in terms of how the court deals with what may be potentially a problem is to require that those individuals -- and I have the transcript of four of the plaintiffs. There are certain plaintiffs that you've listed who have not appealed that I don't have the transcript for, but I would include those plaintiffs, as well, within a 72 hour review.

MR. DAVIS: Judge, it sounds like Your Honor's granting relief as to the plaintiff class at least as to one of the areas of relief sought which is a more quick review. Judge, from my own personal knowledge I can represent that in Middlesex they do it every single day that court is in session. Ocean -- different counties do it two or three times. Mercer is among --

THE COURT: That's not before me. I don't have -- I mean --

MR. DAVIS: Your Honor, if I can clarify that the point you have stated several times that you -- you're not an appellate court, and I'm not asking you to be one. What I'm asking you to do is to look at the overwhelming evidence presented before you -- and, Judge, as an officer of the court, this is every transcript I have and every transcript is wrong. I'm asking you to look at the fact that it --

THE COURT: Well, I don't know whether every transcript is wrong. You have appealed a number of cases. There are one, two, three, four, five, six appeals.

MR. DAVIS: Eight, Judge.

THE COURT: Now, there are thousands and thousands of child support hearings every year in the State of New Jersey, and I would suspect that there would be a number of appeals and that there would be a number of individuals who would prevail on appeal. That happens in child support cases. It happens in divorce cases. It happens in termination of rights. It happens in a number of cases.

MR. DAVIS: Judge, in most appeals it's not 100 percent reversal rate. I think the present reversal rate on average is 28 percent.

THE COURT: Yes, but I don't know how many other appeals have been filed. You've given me six appeals where you have prevailed. There may have been hundreds of other appeals where there weren't --

MR. DAVIS: Judge, just for the record, I see my reply brief sitting on the bench, and Your Honor has referred to some of the attachments in the exhibits, but none of the arguments that are contained in the reply brief.

THE COURT: I've read -- well --

MR. DAVIS: I'm sure -- you haven't just -- you haven't referred to them in any way, Judge, and --

THE COURT: I've referred to each and every one. I don't know how far you want me to go.

MR. DAVIS: Okay. Judge --

THE COURT: What other argument do you have? Tell -- give me your best argument on when a person should be

reviewed once they've been picked up on a Failure to Appear Warrant.

MR. DAVIS: Judge, I want to be clear for the record that there's no challenge to the present procedure of picking somebody up who fails to appear who was properly noticed. That's not challenged

THE COURT: All right. So what does the court do? You've got a defendant who has been served. There is proof of service with a green return receipt card, you have a defendant. What's your reaction to the practice of having a review hearing twice a month?

MR. DAVIS: Judge, I would submit that that is long. If the criminal standard of 12 hours, which I understand may not be appropriate, that this person -- there is evidence that they failed to appear -- it's not a criminal standard --

THE COURT: What's your reaction to a 72 hour review hearing?

MR. DAVIS: That would certainly, Judge -- I mean, that's adequate. I believe that that's appropriate especially if you consider -- I would think it should be done every day the court is in session, and that will sometimes necessitate a 72 hour if there's a holiday weekend. But, Judge --

THE COURT: What's your position on once a determination has been made as to brining that obligor back to court?

MR. DAVIS: Judge, the focus of this complaint is what happens at those hearings. They shouldn't be brought back --

THE COURT: Well, you've also asked the Court -- you've also asked the Court to require that there be a hearing within a certain period of time.

MR. DAVIS: That's correct, Judge.

THE COURT: That's one of the things that you're seeking relief on. And, so I'm asking you, what's your position on bringing a obligor back to court every two weeks?

MR. DAVIS: If there is evidence that that person has the ability to pay -- and that's the point that we're going light on here, Judge, that I want to focus on -- if there's evidence that person has the ability to pay, review them every two weeks and see if they have decided that they will write the check. What I'm concerned about, Judge, is the people who are in jail right now who can't write the check, who don't have the money, who don't have the assets who are sitting here on open-ended civil commitments --

THE COURT: But, those individuals can effectuate an appeal.

MR. DAVIS: Judge, how can they effectuate an appeal? That's why this is a class action. I went down to the jail because I was -- I've been retained on eight -- on six cases -- two of these were pro bono -- on six cases

where I went down to the jail and I spoke with the person and I got them out. The last case, who is not a named plaintiff, a man named Ronald Sweeney -- when I went down to the jail to visit him -- they now have all the child support obligors in one area -- and I learned that the system is still the way it was a year and a half ago, which surprised me -- that all of these people are sitting in here. Judge, in the courtroom right now is Todd Logan --

THE COURT: I --

MR. DAVIS: -- and one of the other plaintiffs and, Your Honor, these people were sitting in here with -- $10,000 release amounts. They don't have it, and it's wrong, and it's a violation of their civil rights.

THE COURT: But, they're now out. They filed an appeal, and --

MR. DAVIS: Jude, one of them filed an appeal, Judge, the other one has now put in 60 or 70 days. We could call him to testify if Your Honor wanted to --

THE COURT: I'm not going to take any testimony today.

MR. DAVIS: I understand you don't want to, but these are people that were deprived for their liberty for -- the longest was 93 days. Judge Council stated on the record and it's quoted in our reply brief, "I have people who have sat in jail for six months owing me a few thousand dollars." That's stated by Judge Council, and that is wrong. That is a violation of the civil rights of these people.

THE COURT: I don't have that -- do I have that transcript?

MR. DAVIS: Yes, you -- no, Judge -- yes, you do, Judge. That is Ray Tolbert, and I can tell you that that --

THE COURT: Ray Tolbert -- all right. Don't -- don't -- I have --

MR. DAVIS: I can tell you which exhibit number it is, Judge.

THE COURT: Well, that's -- okay.

MR. DAVIS: Judge, these people have a civil right not to be incarcerated "coercively" if they don't have the ability to pay. And, I'm not asking Your Honor to review any one of these individual -- to sit as a court of review for Judge Hayser or Judge Blackburn or Judge Kelly, but what Your Honor needs to see here is that there is a pattern, and it's an ongoing pattern. Judge, I'm a sole practitioner. I don't have the resources to get a thousand transcripts. What I've presented you, I've testified as an officer of the court, is every transcript I've had. I have yet to see an Ability to Pay Hearing -- no that's not true -- I've seen very few Ability to Pay Hearings where the person had the ability and they were appropriately incarcerated.

THE COURT: Well, you haven't reviewed all the transcripts of the many thousands of child support hearings.

MR. DAVIS: Judge --

THE COURT: All right. I understand your

argument. Let me hear from the other side. React to his -- to Mr. Davis's request for class action certification.

MS. STOOP: Your Honor, obviously, I find it completely inappropriate not only for the reasons that Your Honor has stated, but in reviewing Mr. Davis's reply brief, I realized that Mr. Davis makes a statement at the end, "It is the system that is being challenged, not the character of any of the defendants, named or otherwise." And, the relief that Mr. Davis is seeking -- he's named the wrong -- the wrong defendants, Your Honor. Suing Superior Court judges in order to try to get this system changed, is not appropriate. The Superior Court judges don't establish policy for the judicial system of New Jersey. That is left to the Administrative Office of the Courts, otherwise known as the AOC. If Mr. Davis is looking for a change in the system, he should be suing or bring to court the AOC, not six Superior Court judges.

As you pointed out, in addition, naming six Superior Court judges and throwing out transcripts from a very small number of hearings is inappropriate to support a class action suit. So, not only has he named the wrong defendants, including by the way Judge Locascio and Judge Cavanagh in Monmouth who never even dealt with any of these plaintiffs' incarcerations, he's also trying to bring a class action suit based on an infinitesimal number of cases, which is inappropriate under the requirements of the rule.

THE COURT: Do you know how many child support cases are heard every year in New Jersey?

MS. STOOP: I would hate to even guess, Your Honor.

THE COURT: There's probably at least 30,000, but I don't know that for a fact. But, anyway, go on.

MS. STOOP: So, he's -- number one, he's named the wrong party to try to gain the relief that he is seeking. He is -- has -- he has alleged inadequate hearings, but in reviewing the transcripts that he did supply, I think it's difficult for him to show that every judge is not inquiring because if you look at the transcripts some of the judges do indeed ask about, do you have a job, you know, did you have a job, how long did you work, when did you stop -- this kind of thing. Perhaps Mr. Davis finds that inadequate, but there was not a lack of any kind of inquiry in many of these transcripts as to a person's ability to come up with some kind of payment.

As you had mentioned, Your Honor, just as an aside, the children that he is trying to bring in as plaintiff class is completely inappropriate. Minors are not permitted to bring a lawsuit unless they have some kind of authority or authority figure representing them or looking after their interests. And, this is not present in this case.

That really is basically what I would argue in addition to the arguments Your Honor has already made

regarding the class action.

THE COURT: Now, let me ask you this. You've heard the Court's comments with reference to the concern when an individual is brought back on a failure to appear --

MS. STOOP: Yes.

THE COURT: -- and in trying to structure a time period that might be appropriate, I've come up with this concept of 72 hours and then a two-week review thereafter. What's your reaction to that?

MS. STOOP: Well, my initial reaction, Your Honor, to the two-week review is that it's my understanding that in Mercer County this is what occurs.

THE COURT: They're doing that --

MS. STOOP: They're doing that.

THE COURT: Yes, but not the initial one --

MS. STOOP: No, not the --

THE COURT: I'm concerned about the initial -- right.

MS. STOOP: That's correct. The initial one -- it's my understanding that -- and I have to plead -- I'm just learning this as we go along, Judge --

THE COURT: Okay, but -- right, but there are --

MS. STOOP: -- but, it's my -- oh, I'm sorry.

THE COURT: There are -- are there people here --

MS. STOOP: Yes, Your Honor.

THE COURT: -- from any of the counties? Okay. It's my understanding that people are brought in -- that they do hearings twice a month -- so, if somebody's brought in on a failure to appear and they just had a hearing, that person could sit for another 14 days. That's my understanding.

MS. STOOP: My understanding, Your Honor, may be a little different. My understanding is that on the first -- and I have people out here from probation waiting to answer any questions you might have, Your Honor --

THE COURT: All right. Well, I'd like to know what --

MS. STOOP: It's my understanding that on the first and third Thursdays there are videotaped interviews with people at the jail, and then there are in addition to that official hearings before the court on the second and fourth Thursday of the month.

THE COURT: Right, but they're not seeing a judge potentially for 14 days?

MS. STOOP: That's correct. They would be interviewed by a court official of some kind on the first and --

THE COURT: A probation person, I assume.

MS. STOOP: -- on the first and the third.

THE COURT: Because I know that often times the Probation Department will try to negotiate and try to see if they can resolve the matter.

MS. STOOP: As far as the 72 hour -- as the 72

hour --

THE COURT: Hearing --

MS. STOOP: -- limitation period is concerned, I'm not quite sure how to address that. The -- my problem is that I'm trying to represent three -- at this point, people from three separate counties who do things in three different ways.

THE COURT: In one of the counties, they bring the person in the next day according to the certification.

MR. DAVIS: Middlesex, Judge.

MS. STOOP: I believe that was Middlesex County, Your Honor.

MR. DAVIS: I'm not sure if she had a certification, but I know that in Middlesex they bring them in every day -- every morning that the court --

THE COURT: Okay. Well, I don't have Middlesex. I only have Monmouth, Mercer and Ocean. Those are the only counties that are involved in this. But, here we go, in Ocean County, it's the next business day or the next -- usually the next business day, so that's Ocean. And Monmouth must be -- they say four days. Okay, that's --

MS. STOOP: The only problem I see with --

THE COURT: It's the other way around? Okay, let me see what we've got here. This is Ocean County. This is a little confusion (sic). If the obligor does not pay the purge amount, he or she will remain incarcerated until the next court day, which is usually the next business day. Therefore, the longest possible period of time that an obligor would be incarcerated on his Failure to Appear Warrant is three non-business days.

MS. STOOP: I think they mean like a holiday weekend, Your Honor.

UNIDENTIFIED SPEAKER: That's Ocean.

THE COURT: Yes, that's Ocean.

UNIDENTIFIED SPEAKER: I --

THE COURT: Now, I think -- is Carpenter from Monmouth?

MS. STOOP: Carpenter is from Monmouth County.

THE COURT: Oh, okay, Carpenter is from Monmouth. So, Monmouth is generally one day, and Ocean County -- thank you -- Ocean County is four days, the longest possible period of time, because they review in Ocean Tuesday, Wednesday and Thursday.

MS. STOOP: Yes. The only problem that I see as a possible problem, Your Honor, is the availability of court personnel. As I'm sure you're well aware, Family Court is very, very busy.

