Docket Number 17-11500

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

On Appeal from the United States District Court
for the Northern District of Alabama

Civil Action Number: 5:15-cv-2325-AKK

SHEENA YARBROUGH, Plaintiff-Appellant

v.

DECATUR HOUSING AUTHORITY, Defendant-Appellee

INITIAL BRIEF OF THE APPELLANT

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Certificate of Interested Persons

The Appellant, in accordance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 28-1(b), hereby certifies that, to her knowledge, the following persons have an interest in the outcome of this appeal:

Bradley, Arant, Boult, and Cummings, LLP, law firm of attorneys for defendant-appellee, 445 Dexter Avenue, Suite 9075, Montgomery, AL 36104.

Forton, Michael, 1115-F Church Street, Huntsville, AL 35801, counsel of record for plaintiff-appellant.

Hill, Jonathan C. "Rudy," Attorney for DHA.

Hon. Abdul Kallon, United States District Court Judge for the Northern District of Alabama, Northeastern Division.

Housing Authority of the City of Decatur, Alabama, defendant-appellee.

Housing Authority Insurance Group, insurer of DHA.

Huff, Michael Paul, former counsel of record for DHA in the District Court.

Legal Services Alabama, law firm of attorneys for plaintiff – appellant, 2567 Fairlane Drive. #200, Montgomery, AL 36116.

McArthur, Benjamin L., former counsel of record for DHA in the District Court.

Ray-Kirby, Holly Nicole, counsel of record for Appellant Sheena Yarbrough in the District Court.

Stewart, Charles, counsel of record for defendant-appellee.

Yarbrough, Sheena, plaintiff-appellant.

No publicly traded corporation has an interest in the outcome of this case or appeal.

Statement Regarding Oral Argument

Appellant, pursuant to Fed Rule of Appellate Procedure 34 and Eleventh Circuit Rule 28-1(c), hereby requests oral argument. In support of this request, Appellant submits that because the federal housing subsidy at issue here is vital to her, she would like to fully address any concerns of the Court that may not have been covered in the briefs.

This case centers on the federal due process requirements that must be met before terminating one's Section 8 housing voucher. Counsel for Appellant would like to emphasize that the Court's decision herein will affect all low-income households throughout the Eleventh Circuit who hold federal Section 8 housing vouchers, as well as future low-income households who will be issued federal housing vouchers. Thus, there could be dire consequences from counsel not having effectively communicated their respective arguments in the briefs alone.

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Statement of Subject-Matter and Appellate Jurisdiction

Subject matter jurisdiction is conferred herein by 28 U.S.C. § 1331. This case is a civil action, raises a federal question, and arises under the laws of the United States. Jurisdiction is also conferred by 28 U.S.C. § 1343(a)(3,4).

This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 1294, as this is an appeal from a final order (Doc 41) of the United States District Court for the Northern District of Alabama to the court of appeals for the circuit including that district. Yarbrough timely filed her notice of appeal on April 5, 2017, as the district court entered the Judgment on March 7, 2017. *See* Fed. R. App. P. 4(a)(1), (3).

Statement of the Issues

1. Did the district court err in upholding the hearing officer's decision which was based solely on an indictment where the underlying charge is being dismissed and improperly shifted the burden of proof to the plaintiff?
2. Did the district court err in upholding the hearing officer's decision which relied solely on an indictment to prove by a preponderance of the evidence that the plaintiff had committed criminal activity?
3. Did the district court err in making determinations about the plaintiff's perceived demeanor when the plaintiff was never questioned about any criminal activity and the hearing officer made no determinations regarding her demeanor in the hearing decision?

Statement of the Case

A. Introduction

This case presents an appeal by Appellant, Sheena Yarbrough (hereinafter "Yarbrough"). In its Judgment, the district court found that the Defendant-Appellee, Decatur Housing Authority (hereinafter "DHA") met its burden of proof and granted summary judgment in favor of DHA. As a result, the district court determined that the hearing officer for DHA rightfully terminated the plaintiff-appellant's Section 8 housing subsidy.

