

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Linguista White, Emily Bellamy, and)
Janice Carter)
Plaintiffs,)

Civil Action No.
2:19-CV-03083-RMG

v.)

**RESPONSE
OF DEFENDANT
KEVIN SHWEDO TO PLAINTIFFS’
NOTICE OF SUPPLEMENTAL
AUTHORITY**

Kevin Shwedo, in his official capacity as)
the Executive Director of the South)
Carolina Department of Motor Vehicles;)
and Ralph K. Anderson, III, in his official)
capacity as the Chief Judge of the South)
Carolina Administrative Law Court and)
Director of the South Carolina Office of)
Motor Vehicle Hearings,)
Defendants.)

Defendant Kevin Shwedo, in his official capacity as the Executive Director of the South Carolina Department of Motor Vehicles (DMV), submits the following response to Plaintiffs’ Notice of Supplemental Authority, ECF No. 66.

Plaintiffs have called the Court’s attention to the recent Eleventh Circuit panel decision in *Jones v. Governor of Fla.*, __ F.3d. ___, 2020 WL 829347 (11th Cir. Feb. 19, 2020), petition for rehearing in banc filed, Feb. 26, 2020. *Jones* was filed by several felons who completed their terms of imprisonment and supervision, but who, because of alleged indigency, failed to pay fines or other financial obligations imposed as part of their sentences. The Eleventh Circuit heard

the State's appeal on an expedited basis,¹ and affirmed the granting of a "carefully circumscribed" preliminary injunction which applied only to the seventeen named plaintiffs in the case. The preliminary injunction prohibited the State

from preventing [the named] plaintiffs from registering to vote based solely on an inability to pay outstanding legal financial obligations, where each plaintiff asserts that he or she is genuinely unable to pay. It further enjoined the same defendants from preventing the plaintiffs from actually voting if indeed they could establish that they are unable to pay.

2020 WL 829347, at *5.

1. It should first be noted that the factual scenario in *Jones* was substantially different from the present case, because in Florida, there was apparently no procedure for the mitigation of a person's inability to pay legal financial obligations (LFOs), i.e., fines, fees and other court-imposed requirements, prior to the person's attempting to register to vote. In South Carolina, on the other hand, S.C. Code Ann. § 17-25-350 requires courts to afford convicted persons an opportunity to demonstrate indigency and obtain a monthly payment plan in the event that they can show indigency, as the Defendants in this case have pointed out in prior filings.

Plaintiffs frequently cite *Bearden v. Georgia*, 461 U.S. 660 (1983), but *Bearden* holds only that a person should not be subject to incarceration if he "has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own. . . ." 461 U.S. at 668. Even assuming that *Bearden* might apply in a case not involving incarceration, a point which is by no means settled and which DMV denies, persons such as the three named Plaintiffs in the present case cannot make the showing necessary to trigger *Bearden's* principles, because in failing to appear in their summary court cases, make a showing of indigency, and obtain a

¹ The court noted that "The next statewide election is Florida's presidential primary election, which takes place on March 17, 2020. Early voting begins on March 7, 2020, and the deadline to register to vote for the presidential primary is February 18, 2020." 2020 WL 829347, at *6 n. 7.

payment plan, they have not shown that their present situation occurred “through no fault of their own.” As a result, *Jones* is factually distinguishable from the present case.

2. Secondly, the text of Plaintiffs’ Notice of Supplemental Authority in the present case is virtually identical to the Rule 28(j) supplemental authority letter filed with the Fourth Circuit on February 24, 2020, by the plaintiffs in *Johnson v. Jessup*, 381 F. Supp. 3d 619 (M.D.N.C. 2019)(appeal docketed, No. 19–1421 (4th Cir. Apr. 18, 2019)), oral argument scheduled for March 17, 2020). A copy of that letter, minus the *Jones* case attachment, is filed herewith as Exhibit 1. This nearly-identical language in the supplemental authority filings of the plaintiffs in both cases shows once again that the two cases involve identical legal claims with regard to Plaintiffs’ *Bearden*-related arguments. DMV contends that this Court should deny Plaintiffs’ Motion for Preliminary Injunction, and indeed should dismiss this entire case, based on Plaintiffs’ waiver of the right to assert indigency and/or lack of standing. However, if the Court determines that Plaintiffs’ *Bearden* claims should be reviewed, those claims will presumably be resolved in *Jessup*.

3. Even if the Court were to consider at present the issue for which Plaintiffs have cited *Jones*, that is, the Eleventh Circuit’s holding that heightened scrutiny was required by what that court called “the *Griffin–Bearden* line of cases.” *Jones*, 2020 WL 829347, at *17, that holding does not apply in this context. Plaintiffs quote a statement in *Jones* that “the holding in *Griffin* did not turn on whether there is a fundamental right to an appeal. . . .” ECF No. 66 at 1, quoting *Jones*, 2020 WL 829347, at *21. However, *Jones* relied on *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) as involving “the fundamental nature of the right to vote,” as well as requiring “the application of “heightened scrutiny to wealth discrimination in the context of access to the franchise [because of] the importance of the right in general. . . .” 2020 WL

829347, at *20, *21. Plaintiffs' supplemental filing does not attempt to place having a drivers' license at the same level of the hierarchy of rights as the right to vote, and such an effort would have been unsupported by authority if it had been attempted.

Finally, as DMV has previously pointed out, ECF No. 46 at 20-24, previous attempts to apply heightened scrutiny in cases involving claims of indigency in conjunction with drivers' license suspensions or revocations have so far generally failed, the sole exception being a Tennessee district court case now on appeal. Briefly restated, the reason those attempts have failed is that neither *Bearden*, nor *Griffin v. Illinois*, 351 U.S. 12 (1956), nor any of the other cases previously cited by Plaintiffs on this point, apply when there is neither incarceration as a result of indigency nor where the case does not involve some access to the courts. ECF No. 46 at 22-24. To the extent that *Jones* might be read as holding otherwise, DMV respectfully submits that it should not be followed, or at least not until such time, if ever, as the Fourth Circuit so holds in *Johnson v. Jessup*.

Respectfully submitted,

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