THE COURT: Well, but -- yes, I understand that, but that's still no excuse for not -- to have somebody sit in jail for 14 days before being brought before the court. I know the argument that's made is that it's a failure to appear so that they've sort of given up --

MS. STOOP: Right, we waited for them, Your Honor.

They didn't show up.
THE COURT: I understand.
MS. STOOP: We gave them the opportunity to come in and talk to us --
THE COURT: I understand that, but --
MS. STOOP: -- and they thumbed their nose.
THE COURT: Even somebody picked up on a warrant in a criminal case goes before the court before 14 days. It would seem that somebody on a child support should be brought before the court sooner than that, it would seem to me.
MS. STOOP: I guess -- I guess, Your Honor, what I would say would be that I understand Your Honor's concern and that they -- that these obligors be brought within a reasonable period of time. I'm just not sure what the reasonable period of time would be given the --
THE COURT: Well, let me --
MS. STOOP: -- the court situation.
THE COURT: Yes, well, I'm more concerned about the rights of the obligors than I am about the resources of the court because I think that that's a significant issue. My sense is that this may be something that the Family Practice Committee should be taking a look at and making a recommendation to the Supreme Court, and perhaps what the Court should do is set a 72 hour review standard subject to this matter being considered by the Family Practice Committee and recommendations being made to the Supreme Court.
MS. STOOP: May I ask, Your Honor, I just want to make sure that I'm clear. When you're speaking about the 72 hour window, you're addressing that solely to people who are picked up --
THE COURT: Picked up on a warrant.
MS. STOOP: -- only on failure to appear charges --
THE COURT: And only in those --
MS. STOOP: -- and do not have other --
THE COURT: Other -- that's correct, that's correct.
MS. STOOP: My other concern, then, is notification and whether or not the Family Part would be notified in a timely manner.
THE COURT: Well, the jail would just notify the Family Court. That's -- that happens all the time. That happens all the time. You have some people from probation?
MS. STOOP: I do, Your Honor.
THE COURT: I'd like to ask just a couple of questions.
MS. STOOP: May I go and get them, Your Honor?
THE COURT: Yes, please.
(Pause)
MS. STOOP: Your Honor, this is Ms. Nancy Desaw (phonetic).

THE COURT: Yes.
MS. STOOP: -- who's a supervisor of the Bench Warrant Unit and Ms. Cynthia Vanek (phonetic) who is the Assistant Probation Officer in charge of child support enforcement.
THE COURT: All right. I just have a couple questions. Come on up here, and Mr. Davis I'll give you an opportunity to ask any questions that you'd like, as well. I just want to get some information.
MS. STOOP: Where would you like them Your Honor?
THE COURT: They can just come right up here.
MS. STOOP: Thank you, Your Honor.
MR. DAVIS: We have a seat for them, Judge, if they'd like it.
THE COURT: Pardon me?
MR. DAVIS: We have a seat for them if they'd like it. Judge, I would prefer if they're in front of a microphone.
THE COURT: Yes, I'm going to have them sit right here. Ms. Vanek, why don't you go to the microphone right here?
MS. VANEK: Sure.
THE COURT: And, I'm just going to ask you a -- these are just procedural questions.
MS. VANEK: Sure.
THE COURT: I have -- when a defendant -- when an obligor is picked up on a -- let me swear you in first. I don't want to take a lot of testimony, I -- these are just procedural questions, but let me swear you in. Will you raise your right hand?
C Y N T H I A V A N E K, DEFENSE WITNESS, SWORN
N A N C Y D E S A W, DEFENSE WITNESS, SWORN
THE WITNESS: Yes, I do.
THE COURT: And, your full name?
THE WITNESS: Cynthia Vanek.
THE COURT: And, your full name?
THE WITNESS: Nancy Desaw.
EXAMINATION BY THE COURT:
Q Ms. Vanek, you're employed by the Probation Department?
A Yes, I am.
Q And, how long have you been with the Probation Department?
A Twenty-six years.
Q Okay. When an obligor is picked up on a Failure to Appear Warrant and that person is held, it's my understanding that it's -- the hearings are held twice a month before a judge, is that correct?
A That's correct, that's correct.
Q Is that the first and third or second and fourth Thursday?
A Second and fourth Thursday.
Q So, if a defendant were picked up -- if the

hearings were today at let's say nine o'clock in the morning, and an obligor was picked up this afternoon, it's possible that that obligor wouldn't see a judge for 14 days?
A That's correct.
Q Is that correct?
A Um-hum.
Q Okay. And, you have video conferences on the --
A Conferencing --
Q -- first and third Thursday?
A First and third of each month.
Q What does that entail?
A We have an investigator from the bench warrant, they appear and they ask the obligor a series of questions. We have a form here with all the questions on it if you need to know the questions.
Q That's just a dialogue between somebody from probation and the obligor, correct?
AYes.
Q Okay. Now, when the obligor who's picked up this afternoon is not going to have that hearing for two weeks, when that person goes before the judge, that hearing is in the context of why didn't you appear, and then I guess there's a review of their ability to pay the child support amount?
A That's correct.
Q So, it's really two-fold; why didn't you come to court, and then there is, I guess, an Ability to Pay Hearing?
A Um-hum.
Q Is that correct?
A I would say so, yes.
Q Okay. All right. Do you have any questions because she's a -- Ms. Vanek has established what I thought was the case, and just so that you know, my concern is having an obligor sit for two weeks without going before a judge. When that -- let me ask you this -- when the failure to appear person is picked up, and they have that hearing in two weeks, is that person reviewed again two weeks later?
A The obligor is picked up --
Q The obligor is picked up --
A We have the video conferencing before he --
Q Well, let's assume he's picked up, there's a hearing today -- hearings are today. Let's assume that we're having hearings the -- what's the date today -- this is the second Friday of the month?
UNIDENTIFIED SPEAKER: The eleventh.
Q Today's the eleventh. It's the second Friday of the month. Let's assume that in Mercer County you have hearings the second and fourth Friday of the month, and we've now had our hearing for those individuals who were entitled to hearings, but we've picked up somebody this afternoon who failed to appear --
A Um-hum.

Q -- on a requirement to come to court. They're not going to have -- go before a judge for two weeks, correct?
A That's correct.
Q Okay. Now, they're going to have their video conference next week --
A Right.
Q -- with the Probation Department, and the purpose of that is to update information?
A Yes.
Q -- so, that you can then provide information to the court when you go before the judge?
A Correct.
Q Okay. Now, you -- this person's had their hearing two weeks from now, which is the 25th.
A Um-hum.
Q Is that person going to be seen again? When is that person going to be seen again?
A If the person is remanded?
Q Yes.
A In two weeks.
Q In two weeks -- so the first hearing potentially is two weeks, and then the next hearing is two weeks. Okay. And, how do we know whether those people are being reviewed in two weeks? There's a representation that those people are not being reviewed.
A We keep a tracking record of everyone that has appeared in court and if they're remanded. Everything's kept on a data base.
Q Okay. And, are there defendants who are picked up -- excuse me, please -- I don't want -- not you. You're pointing, you're talking -- no talking -- no pointing, no talking. Be seated. Now, I lost where I am.
MR. DAVIS: You were asking about how long they're held with prior -- in between reviews, Judge.
THE COURT: All right, that's right.
Q Now, are there individual obligors who are picked up and have detainers for other things?
A Yes, there are.
Q Okay. And, is there a different standard for review for those individuals?
A Yes, there are.
Q Okay. And, if a person -- if all the other detainers are taken care of, is there a way that you know so you can bring that person to court?
A Yes. The Bench Warrant Supervisor, Nancy Desaw, keeps in close contact with the jail.
Q So, she would know when a person is being released --
A Right.
Q -- or when they're eligible for release?
A Um-hum.
Q Is that correct?
A Definitely, yes.

Q All right. Do you have any questions of Ms. Vanek?
MR. DAVIS: Judge, briefly.
CROSS EXAMINATION BY MR. DAVIS:
Q You indicated that you've worked for Probation for 26 years?
A Um-hum.
THE COURT: You're going to have to say yes or no.
A Oh, I'm sorry. Yes.
Q How long -- what's your capacity been for 26 years, have you been in the same position?
A No. I started as an investigator, promoted to probation officer, to senior probation officer, to supervising probation officer, to assistant chief.
Q Okay. So, you're now the assistant chief?
A Um-hum. In child support, yes.
Q Okay. Now, you've testified that people are reviewed every two weeks?
A That's correct.
Q Let me ask you this. Do you personally attend the hearings for judges -- set release amounts for child support violators?
A Do I personally attend? No, I do not.
Q Okay.
A We have a court liaison that attends the hearings.
Q Okay. Then, what's the basis of your knowledge that they're reviewed every two weeks after they're remanded to the jail?
A The basis of my knowledge is I oversee the entire division, and I meet with my supervisors on a monthly basis, and we go over procedures.
Q So, it's just from a procedural standpoint, it isn't that you see orders in individual cases? That's not within --
A Do I see orders in individual cases? No, I do not.
Q Okay. How many hearings would you estimate have occurred, how many child support enforcement hearings where somebody was remanded to the jail in the -- say in the time that you've been in your present position?
THE COURT: Let's do it on a -- how many child support hearings are held every month?
THE WITNESS: Just for the -- you mean jail cases, correct?
MR. DAVIS: Jail cases.
THE WITNESS: We're speaking of --
THE COURT: No, all enforcement hearings.
THE WITNESS: All enforcement hearings?
THE COURT: All enforcement hearings?
THE WITNESS: There's 350 a month just for enforcement hearings, and then with the jail cases vary. And, they can be --
THE COURT: So, 350 a month, so there's over say about four or 5,000 a year?

THE WITNESS: Um-hum.
THE COURT: Is that correct?
THE WITNESS: Yes, that's correct.
Q And, how many of those are jail cases?
A Jail cases, I'd say approximately about 15 a hearing, so maybe 30 a month. Does that sound correct to you, approximately?
MS. DESAW: In some instances.
A In some instances -- it varies.
MS. DESAW: It varies.
THE COURT: About 30 a month? All right.
THE WITNESS: It varies.
THE COURT: So, maybe 500 a year?
THE WITNESS: Yeah.
THE COURT: Four or 500 a year? All right.
Q In those jail cases, does each of the defendants -- are they asked how much of a release amount can you pay?
A The judge asks --
Q They are asked that?
A I believe so.
MS. DESAW: Excuse me -- yes --
THE COURT: I don't -- no, no. They don't -- they can't testify. She's not at the hearings. How does she know what the judge might -- and I want to go -- my question was about the two weeks. I wanted to verify the two weeks. I don't want to get too far from this.
Q Would you be -- let me ask you one other question before I ask you that one. You said that a data base is maintained by probation?
A Um-hum. That's correct.
Q And, is that a -- do you know whether or not that's a duty that's imposed on probation by statute or by the Administrative Office of the Courts? Who has determined that probation --
A We have prepared that on our own just as a tracking system.
Q And, according to this tracking system somebody is flagged every two weeks and brought back to court if they're being held solely on a child support warrant?
A We try to --
Q Or -- I'm sorry, on an inability to pay a release amount?
A We check our -- yes, we check the cases every two weeks to make sure, you know, if they're still in there, you know, what the status is of the case --
Q And, how many people are --
A -- and update our records.
Q If you know, approximately how many people are in the jail right now as -- who were not able or have not paid the release amount that was set?
A Nancy would know that. I do not know that amount.
THE COURT: I'm not going to allow that. Quite frankly, I called her for a very limited purpose and if you

want to question her with reference to the two weeks or the review that's fine. I don't want to go beyond. I've got a full motion calendar this morning. Do you have any other questions with her with reference to the issues that I raised, with reference to the two weeks and the review?

Q Would you be surprised to hear that Judge Council told somebody that he was going to leave them in for six months if they didn't pay $10,000?

THE COURT: That's absolutely inappropriate to ask this witness that question.

Q Okay. Have you ever heard of the court -- does the court always follow the two-week remand rule, or do judges sometimes set their own?

A No, we follow that.

Q And, you have no knowledge of anybody ever being sent for six months?

A No.

THE COURT: They may have been held, but they've got other detainers?

THE WITNESS: Yes.

Q Without other detainers, with absolutely nothing else holding them?

A Not to my knowledge.

Q How -- what is the longest that you've ever heard of a person being kept in a jail for failure to pay a release amount?

A Six weeks, the longest -- that's what I've heard.

THE COURT: Six weeks? All right.

Q Not 73 days -- you've never heard of --

THE COURT: All right.

MR. DAVIS: I'm sorry, Judge.