B. Procedural History

On December 23, 2015, Yarbrough filed a Complaint for Declaratory and Injunctive Relief (Doc 1) in the United States District Court for the Northern District of Alabama. In the Complaint, Yarbrough requested that the court order DHA to reinstate Yarbrough's federal housing entitlement subsidy under the "Section 8 Housing Choice Voucher" program authorized by 42 U.S.C. § 1437f and administered nationally by the United States Department of Housing and Urban Development (hereafter "HUD"). *Id.* Yarbrough further asserted in her Complaint that DHA violated her constitutional Due Process rights and her rights under the applicable HUD regulation – 24 C.F.R. § 982.555 *Id.*

On January 19, 2016, DHA filed an Answer with Affirmative Defenses (Doc 6) in which Appellees denied all essential allegations of the Complaint.

On February 25, 2016, Yarbrough filed a Motion for Preliminary Injunction requesting the immediate reinstatement of Yarbrough's benefits (Doc 15). DHA filed an Opposition to Yarbrough's Motion on March 8, 2016 (Doc 17) and the Court set the motion to be heard on March 11, 2016 (Doc 16). After additional briefing on the issue (Doc 20-22), the Court denied Yarbrough's request for an injunction on April 6, 2016 (Doc 23). The Court also denied a Motion for Reconsideration on May 24, 2016 by minute entry (Doc 27).

On July 28, 2017, Appellees filed a Motion for Summary Judgment and supporting materials (Doc 30-32) stating that there were no disputed issues of fact and asking the Court to uphold the hearing officer's decision. On August 18, 2016, Yarbrough filed a Response in Opposition to the Motion for Summary Judgment and supporting materials (Doc 34). On March 1, 2017, Yarbrough filed a Motion for Summary Judgment and supporting materials (Doc 40) stating that there were no disputed issues of fact and asking the Court to reinstate Yarbrough's benefits.

On March 7, 2017, without holding a hearing, the Court issued a decision granting DHA's Motion for Summary Judgment and denied Yarbrough's. (Doc 41-42). Yarbrough filed a timely Notice of Appeal (Doc 43) on April 5, 2017.

C. Statement of the Facts

Yarbrough is a participant in the Housing Assistance program pursuant to Section 8 of the U.S. Housing Act of 1937, 42 U.S.C. § 1437f (hereinafter referred to as "the Section 8 program"). (Doc 1 – Pg 1). Under the Section 8 program, low income families are given vouchers to assist with housing rental payments. *Id.* The recipient is allowed to use these vouchers at any location approved by the housing authority. *Id.* The Section 8 program is administered by local Public Housing Authorities (hereinafter "PHAs"), such as DHA, which enter into annual contracts with HUD. *Id.* at 1-2. Pursuant to these contracts, subsidies compensate landlords for the difference between the rent a tenant can afford and the market rental rate. *Id.*

As of 2015, Yarbrough had received voucher benefits from the DHA for approximately nine years. (Doc. 40 – Pg 5). On October 8, 2015, Yarbrough received a notice stating she was being terminated from the program for allowing an unauthorized occupant to live with her, for failing to complete a repayment schedule, and for criminal activity. *Id.* On October 15, 2015, she filed a request for an informal hearing. *Id.*

On November 10, 2015, a hearing was held. *Id.* The Housing Authority discussed the first two reasons for her proposed termination, the purported unauthorized occupant (her elderly grandfather) and the repayment schedule, at length. *Id.* at 5-6. They offered numerous documents regarding both of these issues,

and Yarbrough was questioned about both of these matters extensively. The majority of the time in the hearing was spent on these two issues which had most recently been raised by the Housing Authority.[1] *Id.* at 6.