THE COURT: Once again, I don't want to go -- all right. Thank you, thank you. All right. Anything else from the attorney general's position?

MS. STOOP: Excuse me.

THE COURT: You were talking about the class. I had asked you about the -- your response to a 72 hour rule that would require probation to bring a person before the court within 72 hours rather than two weeks and having other reviews for two weeks. You've now had the benefit of hearing some review of procedures from Mercer County. Anything you want to add to what you indicated before?

MS. STOOP: No, I don't think so, Your Honor. I think I would just reiterate that a reasonable period, I think, is understandable based on what Your Honor has said. I think it's just a problem determining what a reasonable time period would be based on logistical problems as much as anything else, Your Honor.

THE COURT: All right.

MR. DAVIS: Judge, I would like to briefly close if I have that opportunity?

THE COURT: Sure, absolutely.

MR. DAVIS: First, Judge, if I can inquire -- is

Your Honor certifying the defendant class if you're going to impose the 72 hour rule on judges across the State?

THE COURT: If I impose a 72 hour rule, that certainly would impact Monmouth County, Ocean County, and Mercer County.

MR. DAVIS: Judge, are people in Essex County less worthy or do they have less rights?

THE COURT: Well, to the extent that this -- if I issue a written opinion that's published, it -- I don't know the impact on other counties, quite frankly.

MR. DAVIS: Judge, at least as to class certification, I would ask that Your Honor order that probation produce a list of how many people are presently in the jail. I think that that impacts directly on whether or not there is sufficient numerosity if that's what Your Honor is denying defendant class status on.

THE COURT: You've -- go on.

MS. STOOP: I would object, Your Honor. As I tried to point out earlier, the defendant class cannot be certified because they are not the correct plaintiff -- I mean -- I'm sorry, the correct defendant in this. The named defendants, the five judges who are named here, represent only three counties in the State, and they are not the policy makers for the judicial system in the State of New Jersey. They are inappropriate defendants for the relief that Mr. Davis is seeking.

MR. DAVIS: Judge, if I may very briefly -- there is no --

THE COURT: And all of them had Ability to Pay Hearings. The representation or challenge by counsel is that the judge didn't handle the hearing properly.

MS. STOOP: Correct. He is only challenging the adequacy of --

THE COURT: Of the findings --

MS. STOOP: -- these five judges, and that is far from what is required for a class certification.

MR. DAVIS: Judge, initially, if I can address --

THE COURT: Anything further before --

MR. DAVIS: Yes, Judge, I'll --

THE COURT: I can give you about three minutes, and I've got to move on.

MR. DAVIS: I'll do this as quickly as possible, Judge. I don't want to give the transcriber a nightmare, though. Judges Locascio and Cavanagh did not commit any acts as to the list of plaintiffs that committed the acts as to the plaintiff class. There's transcripts that demonstrate that. As to whether the AOC or the judges are responsible and are the proper defendants, it is -- the duty is on the judges. The duty is on the judiciary to hold these hearings correctly and to not violate the civil rights of the obligors that come before them. Minors, Judge, have civil rights. They can't contract, they can't sue in a contract, but there are plenty of cases all the way up to

the United States Supreme Court -- I'm sorry, I didn't write the cite down -- but the black arm bands during the Vietnam War, that was a case that was brought by minors to the United States Supreme Court in their own name. It's only in a contract action that you have to do it through an adult.

Judge, let me finish -- first of all, I know right now unless they were released yesterday at their hearings, Samuel Tucker and James Pool are two people right now in the jail with multi-thousand dollar release amounts who don't have it. I don't know which judge reviewed them -- I guess I'm going from here to the --

THE COURT: They may have been -- who's to say that the judge didn't properly conduct an Ability to Pay Hearing?

MR. DAVIS: Judge, finally, let me close with this, and I realize it's a loaded statement, if I were to show you a dozen transcripts from around the State where judges were saying to people, you're African-American so I'm going to throw you in jail, how many of those would you need before you would say, this is a violation --

THE COURT: That's totally -- why are you saying that? There's no --

MR. DAVIS: Because it is a violation of civil rights.

THE COURT: But, there's no evidence that that occurred in this case.

MR. DAVIS: Judge --

THE COURT: If you want to argue a particular premise or proposition in this courtroom --

MR. DAVIS: Yes --

THE COURT: for -- in this particular case, don't give me examples that are not part of the record.

MR. DAVIS: Judge, it's a perfect analogy.

THE COURT: It's not a perfect analogy.

MR. DAVIS: I'm not saying that that's what happened, although ten of the 11 plaintiffs do happen to be African-American, that' not what I'm -- the premise that I'm bringing now, that's for a later day. But, what I'm saying, Judge, is if I show you egregious violations of civil rights from the trial court, how many do you need before you decide it's a class action, Judge?

THE COURT: All right. Mr. Davis, thank you. Thank you. All right, let me indicate for the record, I think I'm going to -- I'm sort of tempted to issue an opinion today from the bench, but there have been a number of issues raised, and I think I want to take some time, outline the arguments that have been made, particularly the class. I'm going to give you my tentative thoughts right now.

As I indicated before, I am not satisfied that there's been a proper showing of class certification for a host of reasons. There's no showing, really, of commonality. Each case is fact sensitive and different.

There's not showing of numerosity. There are thousands and thousands of child support hearings every year. The other standards that are articulated in 4:32, I can mention them now, but I've got a whole courtroom of people, and I've got to be done today by 12:30 and it's now a quarter after ten. But in a written opinion I will outline the four factors in 4:32 and the three additional factors that are the second part of the rule because I'm not satisfied that there is a class as to the plaintiff or the defendant.

With reference to the court reviewing these particular cases and making any findings, I have some concerns from some of the transcripts, and as a result of that I think there's some propriety of the Court ordering that the persons who are plaintiffs in these cases who have not filed an appeal because of the question as to whether they had a hearing within 72 hours -- order that those cases be reviewed. I am not going to serve as an Appellate Court in this case.

The one issue that's been raised by counsel that does cause me some concern is the possibility of an obligor who is picked up in Mercer County on a day that hearings have been held, and that person is picked up after these hearings and would have to wait for 14 days. My initial thoughts are that anybody picked up on a Failure to Appear Warrant should go before a judge within 72 hours. That judge should address the issue of the failure to appear and the ability to pay and go through all the standards that are part of established case law under Pierce v. Pierce and Saltzman v. Saltzman, and that those obligors be subject to another review every two weeks that they remain incarcerated. Now, I don't know what other counties do, but my intention would be to write an opinion and to distribute it to counsel and probably submit this for publication because I think it's an issue that's significant enough, that's important enough that every obligor have the right to have a hearing within 72 hours. And, I would also indicate that I will leave the record open until Wednesday, so if either Mr. Davis or Ms. Stoop wants to supplement the record and convince me as to any issue which is before the Court, I will give you until Wednesday. I would generally give you longer, but quite frankly I think it's important to move this matter forward rather than to delay. So, I will give you until Wednesday. My hope would be to issue a written opinion probably on Friday or perhaps the following Monday. All right.

MR. DAVIS: Judge, I want the Court to be aware that I am going to seek emergent review, obviously not now until next Wednesday because it's now become interlocutory -- but before

THE COURT: You can -- you can file whatever relief you want.

MR. DAVIS: I understand, Judge. I just -- I wanted the Court to be aware of that before you wrote a

written opinion that might be subject to --
THE COURT: Mr. Davis, you take whatever action you think is appropriate.
MR. DAVIS: Of course, Judge.
THE COURT: I'm going to make my findings and put them in writing under Rule 1:7-4 --
MR. DAVIS: Thank you, Judge.
THE COURT: If you want to file an appeal or take emergent relief, certainly you have the right to do that.
MR. DAVIS: Of course, Judge.
THE COURT: Thank you.
MS. STOOP: Thank you, Your Honor.

* * * * *

C E R T I F I C A T I O N

I, DENISE M. O'DONNELL, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number CI7-02-LRF, index number from 01 to 4657, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded, to the best of my ability.

_____
DENISE M. O'DONNELL

Approved by:

_____
JOHANNA LiMATO AOC # 179

J&J COURT TRANSCRIBERS, INC. Date: _____

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
MERCER COUNTY, NEW JERSEY
DOCKET NO. FD-11-2011-95

STATE OF NEW JERSEY,	)	
	)	TRANSCRIPT
	)	OF
v.	)	HEARING
	)	
JEFFREY LEONARD,	)	
	)	
Defendant.	)	

Place: Mercer County Civil
Courthouse
175 South Broad Street
Trenton, NJ 08650

Date: November 15, 2001

BEFORE:

HON. AUDREY P. BLACKBURN, J.S.C.

TRANSCRIPT ORDERED BY:

DAVID PERRY DAVIS, ESQ.

APPEARANCES:

JEFFREY LEONARD, Pro Se

ALEX ROTOR, Probation

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Audio Operator, A. Gibson

I N D E X

PAGE

THE COURT:

THE COURT: Mr. Leonard. This is the matter of Docket FD-11-2011-95, the defendant being Jeffrey Leonard, the child in question being Jasmine Leonard born November 19th, 1992, total arrearages, $11,968.12.

There is also Docket FD-03-1611-93. The children in question being Janeil Crawley (phonetic) born February 15th, 1991, and again, Jasmine Leonard, whose birthday is November 19th, 1992. Total arrearages on this account, $9,551.87. Mr. Rotor?

MR. ROTOR: Thank you, Your Honor. In the McClean versus Leonard matter, Mr. Leonard is under a child support obligation to pay $35 per week child support, plus $13 per week arrears. Probation's records of November 6th, 2001 show the most recent payment made on the account was July 13, 2001, $20.81 was paid by wage withholding. The arrears balance of $11,968.12 is split as follows: $8,343.12 is owed to Mary McClean and $3,625 is owed to Mercer County Board of Social Services.

In the Crawley versus Leonard matter, Mr. Leonard is under a child support obligation to pay $100 per week child support, plus $25 per week arrears and Probation records show the most recent payment was July 13th, 2001, $54.19 was paid by wage withholding. The arrears balance of $9,551.87 is split as follows: $4,475.42 is owned to Ernestine Crawley and $5,076.45 is owed to Burlington County Board of Social Services.

This is a remand matter and Mr. Leonard was last heard before Your Honor October 11, 2001. The purge is $1,500 for $750 each case.

THE COURT: Mr. Leonard, what have been the results of your efforts to raise the purge amount?

MR. LEONARD: Your Honor, I was giving my daughter money every week. I just -- me and the mom just don't see eye to eye, that's all. I was taking care of it.

THE COURT: Well, sir, you have monies that were due and owing through Probation and you did not pay it.

MR. LEONARD: To make a long story short, the sooner I get on the street, I can get back to work and take care of my business.

THE COURT: Well, you didn't do it when you were out on the street before. You had a job and you weren't paying child support.

MR. LEONARD: I still have one. I have to get out on the street and get my -- and get it -- and get everything back in (indiscernible) in order for me to take care of this.

THE COURT: Well, sir --

MR. LEONARD: I don't have no money to give this courtroom to get out of here.

THE COURT: Your child didn't have the chance to get a job to take care of herself. The one who was supposed to be taking care of his child and/or children is you and you didn't pay the obligation, sir. So, you were out and you didn't do it. That is the reason that the Court believes that there should be some monies paid before such time as you are released, Mr. Leonard because when you were on the street and had the opportunity to do it, you did not.

The Court is going to reduce the amount of the purge to $250 for each case, making it a total of $500. It must be paid before such time as you're released --

MR. LEONARD: So --

THE COURT: -- Mr. Leonard.

MR. LEONARD: -- so, what am I supposed to do about -- about my job now? When I get out on the street, I'm still not going to have nothing.

THE COURT: Well, Mr. Leonard, your children didn't have anything because you weren't take care of them.

MR. LEONARD: But I can correct that if you let me out on the streets.

THE COURT: Well, sir --

MR. LEONARD: That's the small manage --

THE COURT: -- you're not hearing what I'm saying to you. You haven't heard a word that I've said. When you were out and had the opportunity to do it, you didn't.

MR. LEONARD: But my life don't stop --

THE COURT: The Court is --

MR. LEONARD: -- because I made one mistake.

THE COURT: Sir --
MR. LEONARD: Ain't nobody going -- I'm not --
THE COURT: -- it is going to be necessary --
MR. LEONARD: -- nobody going to --
THE COURT: Sir, it is going to be necessary --
MR. LEONARD: -- (indiscernible) God and I'm not perfect.
THE COURT: Sir. I was certainly not believing that you were perfect. After the $500 is paid, you may be released. You are to report to your probation investigator every week until the entire balance has been paid. If you mist two reportings in a row, a warrant will issue for your arrest.
If you miss two payments in a row after you are released, a warrant is going to issue for your arrest. Do you understand that, sir?
MR. LEONARD: Yes, ma'am.
THE COURT: Thank you.
MR. LEONARD: I'll see you on the 29th.

* * * * *

C E R T I F I C A T I O N

I, JOY K. BRENNAN, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number F-400-01, index from 560 to 899, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded, and to the best of my ability.

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JOY K. BRENNAN AOC #505

J&J COURT TRANSCRIBERS, INC.

Date:_____

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART

MERCER COUNTY, NEW JERSEY
DOCKET NO. FD-11-487-86E

STATE OF NEW JERSEY,	)	
	)	TRANSCRIPT
	)	OF
v.	)	HEARING
	)	
CLEO MERRITT,	)	
	)	
Defendant.	)	

Place: Mercer County Civil Courthouse
175 South Broad Street
Trenton, NJ 08650

Date: November 15, 2001

BEFORE:

HON. AUDREY P. BLACKBURN, J.S.C.

TRANSCRIPT ORDERED BY:

DAVID PERRY DAVIS, ESQ.

APPEARANCES:

CLEO MERRITT, Pro Se

ALEX ROTOR, Probation

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Audio Recorded
Audio Operator, A. Gibson

I N D E X

THE COURT: Mr. Merritt --

MR. MERRITT: Yes, ma'am.

THE COURT: -- first, please. This is the matter of Docket FD-11-487-86. The defendant in this matter being Cleo Merritt. The child in question, Toshanda Merritt (phonetic) born June 9th, 1985, total arrearages $23,379.62. There is also Docket FD-11-487-86E. The child in question, again, being Toshanda Merritt. The arrearages on that account being $1,584. There being a total of $27,963.62. Mr. Rotor?

MR. ROTOR: Thank you, Your Honor. In the first matter, Merritt versus Merritt, Mr. Merritt is under a child support obligation to pay $53 per week child support, plus $25 per week arrears. Probation's records of November 6, 2001 show that in the past 12 months two payments have been made on this account, one on June 26, 2001, $7.22 and the other on June 25th, 2001, $7.97, both paid by income withholding. The arrears balance of $26,379.62 is owed to Mercer County Board of Social Services.

In the Carter versus Merritt matter, Mr. Merritt is under a child support obligation to pay $30 per week arrears. Probation records show that two payments were made in the past 12 months, $2.78 received on June 26, 2001 and $3.07 paid on June 25, 2001, both by income withholding. The arrears balance of $1,584 is owed to Mercer County Board of Social Services.

THE COURT: Mr. Merritt, are you employed?

MR. MERRITT: No, I'm not, Your Honor. I'm on City Welfare.

THE COURT: Why?
MR. MERRITT: Why? Because I'm going through this program called Work First New Jersey and they -- I mean -- and they do help you find a job and that's why I am on there so I can get me a job through the service and I'm --
THE COURT: When was the last time you were employed?
MR. MERRITT: Last -- steadily it was at least about a year and a half ago, but after that I was, like, working, like, temporary jobs here and there, but through this program they do have a job for me that's -- at Steven's Furniture through Welfare Work First.
THE COURT: But when you're employed you weren't paying your child support obligation.
MR. MERRITT: Well --
THE COURT: Why not?
MR. MERRITT: Okay. Like, with my daughter, I would give my mother the money directly from me to her. So, that's why I never went down there, but I was paying -- I mean, I was giving money to my mother from me to her so she can get her what she need to have and the other kids about -- my daughter's mother, she's incarcerated, so I was giving my mother the money that -- I was supposed to give her -- like, to the mother, too, but she was in prison. So, I was giving my mother money every time I got paid.
THE COURT: But, sir, you have this obligation that you were not addressing. Is that correct?
MR. MERRITT: Yes.
THE COURT: Well, this Court believes that it is necessary that there be some payment made before such time as Mr. Merritt is released on these matters. The Court is going to require $500 on each of these accounts to be paid for a total of $1,000 before such time as you are released.
After you are released, you are to report to your probation investigator every week until the entire balance of $27,963.62 has been paid off. If you miss two reportings in a row, sir --
MR. MERRITT: Uh-huh.
THE COURT: -- a warrant is going to issue for your arrest.
MR. MERRITT: Okay.
THE COURT: After you are released, if you miss two payments in a row on either of these accounts, then a warrant is going to issue for your arrest. Do you understand that, sir?
MR. MERRITT: Yes, I do, Your Honor.
THE COURT: Mr. Rotor, what is the name of his probation investigator?
MR. ROTOR: Warren Pay (phonetic), Your Honor.

THE COURT: Thank you. You may be seated, sir.

* * * * *

C E R T I F I C A T I O N

I, JOY K. BRENNAN, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number F-399-01, index from 2364 to 2668, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded, and to the best of my ability.

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Date:_____

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART

MERCER COUNTY, NEW JERSEY
DOCKET NO. FD-11-1215-95

STATE OF NEW JERSEY,	)	
	)	TRANSCRIPT
	)	OF
v.	)	HEARING
	)	
JAMES THOMPSON,	)	
	)	
Defendant.	)	

Place: Mercer County Civil Courthouse
175 South Broad Street
Trenton, NJ 08650

Date: November 15, 2001

BEFORE:

HON. AUDREY P. BLACKBURN, J.S.C.

TRANSCRIPT ORDERED BY:

DAVID PERRY DAVIS, ESQ.

APPEARANCES:

JAMES THOMPSON, Pro Se

ALEX ROTOR, Probation

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Audio Recorded
Audio Operator, A. Gibson

I N D E X

THE COURT: Mr. Thompson. This is the matter of Docket FD-11-1215-95. The plaintiff in this matter being James -- strike that. The defendant being James Thompson. The child in question being Jameer Merchantson (phonetic) born May 20, 1994, total arrearages $11,703.29. There is also Docket FD-11-3947-93. The child in question being Daneen Billingsly (phonetic) born April 9th, 1992, total arrearages $7,710.99 and Docket FD-11-3191. The child in question being Portia Harris (phonetic) born August 30th, 1989, total arrearages, $26,157.78. There being a total of $37,860.38. Mr. Rotor?

MR. ROTOR: Thank you, Your Honor. In the first matter, Merchantson versus Thompson, Mr. Thompson is under a child support obligation to pay $35 per week child support, plus $10 per week arrears. Probation's records of November 6, 2001 show the most recent payment made on this account was on October 10th, 2001. A total of $4 and -- strike that -- oh, that's correct -- $4.71 was paid by wage withholding. The arrears balance is $11,703.29 owed to the Mercer County Board of Social Services.

It should be noted that a wage withholding was active between July 25th, 2001 through October 10th, 2001. The payments were substandard. There is also a gap in payments between March 7th, 2001 through July 25th, 2001.

The arrears balance of $11,703.29 is owed to Mercer County Board of Social Services. In the Glanton versus Thompson matter, Mr. Thompson is under a child support obligation to pay $44 per week child support,

plus $20 per week arrears. Probation's records show the most recent payment made was on October 10th, 2001.

A total of $6.70 was paid by income withholding. There's a similar pattern in terms of pay history on this account to the prior account where payments recently have been coming in through wage withholding, but they were substandard and there was a gap in payments prior to that.

The arrears balance of $7,710.99 is split as follows: $4,431.99 is owed to Ms. Glanton and $3,279.00 is owed to Mercer County Board of Social Services.

And in the Harris versus Thompson matter, Mr Thompson is under a child support obligation to pay $87 per week child support, plus $10 per week arrears. Probation's records of November 6th, 2001 showed the most recent payment made on this account was on October 10th, 2001. There were three payments, one for $3.15 plus $4.78 plus $2.21 paid by wage withholding and again a similar pay pattern to the other two cases. The arrears balance is of $26,157.78 is split as follows: $11,606.04 is owed to Ms. Harris, the plaintiff and $14,551.74 is owed to Mercer County Board of Social Services.

THE COURT: Mr. Thompson?

MR. THOMPSON: Yes.

THE COURT: How did you get so far behind in your child support obligations?

MR. THOMPSON: I was incarcerated for 60 months, from '92 to '98, almost for drug possession, assault with a weapon.

THE COURT: Okay. And you've been out for three years?

MR. THOMPSON: Yes.

THE COURT: And your child support obligations have not lessened. Are you employed?

MR. THOMPSON: Not now, ma'am. Since I've been incarcerated September the 28th, I lost my jobs. I've been incarcerated a month and a half now.

THE COURT: How long were you employed at your last place of employment?

MR. THOMPSON: Well (indiscernible) -- Judge Foster was getting -- taking -- ordered me to get another job so I was there that October and I started my second job in June or July.

THE COURT: Well, sir, the payments that you have been making for child support $1.46.

MR. THOMPSON: I --

THE COURT: That doesn't even buy a Happy Meal.

MR. THOMPSON: -- I wasn't seeing it -- I wasn't -- it was being taken out. I was -- out of the two checks that I was --

THE COURT: But, sir, you saw how much was being taken out.

MR. THOMPSON: But what --
THE COURT: And certainly you knew that it was less than your obligation.
MR. THOMPSON: Miss -- Judge Blackburn, when I received the two checks after they take out -- it don't even be $100. I couldn't even help my wife pay a bill after they was -- after my money was being tooken [sic] out. I wasn't bringing home $100 out of two checks and this is working two jobs.
THE COURT: Well, sir, you -- there must have been other obligations because your child support obligations were $1.46 for one account, $5.40 for the other account and $2.09 for the other account.
MR. THOMPSON: And during my --
THE COURT: That's $7.95 that they took out of your pay check.
MR. THOMPSON: -- and during the time that I was unemployed, they was taking that. That was being took and that was $180 every week. That was being took. I didn't even see that. What I was getting was a receipt and that was it. A stub, rather.
THE COURT: Well, they certainly were not taking it for child support obligations. The most that I see that has been paid on any of the child support obligations was $16 on one, $20 on the other one and certainly just -- they just don't add up, sir.
This Court finds that it is necessary that there be payments made on these accounts before such time as you are released. The -- because you have been making exceedingly minimal payments, but they have been minimal payments.
The Court is going to require that there be $500 paid on each of the accounts for a total of $1,500. After that is paid, you may be released. You are to report then to your probation investigator every week until such time that the entire balance of $37,860.38 has been paid. If you miss two reportings to your probation investigator in a row, a warrant is going to issue for your arrest. If you miss two payments on any of these accounts after your release, a warrant's going to issue for your arrest.
The name of his investigator, please?
MR. ROTOR: It's Kelly Hayes (phonetic), Your Honor.
THE COURT: Thank you. You may be seated, sir.

* * * * *

C E R T I F I C A T I O N

I, JOY K. BRENNAN, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number F-399-01, index from 1300 to 1911, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the

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Date:_____

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART

MERCER COUNTY, NEW JERSEY
DOCKET NO. FD-11-502-01

STATE OF NEW JERSEY,	)	
	)	TRANSCRIPT
	)	OF
v.	)	HEARING
	)	
DEVIN SQUARE,	)	
	)	
Defendant.	)	

Place: Mercer County Civil Courthouse
175 South Broad Street
Trenton, NJ 08650

Date: November 15, 2001

BEFORE:

HON. AUDREY P. BLACKBURN, J.S.C.

TRANSCRIPT ORDERED BY:

DAVID PERRY DAVIS, ESQ.

APPEARANCES:

DEVIN SQUARE, Pro Se

ALEX ROTOR, Probation

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Audio Operator, A. Gibson

I N D E X

PAGE

THE COURT: This is the matter of Docket FD-11-502-01, the defendant in this matter being Devin Square.

MR. SQUARE: Yes.

THE COURT: The child in question being Dominique Jones born July 17th, 1999.

MR. SQUARE: Yes.

THE COURT: There are a total of arrearages due and owing of $3,380. Mr. Rotor?

MR. ROTOR: Thank you, Your Honor. Mr. Square is under a child support obligation to pay $52 per week child support, plus $20 per week arrears. Probation's records of November 6th, 2001 show that no payments have been made on this account since it was established on Probation's records in November of 2000. The arrears balance of $3,380 is owed to Natalie Jones.

THE COURT: Mr. Square, why are you not paying your support obligations?

MR. SQUARE: Well, first, Your Honor, I was incarcerated.

THE COURT: When were you incarcerated?

MR. SQUARE: Like a year and a half ago. I don't know the date.

THE COURT: I can't hear you.

MR. SQUARE: I don't know the date, but I -- been --

THE COURT: Well, when did you get --

MR. SQUARE: -- it's been a while.