At the hearing, the Housing Authority also offered two indictments issued two years earlier (in April 2013) regarding drug activity. *Id.* The indictments did not indicate what (if any) evidence was offered at the grand jury hearing. *Id.* Outside of the language contained on the indictment, no one at the hearing explained what Yarbrough was accused of (or seemed to be aware of what the actual accusations were). *Id.* No witness was called to explain the accusation or to be questioned beyond being aware that the indictments existed. *Id.*

Since no specific factual claims were presented regarding Yarbrough's proposed guilt, she offered an order from the Circuit Court of Limestone County showing that the claims involved were in the process of being dismissed. *Id.* at 7. Yarbrough also testified that she had previously challenged these accusations. *Id.*

On November 30, 2015, the hearing officer in this case issued a decision finding that Yarbrough was terminated from the program for criminal activity. *Id.* The decision indicated that the hearing officer believed that although indictments

[1] The two indictments had happened several years in the past, and the DHA had previously spoken with Yarbrough and elected not to pursue termination based on them.

were insufficient for a finding of criminal guilt (which requires proof beyond a reasonable doubt) that an indictment was, without other support, proof by a preponderance of the evidence. *Id.* at 8. It did not address either the Plaintiff's silence or the DHA's decision not to question her regarding the matter. *Id.*

D. Standard of Review

The Court of Appeals' review of the District Court's grant of summary judgment herein is *de novo*, considering the facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party, in this case Yarbrough's. *Lofton v. Secretary of the Dept. of Children & Family Services*, 358 F.3d 804, 809 (11th Cir. 2004).

The decision to grant or deny an injunction is reviewed for clear abuse of discretion, but underlying questions of law are reviewed *de novo*. *See United States v. Gilbert*, 244 F. 3d 888, 908 (11th Cir. 2001).

Summary of the Argument

The Due Process Clause of the U.S. Constitution requires that welfare recipients be afforded an evidentiary hearing with minimum procedural safeguards before their benefits may be terminated. *Goldberg v. Kelly*, 397 U.S. 254 (1970). This includes the termination from the Section 8 program. *Davis v. Mansfield Metropolitan Housing Authority*, 751 F.2d 180 (6th Cir. 1984). At that hearing, the PHA has the burden of persuasion and must initially present sufficient evidence to establish a prima facie case that benefits should be terminated. *Basco v. Machin*, 514 F. 3d 1177, 1182 (11th Cir. 2008). Although the rules of evidence are not strictly applied in these administrative hearings, there are due process limits on the extent to which an adverse administrative determination may be based on hearsay evidence. This Court has stated that "hearsay may constitute substantial evidence in administrative proceedings as long as factors that assure the 'underlying reliability and probative value' of the evidence are present." *Id*. The reliability and probative force of such evidence depends on:

> whether (1) the out-of-court declarant was not biased and had no interest in the result of the case; (2) the opposing party could have obtained the information contained in the hearsay before the hearing and could have subpoenaed the declarant; (3) the information was not inconsistent on its face; and (4) the information has been recognized by courts as inherently reliable.
>
> *Id*.

Substantial evidence in an administrative hearing "is more than a scintilla and is such relevant evidence as a reasonable person would accept as adequate to support a conclusion." *J.A.M. Builders, Inc. v. Herman*, 233 F. 3d 1350, 1352 (11th Cir. 2000).

The use of indictments, such as the ones at question in this case, predicated on multiple levels of hearsay, where no evidence or specifics are detailed, and where the underlying declarant's statement is not given and their identity is withheld, is not such substantial evidence. The underlying hearsay to be in analyzed this case is not, as the PHA and District Court indicate, the indictments offered at the hearing. The hearsay accusations to be analyzed are unspecified statements made by an unnamed person which may have been presented by another person to a grand jury hearing the Appellant's indictment. Such statements are neither reliable nor probative and are not the type of evidence a reasonable person would accept as adequate to support a conclusion that the Appellant committed criminal conduct.

Based on the principles set out in *Goldberg*, HUD has also set out numerous regulations for such a hearing. *See* 24 C.F.R. §§ 982.552, *et seq*. Among other things, these rules govern the presentation of evidence and the questioning of witnesses and clearly contemplate some type of evidentiary hearing. The DHA's position would permit a PHA to all but evade the need to make a determination of facts and credibility by substituting an accusation for facts.

Because the only evidence against Yarbrough was unreliable hearsay without probative value, the termination of Yarbrough's federal Section 8 housing voucher subsidy should be reversed. This Court, therefore, should reverse the District Court Judgment herein with directions to order the reinstatement of the subsidy effective December 1, 2015.