THE COURT: When did you get out?
MR. SQUARE: Like, April -- April.
THE COURT: April of this year?
MR. SQUARE: No.
THE COURT: April of 2000?
MR. SQUARE: Yes.
THE COURT: Okay. When did you go in? Did -- did you go --
MR. SQUARE: It was -- I did two months, so that would be April --
THE COURT: So, you were only incarcerated for two months?
MR. SQUARE: Yes. Then I went to a program -- a drug program.
THE COURT: Okay. How long were you in the drug program?
MR. SQUARE: A 28 day program.
THE COURT: Oh, so that's another -- that makes three months.
MR. SQUARE: Yes.
THE COURT: So, that ended in June --
MR. SQUARE: Yes.
THE COURT: -- 2000?
MR. SQUARE: Yes.
THE COURT: About.
MR. SQUARE: Yes. But then again, I'm -- Your Honor, I was -- well, after that, my mother didn't want to put up with me no more after that so I was homeless for a while, so I resided at the Rescue Mission then I got on City Welfare.
THE COURT: And how old are you, Mr. Square?
MR. SQUARE: Ma'am, I'm 32.
THE COURT: Your mother doesn't need to put up with you any more.
MR. SQUARE: I know.
THE COURT: It's long since past the time that you left your mother's house.
MR. SQUARE: Right.
THE COURT: What do you think your child was doing all this time?
MR. SQUARE: I know, Your Honor.
THE COURT: He didn't have a option to go in and get a job to take care of himself did he?
MR. SQUARE: No, sir. No, ma'am.
THE COURT: He was depending on you to do it.
MR. SQUARE: Yes, ma'am.
THE COURT: The Court's going to require a lump sum payment of $500 before such time as you are released. After you're released, you're to report to your probation investigator every week until such time as the balance of $3,380 is paid.
If you miss two reportings to your probation investigator, a warrant's going to issue for your arrest, okay? If you miss two payments in a row, after you are released, a warrant's going to issue for your

arrest. Do you understand that?

MR. SQUARE: Yes, ma'am.

THE COURT: The name of his investigator, please?

MR. ROTOR: Is Kelly Hayes (phonetic), Your Honor.

THE COURT: Thank you. Thank you, Mr. Square.

MR. SQUARE: Thank you.

* * * * *

C E R T I F I C A T I O N

I, JOY K. BRENNAN, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number F-399-01, index from 2913 to 3144, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded, and to the best of my ability.

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Date:_____

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART

MERCER COUNTY, NEW JERSEY
DOCKET NO. FD-11-1483-86

STATE OF NEW JERSEY,	)	
	)	TRANSCRIPT
	)	OF
v.	)	HEARING
	)	
GARY DAVIS,	)	
	)	
Defendant.	)	

Place: Mercer County Civil Courthouse
175 South Broad Street
Trenton, NJ 08650

Date: November 15, 2001

BEFORE:

HON. AUDREY P. BLACKBURN, J.S.C.

TRANSCRIPT ORDERED BY:

DAVID PERRY DAVIS, ESQ.

APPEARANCES:

GARY DAVIS, Pro Se

ALEX ROTOR, Probation

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Audio Recorded
Audio Operator, A. Gibson

I N D E X

THE COURT: Gary Edwards, is that correct?
MR. DAVIS: Davis.
THE COURT: Oh, Davis. That's why I can't find his -- thank you. Thanks. Now, Mr. Davis -- this is the matter of Docket FD-11-1483-86, the defendant being Gary Davis, the child in question, Anthony Littlejohn (phonetic) born June 25th, 1984, total arrearages, $21,898.15. There is also Docket FD-11-788-87, the defendant being Gary Davis, the children in question being Natanya Jennings (phonetic) born December 4th, 1977, Gary Jennings (phonetic) born on October 24th, 1978, Darvis Jennings (phonetic) born December 27th, 1979 and Ricky Davis (phonetic) born July 5th, 1981, total arrearages $22,220.04. Mr. Rotor?
MR. ROTOR: Thank you, Your Honor. In the Ellerbee (phonetic) versus Davis matter, Mr. Davis is under a child support obligation to pay $92 per week child support, plus $63 per week arrears. Probation's records of November 6, 2001 show the most recent payment date was July 20th, 2000. The arrears balance of $21,898.15 is split as follows: $19,495.15 is owed to Patty Ellerbee and $2,403 is owed to Mercer County Board of Social Services.
In the Wilkerson (phonetic) versus Davis matter, Mr. Davis is under a child support obligation to pay $20 per week child support, plus $10 per week arrears. The most recent payment date indicated was July 20, 2000. The arrears balance of $22,220.04 is split as follows: $20,269.04 is owed to Mercer County Board of Social Services and $1,951 is owed to Ms. Wilkerson, the plaintiff.
THE COURT: Thank you, Mr. Rotor. Are you employed Mr. Davis?
MR. DAVIS: Yes, ma'am. I was as of September 28 when I got arrested.
THE COURT: So, why were you not --
MR. DAVIS: Then I worked through a hiring hall 595 -- it's a local --
THE COURT: So, why weren't you paying child support?
MR. DAVIS: I paid. And I --
THE COURT: Not according to the records here, sir.
MR. DAVIS: See, number one, my kids, they come up and told me that don't give my mom that money because we don't get it. I was taking care of my kids out of my pocket. When they needed something, I went and took care of them and not that I was trying to disregard the Court Order, but that's what I was doing.
THE COURT: Well, sir, you see --
MR. DAVIS: I understand that.
THE COURT: -- you see where --
MR. DAVIS: I --

THE COURT: -- it landed you.
MR. DAVIS: -- I take the (indiscernible) because me and my kids, we are together right now.
THE COURT: Well, sir, no you're not together right now.
MR. DAVIS: I mean not right now, but we live together --
THE COURT: I don't see any of your children sitting over there in that --
MR. DAVIS: Yes, ma'am.
THE COURT: -- in this courtroom --
MR. DAVIS: I understand.
THE COURT: -- and I see you sitting over there --
MR. DAVIS: Not just now --
THE COURT: -- in an orange jumpsuit.
MR. DAVIS: -- but I'm saying we live together.
THE COURT: Well, sir?
MR. DAVIS: Yes, ma'am
THE COURT: You owe $44,118.19 in arrearages.
MR. DAVIS: Yes, ma'am.
THE COURT: For the support of your children and when you were employed you weren't paying. You weren't paying on these obligations. On the one account the monies are owed to the Mercer County Board of Social Services that were taking care of your children. Over $20,000. You did not have the option of not to pay, sir.
This is Court is going to require that there be a lump sum payment of $1,000 on each of these cases paid before such time as you are released. After you are released, you are to report to your probation investigator every week until the entire balance of $44,118.19 is paid.
If you miss two payments in a row after the -- after you are released, then a warrant's going to issue for your arrest. Do you understand that, sir?
MR. DAVIS: Yes, ma'am.
THE COURT: The name of his probation investigator, Mr. Rotor?
MR. ROTOR: Is Matthew Crinsley (phonetic) to my right, Your Honor.
THE COURT: Thank you. You may be seated, sir.

* * * * *

C E R T I F I C A T I O N

I, JOY K. BRENNAN, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number F-399-01, index from 1911 to 2202, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded, and to the best of my ability.

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JOY K. BRENNAN AOC #505

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January 9, 2002

Hon. Linda R. Feinberg, A.J.S.C.
Superior Court of New Jersey
175 South Broad Street
Trenton, NJ 08650-0068

Re: Leonard, et al v. Blackburn, et al
Docket No. MER-L-3761-01

Dear Judge Feinberg:

Please accept this letter brief in lieu of a more formal submission in reply to the opposition filed in this matter and in further support for plaintiffs' application for class certification and a preliminary injunction.

PRELIMINARY STATEMENT

Defendants' first and primary argument rests on the untenable proposition that the majority of the named plaintiffs in this matter were arrested and detained for months on end as a result of their failure to appear, not as a result of their inability to pay the release amounts set by the Court.

This claim flies in the face of the six summary appellate reversals[18] that were provided with plaintiffs' Order to Show Cause and are in direct contradiction to the transcripts of the hearings, attached hereto.

It is both admitted and irrelevant that the majority of the plaintiffs were initially arrested as a result of their failure

[18] During the pendency of this Order to Show Cause, two more reversals were handed down by the Appellate Division after Hon. Thomas P. Kelly, J.S.C. ordered that two of the named plaintiffs remain incarcerated (*See* Transcripts of hearings attached as Exhibits E & F, Summary reversals attached as Exhibits V & W).

to appear. Plaintiffs have not claimed an illegal arrest was involved. In fact, the only claim relating to the time spent in jail between arrest (for whatever reason) and review before a Family Part judge is that plaintiff's constitutional rights are being violated when, for example, it takes seventy-one (71) days from the time of arrest until their first review.[19] A criminal defendant is entitled to review and at least a preliminary bail within 12 hours of arrest. R. 3:4-1(2). By contrast, child support detainees have been held for as long as 93 days without having any review of whether their incarceration continues to serve a legitimate coercive goal.[20]

[19] As of December 5, 2001, there were five known obligors who had been held for periods in excess of 40 days without any type of review (Craig Williams - 93 days, Jeffrey Jones - 61 days, Todd Logan - 51 days, David Chavis - 40 days, Cheyanne Johnson - 22 days). Again, these are only the known cases, from one county.

[20] Counties vary widely on this issue. In Middlesex persons incarcerated for child support (or failing to appear for a child support hearing) are reviewed every day that court is in session. Other counties have reviews two (Ocean) or three (Somerset) times per week. Other counties schedule reviews every 30-60 days.

Defendants' legal arguments, claims and the contents of the supporting certifications from the probation department are unsupported by *any* cited legal authority and are at best confusing. Under the system defendants appear to be alleging is in place, when an obligor is arrested for failing to appear for an enforcement hearing, a purge amount is set and the obligor is held indefinitely (subject to review "every two weeks"[21]). No explanation of the factors allegedly used to determine the "purge" amount is provided. If this is a bail, the factors pursuant to State v. Johnson, 61 N.J. 351 (1972) must be applied. If it is a coercive incarceration, the amount must be tied to the ability of the obligor to pay. There is no other form of constitutionally permissible incarceration in New Jersey. Defendants' attempt to create some mysterious new form of constitutionally permissible incarceration based on a failure to appear is invalid on its face. Defendants provide absolutely no support for the assertion that the Constitution, the provisions of R. 1:10-3 and all the supporting caselaw completely vanish when a litigant is arrested for failing to appear. Failure to appear can be prosecuted as criminal contempt and is a legitimate factor to be considered when setting a bail. State v. Johnson, 61 N.J. at 354. It is not a legitimate factor when establishing the amount required to purge a contempt order and cannot justify the system defendants seem to assert is in place.

Moreover, the remedies available to the Court when a litigant is adjudged to be in contempt as a result of a failure to appear are very specifically enumerated in R. 1:2-4 (a). In spite of the case law provided with plaintiffs' original application and in spite of the ongoing series of summary reversals, defendants inexplicably continue to assert that a purge amount can be legitimately established, during a court appearance with the obligor present,[22] without tying the release amount to the ability of the obligor to pay same. This issue is well settled and has been discussed at length in volumes of case law dating back to the origins of our system of jurisprudence. *See, e.g.,* Nussbaum v. Hetzer, 1 N.J. 171(1948), Lathrop v. Lathrop, 57 N.J.Super. 532 (App.Div. 1959) ("Effect should be

[21] Both this statement and the claim that the obligors are not held as a result of their failure to pay child support is contradicted by every transcript. By way of one example only, these claims are diametrically opposed to the Court's statement during the ability to pay hearing in Brookins v. Tolbert:

> THE COURT: I have people who have sat for six months for owing seven and $8000... (Exhibit L, Page 5, Lines 13-14).

[22] There appears to be a conflict between the certifications submitted by defendants and their brief. In the certifications, it appears (with the notable exception of Ocean County) that the "failure to appear" purge amount is set at the time of the execution of the warrant following an obligor's nonappearance. This purge amount is established without the obligor present and therefore is not tied to the ability of the obligor to pay. This procedure is not challenged herein. Defendants' brief, however, states "the obligor would appear before a judge to have the purge amount set. If the Obligor does not pay the purge amount, he or she would remain incarcerated" (Brief at counter statement of facts, paragraph 2).

given to the saying . . . that he who is guilty of civil contempt has the keys of his prison in his own pocket."), Ex Parte Clark, 20 N.J.L. 648, 45 Am.Dec. 394 (1894).

The remedies a court may impose on a litigant to purge themselves of contempt do not include the system of imprisonment "without regard to the ability to comply" that defendants seem to claim exists.

A purge amount established at "full arrears" is permissible only during what should be the very brief period between arrest and appearance at the first ability to pay hearing.

Amazingly, Ms. VanEk and Ms. DeSaw certify (the "Mercer Certification") in paragraph nine that "none of the Mercer Plaintiffs was incarcerated for failure to pay child support." This completely specious claim is directly contradicted by the transcripts of the proceedings involving the Mercer Plaintiffs and cannot be described as having been made in good faith. It is a complete inversion of what is occurring.

Exhibit D is the November 15, 2001 appearance of named plaintiff Gary Davis, before Hon. Audrey P. Blackburn, JSC. In direct contradiction to the claims made in the Mercer Certification, Mr. Davis was incarcerated on September 28 - far more than "two weeks" prior to November 15. At the hearing, he was jailed as a result of his failure to pay child support. A $1,000 release amount was set without any inquiry whatsoever into Mr. Davis' ability to pay same. *See Exhibit D at Page 6.* Exhibit E is Mr. Davis' second court appearance, on December 14, 2001 (again, far more than the claimed "two weeks" elapsed between hearings). On this date, Mr. Davis appeared before Hon. Thomas P. Kelly, JSC, and was again incarcerated as a result of his failure to pay child support and, once again, the Court set a release amount without any evidence Mr. Davis had the ability to pay same. *See Exhibit E at 7.* Not incidentally, Mr. Davis is the father of five children, all of whom were deprived of his non-financial child support during the nearly 90 days he spent in jail, unable to secure his release.[23] The Court's December 14 Order jailing Mr. Davis was summarily reversed upon an emergent application to the Appellate Division. *See Exhibit W.*

Exhibit F is the December 14, 2001 appearance of Todd Logan. He had been arrested on October 9. The trial court set a release amount without inquiring into his ability to pay same (*See Exhibit F)* and was summarily reversed on December 20.

Exhibit G is the November 15, 2001 ability to pay hearing of named plaintiff Jeffrey Leonard. The transcript indicates he had last been reviewed on October 11 - again far more than the claimed "two weeks" (*See Exhibit G at Page 4, Line 4*). A release amount was set without any inquiry into his ability to pay same (*See Exhibit G at Page 6*).

The remainder of the transcripts (all transcripts, from Ocean, Mercer and Monmouth Counties[24]) and the summary reversals tell the same story. It cannot in good faith be represented to this Court that these people were kept in jail for "failing to appear." They may originally have been arrested for this

[23] See Affidavit of Gary J. Davis submitted with Order to Show Cause.

[24] Additional transcripts, from Atlantic, Bergen, Burlington, Cape May and Essex Counties are being ordered and should be available within two weeks.

reason, but the subsequent ability to pay hearings were Constitutionally and legally inadequate.

The Monmouth County Probation Department's certification is also inaccurate. The attached transcripts and summary reversals contradict the bad faith claim that no one is incarcerated as a result of a failure to pay child support. The transcripts of Mr. Cohen's hearing also proves that he did not, as directly claimed in the certification, fail to appear. He was in fact incarcerated as a result of his failure to pay child support. The transcript of his court appearance is attached hereto as Exhibit A.

The Certification from Michelle Tierney of Ocean County (received at 11:14 a.m. Wednesday, January 9, 2002, and requiring the reprinting of this brief) is the only certification that honestly recounts the system now in place. At paragraph two, the affiant crossed out the words supplied by the certification's author and corrected same to reflect the truth:

2. ... a child support obligor .... is summoned to court to explain ... why payments have not been made. It is at this time that a determination of an obligor's ability to pay be ~~is~~ may be made. The obligor ~~is~~ may be given the opportunity at this hearing to present evidence ... ***If a legitimate inability to pay is demonstrated, the Obligor ~~would~~ may not be incarcerated*** but rather some accommodation ~~would~~ may be fashioned to fit the situation. (The Court should note the initials of the affiant next to each change. Emphasis added.)

Each and every transcript (Exhibits A-P) verifies that the inconsistent and unconstitutional process now admitted to by Ocean County is in fact ongoing throughout the state. Each transcript demonstrates a judge setting a purge amount based on two impermissible factors: the payment history of the obligor and the total arrears owed, and in every case the trial court makes no inquiry into whether the obligor has assets available to pay the purge amount set. In the transcripts attached hereto, not once does a judge indicate that the purge amount is being set based on the obligor's failure to appear.

Defendants' claim, even if true, would provide no defense.

The record unequivocally demonstrates that plaintiffs have been held under allegedly coercive incarcerations as a result of trial courts' failure to make the required findings that plaintiffs have the current ability to pay whatever release amount is set, thereby legitimatizing a "coercive" incarceration. This is not an "allegation." The enclosed transcripts and summary reversals, which the Court can take judicial notice of, establish this as an indisputable fact.

Defendants' next point claims that plaintiffs "have been incarcerated for ... their failure to comply with a court order issued after their ability to pay had already been determined." This precise argument - that a sufficient determination of "ability to pay"; is made when a child support obligation is imposed (or a request to reduce same is denied) - has been soundly rejected by the Appellate Division. The law is clear that there must be a <u>contemporaneous</u> finding of an ability to

pay to justify a "coercive" incarceration. *See, e.g.*, R. 1:10-3 and commentary, Acceturo v. Acceturo, 242 N.J. Super. 281, 287 (App.Div.), certif. denied, 127 N.J. 324 (1990). A finding that a litigant has not shown changed circumstances sufficient to warrant modification of an Order is not synonymous - and cannot replace - a finding that the litigant has the current ability to pay a release amount set by the Court. See also Bachman v. Cohen.[25]

Next, defendants claim "if a legitimate inability to pay is demonstrated, the Obligor would not be incarcerated but rather some method of payment appropriate to the situation would be ordered."[26] In fact, R. 1:10-3 explicitly requires that, prior to the incarceration of a litigant for a Family Part obligation, the obligee (or the probation department as the assignee of the obligee) must "demonstrate to the court that the judgment debtor has assets that have been secreted or otherwise placed beyond the reach of execution." In contrast to defendants' assertion, there is no burden on the obligor to show an inability to pay. Before the extreme relief of depriving a citizen of his or her liberty can be justified, the burden is rightly on the obligee to demonstrate to the Court that assets exist justifying a coercive incarceration. The transcripts and reversals demonstrate that defendants routinely do not make any findings as to the ability of the obligor to pay the release amounts set.

At least on a provisional basis, the classes should be certified. The injunctive relief sought in plaintiffs' order to show cause should be granted forthwith.

REPLY TO COUNTER-STATEMENT OF FACTS

1. Defendants claim that, at an enforcement hearing, a hearing officer or judge, upon a finding of an inability to pay, can modify a child support order. This is procedurally and legally incorrect. Procedurally, enforcement and modification are separate and distinct issues and an application to modify must be brought separately. *See* R. 1:10-3, 5:7-5. Legally, the standard applied on an application to modify support is not "an inability to pay," it is "a substantial change in circumstances warranting modification" of the obligation. Lepis v. Lepis, 83 N.J. 139, 154 (1980).

2. The second half of defendants' #2 is true and contradicts the first defense raised. Defendants state:

> Again, the obligor would appear before a judge to have the purge amount set. If the Obligor does not pay the "purge" amount, he or she would remain incarcerated until the next scheduled ability to pay hearings or hearings for review are conducted.

This is the heart of the application before this Court. Nowhere do defendants claim that an inquiry is made into the ability to pay of the obligor during their appearance before a judge. Again - plaintiffs admit that the arrests are justified; they have never challenged same. The challenge is to (1) the time period between arrest and review and (2) the failure of the court to make contemporaneous findings of a current ability to pay before setting a "purge" amount and imposing or continuing a

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[25] Exhibit R. Please see pages three through six for a detailed discussion of this issue citing to published case law.

[26] Defendants' brief at page three, top paragraph.

coercive incarceration.

3. Plaintiffs agree that obligors may be arrested on other matters and held prior to their review in Family Court on a child support warrant (or detainer). The reply made to paragraph 2 applies equally here.

4. The purge amount is neither "bail" nor a "fine," both of which are criminal law terms. Again, if defendants are implying that plaintiffs are being held as a result of a criminal offense, plaintiffs' constitutional rights as criminal defendants have been completely ignored.

The "purge" amount is more akin to ransom (albeit a legitimate ransom when the obligor has the ability to pay it) than "bail" or a "fine." It is the required payment toward arrears that will result in a litigant having their liberty returned. The money is not "not returned", which implies it is retained by the entity to which it is paid (the state). In fact, it is turned over either to the custodial parent or the county Board of Social Services.

5. It is agreed that an initial purge amount set at the time of the issuance of a warrant for failure to appear can be any amount up to the full arrears owed. Again, this is not the issue. The issue is how long plaintiffs are held prior to review and what happens at the review hearing(s). Defendants acknowledge in paragraph five that the plaintiffs are incarcerated for "failure to comply with a court order" yet they again ignore the issue - that incarceration for such failure is only legitimate if the obligor has the ability to comply with said order.

Defendants appear to be alleging that once a litigant does not show up for an enforcement hearing, they lose all their constitutional rights and are no longer entitled to the protection of any law whatsoever: Not charged with a crime, they have no right to counsel nor to bail. Not being held "coercively" (as a result of failure to pay support), they are not entitled to the protection of R. 1:10-3 that a current ability to pay be shown. Under defendants' declaration of the facts, a person could conceivably spend life without the possibility of parole in jail for a single missed enforcement hearing.

6. Again, defendants' factual allegations as to the reason for plaintiffs' initial arrest are generally correct and, more importantly, they are completely irrelevant. Not all the named plaintiffs (and certainly not all members of the plaintiff class) were arrested for failing to appear. Named plaintiff Ronald Cohen walked into a child support hearing and left in handcuffs. He did not fail to appear (Exhibit A). Jeffrey Jones was arrested under a child support warrant; he did not fail to appear.

As to the other named plaintiffs, defendants curiously state plaintiffs were arrested "... for failing to comply with a court Order, not for non-payment of child support." The court orders at issue require the payment of child support. It was by the nonpayment or underpayment of support that the Order was violated.

7. In their paragraph seven, defendants again confuse an enforcement proceeding with a modification proceeding. Moreover, it is untrue that "none of the plaintiffs petitioned

for a change in their child support amount or voluntarily came to court to explain why their payments were not being made." Plaintiff Ronald Cohen did exactly that, and the vast majority of plaintiffs desperately attempted to explain their nonpayment at the enforcement hearing where they were incarcerated.

8. Defendants repetitively state (including in their paragraph 8) that "no Obligor is incarcerated for non-payment of child support without first having an ability to pay hearing." Again, this is not the issue at hand. The issue is what occurs at said "ability to pay" hearings; no findings are made, and in fact no inquiry is made, into the ability of the obligor to pay the release amount set. The resulting incarcerations are therefore improper (see transcripts, summary reversals).

9. Each of the defendants committed the acts alleged in the complaint. That is, each has conducted ability to pay hearings and has incarcerated members of the plaintiff class (whether named or otherwise) without making the required findings.

Most importantly, plaintiffs do not claim that defendants "are guilty of wrong-doing" and this inflammatory language is inappropriate. "Guilty" is a term applicable to criminal law and there has never been any allegation but that each member of the defendant class has at all times acted with complete integrity in the performance of their judicial duties. It is the system that is being challenged, not the character of any of the defendants, named or otherwise.

ARGUMENT

Point I

DEFENDANTS' MOTION TO DISMISS PURSUANT TO R. 4:5-2 MUST BE DENIED.

Initially, this issue is not properly before the Court. Pursuant to R. 1:6-3(b), a cross application can only be listed for hearing if it relates to the subject matter of the original motion. This issue is outside the scope of the order to show cause and therefore should not be considered.

Substantively, when ruling on a motion to dismiss, all fact questions are resolved in favor of the non-moving party. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995), Horby v. King, 13 N.J.Super. 395 (Law Div.1951).

However, even if the burden was on plaintiffs to prove their case at this early stage of the proceedings, that burden has been met and exceeded.

Throughout their pleadings, defendants make conclusory and unsupported factual allegations. They provide certifications which are (1) not evidential and (2) in direct contradiction to the contents of the transcripts attached hereto. Outside these inadmissible documents, they provide absolutely nothing; not a single exhibit nor a single case that supports their claims.

By great contrast, attached hereto are transcripts of a number of proceedings. As these are certified transcripts of the proceedings of another court, this Court can take judicial notice of them. They prove, beyond any doubt whatsoever, that plaintiffs claims are meritorious and defendants' portrayal of plaintiffs' incarcerations are disingenuous.