Argument

This Court should reverse the ruling of the district court granting summary judgment to DHA, which thereby terminated Yarbrough's housing subsidy based solely on unreliable hearsay evidence.

I. The district court erred in upholding the hearing officer's decision because he improperly shifted the burden to Yarbrough when DHA failed to make a *prima facie* case.

A Public Housing Authority (PHA)'s discretion to deny or terminate Section 8 assistance to a participant is defined and limited by federal law and federal regulations. See 24 C.F.R. §§ 882.210. Termination decisions must be made in accordance with these laws. *See*, e.g., *Ellis v. Ritchie*, 803 F. Supp. 1097 (E.D. Va. 1992); *Hill v. Richardson*, 740 F. Supp. 1393 (S.D. Ind. 1990); *Holly v. Housing Authority of New Orleans*, 684 F. Supp. 1363 (E.D. La. 1988). Where an administrative decision, purportedly based on a specific regulatory provision, does not comport with those regulatory provisions, the decision is "otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Analysis of Constitutional Fourteenth Amendment Due Process standards for termination of federal entitlement benefits begins with the landmark case of *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Goldberg*, the U.S. Supreme Court set the standards for pre-termination hearings for public assistance, which is a

constitutionally protected property interest entitled to procedural due process.[2] The standards enunciated by the U.S. Supreme Court in *Goldberg* apply to "welfare" benefits, which specifically includes housing. *Id.* at 260-266.

The *Goldberg* Court explained that due process requires that "a recipient have timely and adequate notice detailing the reasons for the proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Id*. The Court further explained that these rights are important "where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." *Id*.[3] The Court determined it was "fatal" for the administrative procedures to not include the right to confront or cross-examine adverse witnesses. *Id.* at 268.

The *Goldberg* Court specifically stated,

> the requirements of confrontation and cross-examination . . . have ancient roots. . . . This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny.

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[2] *Goldberg* involved the adequacy of a pre-termination procedure for federal Aid to Families with Dependent Children (AFDC) as administered by the State of New York and a similar program administered by New York City. *Id.* at 397 U.S. 255-256.

[3] In fact, *Goldberg* is replete with statements about the importance of the right of confrontation and cross-examination of adverse witnesses. *Id.* at 259-260, 268, 269, 270.

397 U.S. 270, citing *Green v. McElroy*, 360 U.S. 474, 496-497 (1959).

In 1984, HUD promulgated regulations for the termination of Section 8 benefits to establish the due process outlined in *Goldberg* and its progeny. *See* 24 C.F.R. §§ 982.552, *et seq.* Included in these regulations are § 982.555(e)(5), which says that, "The . . .family . . . may question any witnesses" and § 982.555(e)(6), which says that, "Factual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing." Read together these two regulations, in light of *Goldberg*, provide the basis for understanding all testamentary evidence in administrative hearings.[4]

The right to have witnesses present and be subject to cross-examination, however, is not absolute. Courts in the Eleventh Circuit have a well-developed series of cases regarding the use of hearsay in administrative hearings, and more specifically in Section 8 voucher termination hearings. In these cases, the courts have declined to decide that a witness is required to testify at an administrative hearing, but they have clearly outlined the problems with using uncorroborated hearsay in lieu of a witness. In each of these cases, the courts have held that unreliable,

[4] This, in essence, is the holding of *Edgecomb v. Housing Authority of Town of Vernon*, 824 F. Supp. 312, 315-316 (D. Conn. 1993) (The only evidence presented by the Housing Authority was a police report, two newspaper articles, and the testimony of the Section 8 coordinator, who had no first-hand knowledge. "Denying the tenant the opportunity to confront and cross-examine persons who supplied information upon which the housing authority's action is grounded is improper.")

uncorroborated hearsay evidence is insufficient to deprive the voucher holder of their benefits. *See Basco v. Machin*, 514 F. 3d 1177 (11th Cir. 2008) (where the Eleventh Circuit remanded a Section 8 termination when the Housing Authority relied on two police reports - one which did not state how long alleged guest lived in home and another which was self-contradictory because the name was different); *Lane v. Fort Walton Beach Housing Authority*, 518 Fed. Appx. 904 (11th Cir. 2013) (where the Eleventh Circuit remanded a Section 8 termination when the Housing Authority relied on an address provided to the sex offender registry); *Ervin v. Housing Authority of Birmingham*, 281 Fed. Appx. 938 (11th Cir. 2008) (where the Eleventh Circuit remanded a Section 8 termination when the evidence offered was a letter from the police, a witness statement which was inconclusive and the lawyers' summary of discussions they had with the police); *Sanders v. Sellers-Earnest*, 768 F. Supp. 2d 1180 (M.D. Fla. 2010) (where a Florida District Court granted a preliminary injunction reinstating a voucher holder's benefits when the Housing Authority had relied on a man's statement in a police report that the property was his residence in contradiction to the voucher holder's statement that he stayed over only occasionally); *Taylor v. Decatur Housing Authority*, 2010 U.S. Dist. LEXIS 144770 (N.D. Ala. 2010) (where an Alabama District Court found that the Housing Authority's attempt to shift the burden of persuasion to the voucher holder by

producing a hearsay newspaper article regarding an arrest was a violation of due process and reinstated the individual's benefits).

While there is no dispute as to whether hearsay can be used at an administrative hearing, these cases stand for the proposition that there are due process limits on the extent to which hearsay evidence can be used. *Basco*, 514 F. 3d at 1182. "Hearsay may constitute substantial evidence in administrative proceedings as long as factors that assure the 'underlying reliability and probative value' of the evidence are present." *Id.* (citing *U. S. Pipe & Foundry Co.*, 595 F.2d 264, 270).

In *Basco*, the first case in this Court to address these issues, the Court adopted a four-part test to determine the reliability of hearsay evidence at an administrative hearing:

> The reliability and probative force of such evidence depend on "whether (1) the out-of-court declarant was not biased and had no interest in the result of the case; (2) the opposing party could have obtained the information contained in the hearsay before the hearing and could have subpoenaed the declarant; (3) the information was not inconsistent on its face; and (4) the information has been recognized by courts as inherently reliable." *J.A.M. Builders, Inc. v. Herman*, 233 F. 3d 1350, 1354 (11th Cir. 2000) (citing *U.S. Pipe & Foundry Co.*, 595 F.2d at 270 (citing *Richardson v. Perales*, 402 U.S. 389, 402-06, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971))).
>
> *Basco*, 514 F. 3d 1177, 1182 (11th Cir. 2008).

The first factor for consideration in the *Basco* test is whether the declarant was free from potential bias. In *Sanders v. Sellers-Earnest*, 768 F. Supp. 2d 1180 (M.D. Fla. 2010), the district court interpreted *Basco* when it considered the description of

the contents of a police report.[5] In that case, a declarant told an arresting officer that he resided at the home in question. The *Sanders* court noted that, while the arresting officer might be free from bias, there was no way to assess the reliability of the statements made by the witness.

In Yarbrough's case, the only evidence presented by DHA was two unsupported indictments. (Doc 40 – Pg 9-10). These indictments list one witness, a police officer, and refer to another, a confidential informant. *Id.* The district court only considered whether or not the grand jurors in this case were free from bias, and the district court failed to consider the unreliability of the hearsay evidence upon which the grand jurors made their determination.[6] There is absolutely no information about the alleged evidence and testimony upon which the jurors relied. There is a confidential informant who is unnamed, and his/her testimony is not reproduced in the indictment. Due to the confidential nature of indictment hearings[7], there is no way to know what statements were made by the witness, and therefore, to assess the credibility of the statements and evidence themselves. There is not even an indication

[5] The actual police reports were not contained in the record and therefore, the court could only consider their contents as described by the hearing officer in his/her decision.

[6] A grand jury is not making a finding of guilt, but a finding of probable cause to move forward with trial.