The defendant class continues to violate the clear text of the Constitution of the State of New Jersey. Pursuant to

Article 1, ¶12, "no person shall be imprisoned for debt in any action or on any judgment founded upon contract, unless in cases of fraud; nor shall any person be imprisoned for a militia fine in time of peace." In sum, if the Court were to address the merits beyond the certification and injunction issues in order to consider a summary disposition of the complaint at this juncture, it could only be in plaintiffs' favor.

Defendants claim that all of the emergent appeals were heard on an uncontested basis is similarly false. The opinion in Bachman v. Cohen (Exhibit R) reflects Ed Frankin, Esq. as opposing counsel. As the Court is undoubtedly aware, Mr. Frankin is a partner at Jacobwitz Grabelle Defino McGouhran & Latimer, a premiere family law firm[27] in Monmouth County. Wade v. Sweeney (Exhibit X) was opposed by John A. Hartmann III, a senior partner at Princeton's Pellettieri, Rabstein and Altman and a family law practitioner with over 30 years experience.

It should be noted that neither of these firms (nor the Appellate Division *sua sponte*) pursued defendants' claim that the obligors were not incarcerated as a result of their failure to pay child support, as this claim cannot be supported by any reading the facts. The attached transcripts show unequivocally that the plaintiffs were incarcerated for no reason other than their nonpayment or underpayment of child support and that no inquiry was made into their ability to pay the release amounts set.

Point II

PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF

Defendants are accurate that the power to issue an injunction of the magnitude sought by plaintiffs is an awesome one. It is, however, no more awesome than the duty placed on this Court to support and defend the Constitution and laws of our state. The injunction should issue.

The transcripts are properly before this Court and via the exercise of judicial notice they prove that there are no material facts at issue requiring the Court to refrain from issuing the requested emergent injunctive relief.

Although not raised by defendants, plaintiffs wish to stress that the injunction issue is not mooted by the release of the named plaintiffs from incarceration. Under City of Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), a plaintiff in a civil rights action is entitled to injunctive relief where they allege a probability that the complained of conduct will be repeated. Moreover, although the named plaintiffs may not now be incarcerated, other members of the plaintiff class are in jail.

Point III

THE CLASSES SHOULD BE CERTIFIED AT LEAST ON A PROVISIONAL BASIS SO AS TO GRANT INJUNCTIVE RELIEF.

Class actions are liberally construed, and such actions are permitted unless there is clear showing that they are inappropriate or improper. There is a strong preference in the

[27] The firm represents, among other high-profile clients, Hon. Bradley J. Ferencz, JSC, in his divorce proceedings.

law for class certification when the requirements of R. 4:32-1 have been satisfied. Carrol v. Cellco Partnership, 313 N.J.Super. 488 (App.Div. 1998).

Defendants have not shown that class certification under the allegations presented to this Court would be "inappropriate or improper." In fact, no legitimate reason whatsoever has been presented.

Initially, defendants' claim that class certification should be denied because a motion to dismiss is pending is offered without any support in the law. This is because there is no support for this proposition.

Defendants' claim that class certification should be denied because plaintiffs' have not provided proof of their allegations is similarly offered without support. Initially, this is not the standard applicable to an application for class certification. "While the merits of a putative class representative's substantive allegations should not factor into the court's decision regarding class certification, the court should rigorously analyze *the allegations* of the complaint relating to the maintainability of the action as a class action." Osgood v. Harrah's Entertainment, Inc., 202 F.R.D. 115, 120 (D.N.J. 2001) *citing* Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). Second and more importantly, it is plaintiffs who have offered admissible and convincing proof of their claims via the transcripts attached hereto and the series of summary reversals from the Appellate Division. Defendants have offered nothing by way of rebuttal and their claims that plaintiffs have failed to provide proof ring hollow.

As to numerosity, plaintiffs enclosed an article from the New Jersey Lawyer indicating that there were in excess of 50,000 child support enforcement hearings last year. In the absence of proper discovery, which can only occur after class certification is granted, this neutral documentary evidence exceeds the "speculative and conclusory representation" standard as to the requirement of many. W.P. v. Poritz, 931 F.Supp. 1187 (D.N.J. 1996), Doe v. Charleston Area Medical Center, Inc.,, 529 F.2d 638 (W.Va. 1975), Young v. Pierce, 544 F.Supp. 1010 (E.D.Tex. 1982).

While it is true that less than 500 judges are assigned to the Family Part, the number exceeds 120. Also, new judges are routinely assigned to the Family Part and judges on other assignments are sometimes asked to "fill in" when needed in the Family Part.[28] Plaintiffs are obligated to show only that joinder would be "difficult", "inconvenient" or "impracticable." See, e.g., Weiss v. York Hospital, 745 F.2d 786, 808 (3d Cir.), certiorari denied 105 S.Ct. 1777, 470 U.S. 1060, 84 L.Ed.2d 836 (1984). Moreover, judges of the Superior Court have been certified as a class in many similar cases. *See, e.g.*, Lake v. Speziale, 580 F.Supp. 1318 (D.Conn.1984), Mastin v. Fellerhoff, 526 F.Supp. 969 (S.D.Ohio 1981).

Parenthetically, plaintiffs enthusiastically agree with defendants' assertion that "each judge in the state who does

[28] Named defendant Hon. Rosalie B. Cooper, JSC is not assigned to the Family Part in Ocean County, but was asked to conduct "pay or stay" hearings in March of 2000.

hear this type of matter conceivably may have his or her own method of proceeding in these matters."[29] Plaintiffs will stipulate to this allegation. It is why a class action is necessary and appropriate.

In their moving papers, plaintiffs asserted that "the precise underlying facts surrounding each case may differ." Defendants' claim, again with no legal citation, that this deprives the plaintiff class of commonality. This is completely false. In fact, "the commonality prerequisite requires only that there be ***some*** questions of law or fact common to the class. It is not necessary that all the factual or legal issues raised by the case concern each class member." Vargas v. Calabrese, 634 F.Supp. 910, 918 (D.N.J. 1986), *citing* 7 C. Wright & A. Miller, *Federal Practice & Procedure* Section 1763 at 603 (1972) (**Emphasis on "some" in original**).

Defendants' opposition to typicality is similarly made without legal citation and is similarly flawed. "The Third Circuit has adopted the test for typicality advanced in 7 Wright and Miller, *supra* Section 1763 at 614 . . . [P]laintiff has satisfied [the typicality requirement] if the claims or defenses of the representatives and the members of the class stem from a single event *or are based on the same legal or remedial theory*." Id. at 919, *citing* Weiss v. York Hospital, 745 F.2d 786, 806 n. 36 (3rd Cir.1984).

Finally, when emergent injunctive relief is sought, the Court is authorized to provisionally certify the classes for the purpose of addressing the application for injunctive relief, without prejudice to defendants' right to later seek decertification of the classes. *See, e.g.* Murillo v. Bambrick, 508 F.Supp. 830 (D.N.J. 1980).

Plaintiffs respectfully submit that the allegations of the complaint, especially when considered in conjunction with the proofs thus far submitted, justify the entrance of an Order certifying the defendant and plaintiff classes.

Point IV

THE CLASS OF CHILDREN OF IMPROPERLY INCARCERATED PLAINTIFFS SHOULD ALSO BE CERTIFIED BY THE COURT.

Defendants offered no opposition nor discussion of this issue. Plaintiffs respectfully ask the Court to consider this portion of the application to be unopposed and to grant same for the reasons set forth in plaintiffs' supporting brief.

CONCLUSION

For the above listed reasons, the classes should be certified and the requested preliminary injunction should issue forthwith.

Respectfully submitted this 9 day of January 2002

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[29] Defendants' brief, Page 14, Lines 7-9.

_____
David Perry Davis, Esq.

Superior Court of New Jersey
Appellate Division
DOCKET NO. A-5007-01T3

F1

Appellant's Reply Brief

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On the Brief

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Jasmine Leonard, David Chavis, Davonica Chavis, Tionoa Logan, Ashley Lewis, individually and on behalf of all similarly situated children of unconstitutionally incarcerated parents; Jeffrey Leonard, Devin Square, Craig Williams, James Thompson, Cheyanne Johnson, David Chavis, Todd Logan, Jeffrey Jones, Gary J. Davis, Cleo Merritt, Juan Cruz, Ronald Cohen, individually and on behalf of all persons similarly situated; Plaintiffs vs. Hon. Audrey P. Blackburn, JSC, Hon. F. Lee Forrester, Hon. Rosalie B. Cooper, JSC, Hon. Thomas W. Cavanaugh, Jr., JSC, Hon. Louis Locascio, JSC, individually and in their official capacity as Judges of the Superior Court, and on behalf of all Superior Court Judges of the State of New Jersey, Defendants	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION GENERAL EQUITY PART MERCER COUNTY DOCKET NO. Civil Action **ORDER TO SHOW CAUSE** (Without temporary restraints)

TO: John J. Farmer, Jr.
Attorney General of New Jersey
Division of Law
Hughes Justice Complex
25 Market Street
Trenton NJ 08625

THIS MATTER having been opened to the Court on application of plaintiff class, David Perry Davis, Esq., appearing, for an Order to Show Cause, and notice having been given to defendants,

John J. Farmer, Esq., Attorney General, appearing, and the Court having read and considered the Certification annexed hereto, and it appearing therefrom that substantial and irreparable harm shall occur in the absence of such relief and before a formal Notice of Motion can be filed and heard,

IT IS, on this _____ day of November, 2001, hereby Ordered that Plaintiff shall show cause on the day of November, 2001, at ____: _____ before the Hon. _____, J.S.C., located at the Superior Court of New Jersey, Chancery Division, why an Order should not be entered:

1. Certifying the proposed plaintiff class;

2. Certifying the proposed defendant class;

3. Enjoining the defendant class from incarcerating any member of plaintiff class absent a showing, based on substantial and credible evidence, that said member of plaintiff class has the ability to pay the release amount set;

4. Granting a Preliminary Injunction compelling the defendants to immediately release all currently incarcerated plaintiffs pending an ability to pay hearing, or, in the alternative, to conduct a proper ability to pay hearing within 24 hours.

IT IS FURTHER ORDERED:

That a copy of the within Order to Show Cause be served upon defendants within _____ days hereof.

That counsel for defendants shall file and serve any opposing papers no later than _____, and plaintiff's reply, if any, shall be filed and served no later than _____.

_____

Hon. , JSC

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Attorney for plaintiff class

Jasmine Leonard, David Chavis, Davonica Chavis, Tionoa Logan, Ashley Lewis, individually and on behalf of all similarly situated children of unconstitutionally incarcerated parents; Jeffrey Leonard, Devin Square, Craig Williams, James Thompson, Cheyanne Johnson, David Chavis, Todd Logan, Jeffrey Jones, Gary J. Davis, Cleo Merritt, Juan Cruz, Ronald Cohen, individually and on behalf of all persons similarly situated; Plaintiffs vs. Hon. Audrey P. Blackburn, JSC, Hon. F. Lee Forrester, Hon. Rosalie B. Cooper, JSC, Hon. Thomas W. Cavanaugh, Jr., JSC, Hon. Louis Locascio, JSC, individually and in their official capacity as Judges of the Superior Court, and on behalf of all Superior Court Judges of the State of New Jersey, Defendants	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MERCER COUNTY GENERAL EQUITY PART DOCKET NO. Civil Action

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AN ORDER TO SHOW CAUSE

David Perry Davis, Esq.
On the brief

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CASE LAW

FEDERAL STATUTES

STATEMENT OF FACTS

This matter arises as a result of defendants' orders resulting in the incarceration of a group of noncustodial parents for their nonpayment or underpayment of court-ordered financial child support. As explained herein, the incarcerations are alleged to be "coercive", yet in each case the incarcerated parent either has not had a release amount set at all or has had a release amount set without the constitutionally required finding that the obligor has the present ability to pay same. In most of these cases, there was not even an inquiry as to the ability of the prisoner to pay the release amount set by the Court. Accordingly, the jailings are not legitimate coercive incarcerations, but improper, punitive deprivations of liberty.

There are two groups of plaintiffs. The first consists of the children of said noncustodial parents. These children have a constitutional right to a form of child support deeper than money - the love, care, and companionship of their parents. This right is fundamental and is being violated by defendants class' arbitrary and improper establishment of release amounts for the children's parents. Secondarily, these children have a right to financial child support from their parents. While the legitimate goal of coercive incarceration serves this right, the illegitimate punitive incarcerations imposed by defendants deprives the noncustodial parents of the ability to earn money or seek employment to support said children.