[7] Alabama grand jury proceedings are done in secret. See Ala. Code 12-16-214. The task of the grand jury is not to determine the guilt of a party, but to determine whether the State can demonstrate enough of a case to proceed to trial. *State ex rel. Baxley v. Strawbridge*, 296 So. 2d 779 (1974).

as to where and when the alleged underlying events took place. (Doc 17-5 – Pg 2-5). This case is analogous to *Sanders* in that even if the grand jury is free from bias, there is simply no way to assess whether the declarants were free from bias as precedent requires. In fact, there is even less evidence here than in *Sanders*. In *Sanders*, the declarant's testimony was provided, whereas here, there is no reproduction of the statements and thus, no way to determine whether the unknown declarant was free from bias.

The second prong of the *Basco* test - whether the tenant could have obtained the information contained in the hearsay before the hearing and could have issued a subpoena – is also not satisfied. The informal hearing process required by HUD and conducted by DHA did not provide subpoena power. *Basco,* 514 F. 3d at 1183. Therefore, Yarbrough had no way to subpoena the grand jurors to question them about the testimony upon which they relied in creating the indictment. Yarbrough also had no means by which to subpoena the police officer or the confidential informant to the administrative hearing. Again, due to the confidential nature of indictment hearings, Yarbrough had no way of obtaining the information contained in the hearsay or the evidence upon which it was based.

The district court improperly shifts the burden to Yarbrough here by stating that Yarbrough could have obtained "a statement from Officer Royals or from witnesses who could contradict Officer Royals' contention that Yarbrough had

engaged in criminal drug activity." (Doc 41, Pg 15). There is no clear path by which the defendant in an ongoing criminal case can obtain a statement about that case for a related civil matter from an officer of the law. Furthermore, there has never been any information provided regarding the other witnesses to which the district court refers. Therein lies the problem. Because Yarbrough does not know the identity of the confidential informant, she had no way to attempt to obtain a statement. The indictments do not provide any clear information about the alleged offenses, including a date or time. (Doc 17-5 – Pg 2-5). With that information, Yarbrough would have been better situated to try and obtain testimony from potential alibis, even though the burden was not on her to do so. The district court's attempt to require Yarbrough to collect evidence to prove the absence of guilt ignores the burden that is imposed upon DHA in the first place. Furthermore, DHA, as the party with the burden of proof, actually had the ability to go out and elicit some of the exact evidence contemplated by the district court. DHA chose not to do so and, consequently, did not meet its burden.

The district court further contends that Yarbrough chose to allow a dismissal of the criminal cases with court costs in lieu of a criminal trial, where she would have been able to confront and cross-examine witnesses. The court contends that because of this, she waived her right to confront her accusers and thus the second prong is satisfied. (Doc 41, Pg 14-15). The district court seemingly implies that

Yarbrough's agreement to pay court costs as a condition of the dismissal is tantamount to an admission of guilt. This is simply not the case. A pretrial dismissal of a charge is not an admission, nor is it an adjudication of guilt. *State v. Betterton*, 527 So. 2d 743, 747 (Ala. Crim. App. 1986) (where the Alabama Court of Criminal Appeals found that ". . . a pretrial dismissal of a pending charge does not involve a determination of guilt. . . .") *Id.* Furthermore, there are sound strategic reasons why competent counsel would resolve a case in this manner to trigger jeopardy. This is not an admission of guilt and it should not reflect negatively on a criminal defendant whose case is dismissed. Because there was no trial, Yarbrough had no reasonable means by which to obtain evidence before the hearing.

The third factor in determining the reliability of hearsay evidence is whether the information was inconsistent on its face. Again, the indictments contain such scant information that they cannot be considered complete. The indictments state that Yarbrough sold Lortab and Xanax, respectively, to an undercover police informant. (Doc 17-5, Pg 2-5). The indictments do not provide information on the identity of the informant, the evidence upon which the indictments were based, the date or dates of the alleged criminal activity, the location of the alleged activity, or the quantities sold. *Id.* The fact that Yarbrough's charges were ultimately dismissed also calls into question the reliability of any evidence or testimony produced by the confidential informant. (Doc 32-14). The indictments do not give any indication at

all as to what, if any, evidence was presented at the indictment hearing against Yarbrough. (Doc 40 – Pg 9-10).[8] The district court's focus on the grand jurors ignores the other levels of hearsay contained in and implied by the indictments and once again, improperly shifts the burden to Yarbrough.