The second set of plaintiffs are the noncustodial parents who are in default on their court-ordered child support obligations. Many of the named plaintiffs are now "coercively" incarcerated. The incarceration itself is not challenged. It is undisputed that coercive incarceration may in some instances be an appropriate and fully constitutional method of forcing a recalcitrant but able obligor to comply with a valid child support Order.

What *is* challenged herein is the defendant class' continuous abrogation of the law insofar as it requires the trial court to set a release amount actually tied to the ability to pay of the defaulting obligor. All of the plaintiffs presented have had release amounts set that they are not able to pay, and all the plaintiffs whose cases have been reviewed were subjected to hearings where no meaningful inquiry into their ability to pay was made.[30]

The issue of trial courts incarcerating child support obligors without first making a determination that the obligor possesses an ability to pay the release amount set has been visited on several occasions by the Appellate Division and Supreme Court, and more recently four appellate panels.[31] Each case was presented as an emergent appeal. In each case, the Appellate Division agreed that the violation of the constitutional right to liberty constituted emergent

[30] See affidavits of currently incarcerated named plaintiffs, attached as Exhibit C.

[31] A fifth case is now pending before the appellate division.

circumstances warranting immediate review. In each case, the Appellate Division granted the requested relief and released the incarcerated defendant.[32] The law is clear. Nonetheless, the trial courts continue to incarcerate "deadbeat parents" without making so much as an inquiry into their ability to pay the release amounts set.

The second sub-set of plaintiffs have been held without review of any type, for periods ranging from four to in excess of fifty days. Were these plaintiffs charged with a criminal offense, they would be constitutionally entitled to a bail hearing within 12 hours of their arrest. *See*, R. 3:4-1(b), NJ CONST. ART. 1, § 11. These plaintiffs sit in legal limbo, without a release amount having been set and without their constitutional right to an immediate bail hearing being respected.

As indicated, in the last 18 months, four appellate panels have addressed this issue in individual cases. Nonetheless, the trial court continues to ignore the law and violate the civil rights of the plaintiff-obligors. At this juncture, a class action is appropriate. The plaintiff class should be certified, an immediate hearing should be scheduled, and the requested relief should be granted.

[32] Those cases are attached as Exhibit A.

ARGUMENT

Point I

PLAINTIFF CLASS SHOULD BE CERTIFIED PURSUANT TO RULE 4:32-1(a).

A. As to obligor plaintiffs

Plaintiff class should be certified without delay. As set forth in the attached complaint, the named plaintiffs bring this suit individually and on behalf of all residents of the State of New Jersey who: (1) have been or currently are in arrears under support orders issued by the Chancery Division, Family Part of the Superior Court; (2) are presently incarcerated, will in the future be incarcerated and/or have in the past been incarcerated as a result of their failure to pay said child support; (3) have had their release (purge) amounts set without a meaningful inquiry as to their ability to pay same; and (4) have been incarcerated in spite of their inability to pay the release amounts set by the court.

The Complaint names twelve plaintiffs, but there are many, many more. According to the New Jersey Lawyer newspaper, there were 53,746 enforcement hearings last year. See, New Jersey Lawyer, July 31, 2000, Page 1 (Exhibit B).

This is a proper class action. Rule 4:32-1(a) requires that, as to the class: (1) the persons affected are so numerous that joinder of all parties is impracticable; (2) there are common questions of law and fact; (3) the claims and defenses of the representative plaintiffs are representative of those of the class; (4) the representative plaintiffs will fairly and adequately protect the interests of the class; and (b)(2) the parties opposing the class plaintiffs have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief to the class as a whole.

Where, as here, only injunctive and declarative relief is sought, the standard for establishing the numerosity requirement for class certification has traditionally been relaxed. To establish the numerosity element, plaintiffs are not required to show that it would be "impossible" to join all members, but only that such joinder would be "difficult", "inconvenient" or "impracticable." See, e.g., W.P. v. Poritz, 931 F.Supp. 1187 (D.N.J. 1996), Weiss v. York Hospital, 745 F.2d 786, 808 (3d Cir.), certiorari denied 105 S.Ct. 1777, 470 U.S. 1060, 84 L.Ed.2d 836 (1984). Even "speculative and conclusory representations" as to the size of the class suffice as to the requirement of many. Doe v. Charleston Area Medical Center, Inc.,, 529 F.2d 638 (W.Va. 1975), Young v. Pierce, 544 F.Supp. 1010 (E.D.Tex. 1982).

It is respectfully submitted that plaintiffs satisfy the numerosity requirement for class certification.

As with the defendant class, there are common questions of law and fact. While the precise underlying facts surrounding each case may differ, the common fact is what is relevant: each person in arrears has had a release amount set by the Court which is not based on their ability to pay. This violates well-

settled case law as restated by the Appellate Division in Weinstein v. Weinstein:

An order incarcerating a debtor-spouse in aid of litigant's rights which contains an amount to be paid as a condition for release presupposes that the judgement debtor has assets that have been secreted or otherwise placed beyond the reach of execution. . . the purpose of such an order, and its legal justification, is to induce compliance with a lawful order. In such cases, the incarcerated party has the key to freedom in his/her hands because the debtor-spouse has the ability to comply with the order as a condition for release. The record before us is devoid of any evidence that defendant has assets that can be used to satisfy the release amount ordered by the court. . .

Without a scintilla of evidence that an obligor has the "key to freedom in his hands," a party cannot be incarcerated for defaulting on a child support obligation. Saltzman v. Saltzman, 290 N.J.Super. 117 (App.Div. 1996), Pierce v. Pierce, 122 N.J.Super. 359 (App.Div. 1973); Federbush v. Federbush, 5 N.J.Super. 107, (App.Div.1949); Biddle v. Biddle, 150 N.J.Super. 185 (Ch.Div. 1977); Department of Health v. Roselle, 34 N.J. 331 (1961), Commentary to R. 1:10-3, Current New Jersey Court Rules.

The claims and defenses of the representative plaintiffs are identical to those of the class as a whole.

The representative plaintiffs will fairly and adequately protect the interests of the class. The claims are typical of those raised by defendants in child support matters and the adjudication sought by the plaintiff class, if granted, would protect all the affected plaintiffs.

Finally, the parties opposing the class plaintiffs have acted on grounds generally applicable to the class as a whole, thereby making appropriate injunctive relief to the class as a whole. The judges of the Superior Court of New Jersey preside over hearings wherein they are called on to establish release amounts for obligors who have defaulted on their child support obligations.

Plaintiff class should be certified by this Court.

B. As to child plaintiffs

The right to a meaningful and loving relationship between a parent and child is so well-rooted in our nation's jurisprudence as to be considered fundamental by the New Jersey and United States Supreme Courts. *See, e.g.,* Watkins v. Nelson, 163 N.J. 235 (2000); Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L. Ed.2d 599 (1982); Stanley v. Illinois, 405 U.S. 645, 651-652, 92 S.Ct. 1208, 1212-1213, 31 L.Ed.2d 551 (1972) (and cases cited); In re Guardianship of Dotson, 72 N.J. 112, 122, 367 A.2d 1160 (1976) (Pashman, J., concurring).

Children also have a right to food and clothing. The incarceration of a parent who has willfully defaulted on a child support obligation may be a completely constitutional and appropriate method of coercing compliance with a court's Order.

But for an incarceration to be coercive rather than punitive, the incarcerated party must "have the key to freedom in his hands." *See, e.g.* Saltzman v. Saltzman, 290 N.J.Super. 117 (App.Div. 1996). In the event punitive measures are justified, the trial court remains able to refer a matter to the prosecutor's office for proceedings under N.J.S.A. 2C:24-5 (willful non-support). Weinstein v. Weinstein, April 7, 2000 (Exhibit A at page 7).

Moreover, while a coercive incarceration serves to force a recalcitrant noncustodial parent to provide support for his or her child (by forcing them to "use the key to freedom" by paying the set release amount), a punitive incarceration, or the establishment of a release amount above the ability of the incarcerated parent to pay, has the exact opposite result. The noncustodial parent who cannot hope to pay the release amount set cannot earn money to pay child support and cannot pursue employment while in jail. Neither the child's right to love and parenting nor his or her right to child support is served by defendants' illegitimate incarceration of plaintiff-obligors.

For every plaintiff-obligor, there is (at least) one plaintiff child. Plaintiff class of the children of improperly incarcerated obligors should be certified.

Point II

DEFENDANT CLASS SHOULD BE CERTIFIED PURSUANT TO R. 4:32-1(a).

Defendant class should be certified. Rule 4:32-1(a) requires: (1) the persons affected are so numerous that joinder of all parties is impracticable; (2) there are common questions of law and fact; (3) the claims and defenses of the representative defendants are representative of those of the class; (4) the representative defendants will fairly and adequately protect the interests of the class; and (b)(1)the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

That the persons affected are so numerous that joinder of all parties is impracticable is beyond debate. This Court can take judicial notice of the fact that there are well in excess of the required number of parties who are sitting Judges of the Superior Court of the State of New Jersey. See, New Jersey Lawyers Diary, 2001 Edition, pages 883-892 (listing over 500 state court judges).

There are common questions of law and fact, and the claims and defenses of the representative defendants are representative of those of the class. The factual and legal issues as to all defendants are identical.

The representative defendants will fairly and adequately protect the interests of the class. All New Jersey Judges are represented by the Attorney General's office, experienced litigators who will fairly and adequately protect the interests of the class.

The prosecution of separate actions by or against individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Judges of the Superior Court have been certified as a class under the same circumstances in other jurisdictions. See, e.g. Lake v. Speziale, 580 F.Supp. 1318 (D.Conn.1984), Mastin v. Fellerhoff, 526 F.Supp. 969 (S.D.Ohio 1981).

The defendant class should be certified.

Point III

THE COURT SHOULD ISSUE A PRELIMINARY INJUNCTION AGAINST THE UNCONSTITUTIONAL PRACTICES OF DEFENDANT CLASS

To support a preliminary injunction, the moving party must show irreparable injury and a reasonable probability of eventual success on the merits. Additionally, the court must weigh the possibility of harm to the non-moving party and, when relevant, harm to the public. See Crowe v. DeGioia, 90 N.J. 126 (1982) *reh'g on remand* 203 N.J. Super. 22 (App. Div. 1985); Cherry Hill Township v. Oxford House, 263 N.J.Super. 25, 43 (App.Div.1993); Morris Cty. Tsfr. v. Frank's Sanitation, 260 N.J.Super. 570, 574-576 (App.Div.1992), Cerro Metal Products v. Marshall, 620 F.2d 964, 972 (3d. Cir. 1980), citing Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 356-57 (3d Cir. 1980).

Plaintiffs' probability of success on the merits is high and there is a clear showing, if not *res judicata*, as to the irreparable injury they are suffering. Within the last eighteen months, seven appellate judges[33] in four separate cases, relying on well-established case law[34] have determined that unconstitutional incarceration constitutes sufficient irreparable injury to warrant the granting of emergent relief. In those cases, the longest any single plaintiff had been incarcerated was seventy-three days.[35] In the matter now before this Court, plaintiff Craig Williams has been incarcerated for eighty-five (**85**) days - since September 3, 2001.[36] The appellate division in Bachman v. Cohen set a benchmark of twelve days before a trial court should assume that a defendant's incarceration is no longer "coercive"[37] and they do not possess "the key to freedom in his/her hands."

In this matter, there is no possible harm to the non-moving party. There is no challenge raised to the authority of the court to enforce child support orders. The issue is the defendants' persistent and repetitive failure to establish release amounts based on the ability of plaintiffs to pay same and secure their release. Defendants are not in any way benefitting from plaintiffs' release amounts being based on a factor other than their ability to pay and can therefore allege no harm.

As this matter is brought under § 1983, plaintiffs must allege a probability that the complained of conduct will be repeated before a preliminary injunction can issue. City of Los

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[33] Judges Collester, Cuff, Lessemann, Keefe, Newman, Skillman, and Havey.

[34] Exhibit A.

[35] See Williams v. Tolbert, Exhibit A.

[36] See affidavit attached hereto as Exhibit C.

[37] ". . . defendant's continued incarceration after twelve days may suggest that he has exhausted that source of funds." Bachman v. Cohen, (Exhibit A).

Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). In the matter before this Court, plaintiffs have alleged systematic conduct of establishing release amounts based on considerations other than the ability to pay of the obligor, or in failing to provide plaintiffs with any type of review of their incarceration. The enclosed affidavits indicate a consistent pattern of conduct sufficient to satisfy the Lyons requirement.

All the factors required for an injunction having been met, the Preliminary Injunction should issue forthwith.

CONCLUSION

For the above listed reasons, the classes should be certified and the requested preliminary injunction should issue forthwith.

Respectfully submitted this day of November, 2001

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