The final factor is whether the information has been recognized by courts as inherently reliable. American courts have long expressed doubts about the reliability of grand jury indictments. Possibly the most well-known, and certainly the most colorful, expression of doubt comes from *In re Grand Jury Subpoena of Stewart*, 545 N.Y.S. 2d 974, 977 n.1 (N.Y. Sup. Ct. 1989) where the court stated that a grand jury would indict a "ham sandwich." Only the State has the opportunity to produce evidence and that evidence does not have to comply with any sort of evidentiary standard. *State ex rel. Baxley v. Strawbridge*, 52 Ala. App. 685, 687 (Ala. Crim. App. 1974). Certainly an indictment alone cannot be considered to be reliable to prove guilt.

The district court, to determine the reliability of an indictment, points to *Kaley v. United States*, 134 S. Ct. 1090, 1097, where the Supreme Court stated that indictments can be used to determine whether there is probable cause to believe that a defendant committed a particular crime. This assertion by the court ignores the fact

[8] No additional evidence was presented at the administrative hearing terminating Yarbrough's benefits. The only evidence presented at the hearing was the two indictments. Doc 41 – Pg 5-6.

that there are two separate standards of proof in this case which must be dealt with. At an indictment, a grand jury is simply looking for "probable cause" to go forward with the case. At a Section 8 termination hearing, the standard is preponderance of the evidence. 24 C.F.R. §982.555(e)(6). In *Kaley*, the Supreme Court explains that "probable cause…is not a high bar." *Id.* at 1103. The Court further emphasizes that indictments are reliable only to the extent that they show probable cause. The probable cause standard is so low that it does not require an adversarial hearing. *Id*. The hearing officer and the district court are attempting to allow DHA to supplant the Section 8 termination's preponderance of the evidence standard with the indictment's probable cause standard, a much higher standard. Because indictments are unreliable in proving anything other than probable cause, the fourth prong of the *Basco* test fails.

Each of the five cases from the Eleventh Circuit focuses on the unreliability of hearsay evidence in light of the tenant's inability to confront and cross-examine the witnesses against them. In each case, the court held that the hearsay evidence alone was insufficient for the respective PHA to meet its burden of proof. The cases have also repeatedly determined that a "PHA bears the burden of persuasion at an informal administrative hearing held pursuant to HUD regulations to determine whether a Section 8 participant's housing subsidy should be terminated." *Basco*, 514

F. 3d at 1183-1184.[9] The burden does not shift to the tenant until the PHA meets its burden to present a prima facie case. *Ervin v. Hous. Auth. of the Birmingham Dist.*, 281 Fed. Appx. 938, 941 (11th Cir. 2008). In the present case, the only evidence offered by DHA to meet that burden is an indictment which provides an accusation that lacks any facts and corroborating details which was made by an anonymous source. In light of this line of cases, where this Court and others have held more specific and developed facts to be insufficient, it is clear that both the hearing officer and the district court erred by improperly shifted the burden to Yarbrough.

The hearsay evidence presented by DHA does not comply with the four-part test to determine the admissibility of hearsay evidence. Because unreliable and unsubstantiated hearsay was the only evidence presented at the hearing, DHA did not make a *prima facie* showing and the burden was improperly shifted to Yarbrough. Therefore, the district court erred in granting summary judgment for DHA.

[9] See also *Ervin v. Hous. Auth. of the Birmingham Dist.*, 281 Fed. Appx. 938, 941-942 (11th Cir. 2008); *Lane v. Fort Walton Beach Hous. Auth.*, 518 Fed. Appx. 904, 912 (11th Cir. 2013).

II. The district court erred in upholding the hearing officer's decision because he relied solely on an indictment, which is an accusation and not proof of the underlying facts.

The district court erred in upholding the hearing officer's decision, since his decision was based entirely on DHA's offer of Yarbrough's indictment on a criminal charge that was later dismissed. The existence of an indictment alone is insufficient to meet DHA's burden in terminating Yarbrough's voucher, and the district court thus erred in determining that DHA met its burden.

Indictment proceedings by grand jury are conducted in secret in Alabama. *See* Ala. Code 12-16-214; *see also* discussion *supra*. Grand jury proceedings are *ex parte*; only the State is given an opportunity to present evidence tending to indicate the accused's guilt. *State ex rel. Baxley v. Strawbridge*, 52 Ala. App. 685, 687 (Ala. Crim. App. 1974). Obviously, in such a proceeding, no evidence is presented on behalf of the defense. *Id*. The only question before the grand jury is determining whether there is sufficient evidence to warrant a trial, where the accused's guilt or innocence would be determined. *Id*. "The presentments made by the grand jury do not and never did amount to an assertion that the person presented is guilty. They are merely an assertion that he is suspected." *Id*. (quoting Holdsworth, History of English Law I: 322-323). An indictment can rest on the hearsay testimony of a single

witness who is not subject to cross-examination. *McLaren v. State*, 353 So. 2d 24, 33 (Ala. Crim. App. 1977)[10].

The Ninth Circuit Court of Appeals has recognized that grand juries "tend to indict in the overwhelming number of cases brought by prosecutors. Because of this, many criticize the modern grand jury as no more than a 'rubber stamp' for the prosecutor…Day in and day out, the grand jury affirms what the prosecutor calls upon it to affirm -- investigating as it is led, ignoring what it is never advised to notice, failing to indict or indicting as the prosecutor 'submits' that it should." *United States v. Navarro-Vargas*, 408 F. 3d 1184, 1195 (9th Cir. 2005) (citations omitted).

In this case, the district judge even acknowledged, at the hearing on the Plaintiff's Motion for a Preliminary Injunction, the inherent unreliability of indictments for the purpose of proving guilt. The Court stated, "I tell my jurors in criminal cases that an indictment is not evidence of guilt; that the accused is presumed to be innocent until the government proves its case beyond a reasonable doubt and until the jury makes that determination after all of the evidence is in." (Doc 52 – 4:6-10). The Court further questioned DHA as to why no live testimony was presented at the hearing, to which DHA had no response. *Id.* at 6:12-19. In fact, the Eleventh Circuit Pattern Jury Instructions state that, "The indictment against the

[10] Citing *Armstrong v. State*, 294 Ala. 100 (1975); *Costello v. United States*, 350 U.S. 359 (1956); *Crowden v. State*, 133 So. 2d 678 (Ala. Ct. App. 1961).

defendant brought by the government is only an accusation, nothing more. It is not proof of guilt or anything else." The Alabama Court of Criminal Appeals has recognized that an "indictment is but an accusation in writing," and held that "[t]he trial court correctly refused to allow the introduction of the indictment of another party." *Davis v. State*, 305 So. 2d 390, 395 (Ala. Crim. App. 1974).

The standard for an indictment by a grand jury is probable cause. *Kaley v. United States*, 134 S. Ct. 1090, 1097 (U.S. 2014). *See* discussion *supra*. The *Kaley* Court explains that this is why cross-examination and confrontation are not necessary, why "it has always been thought sufficient to hear only the prosecutor's side," why exculpatory evidence has not been required, and why hearsay has been allowed. *Kaley*, 134 S. Ct. at 1097. (citations omitted). The Court states further:

> On each occasion, we relied on the same reasoning, stemming from our recognition that probable cause served only a gateway function: Given the relatively undemanding "nature of the determination," the value of requiring any additional "formalities and safeguards" would "[i]n most cases . . . be too slight." *Gerstein*, 420 U.S., at 121-122.
>
> *Id.*

In other words, the rules in grand jury proceedings are relaxed precisely because the standard of proof is sufficiently lower than it would be at trial. A grand jury's only task is to determine whether there is enough reasonable proof to indicate that a crime occurred. A grand jury may perform its function perfectly: it is presented

one side of the story only, which may rely on hearsay evidence which would otherwise be inadmissible at trial, and the defendant is offered no opportunity to rebut or even to be made aware of what that evidence is. A grand jury is allowed to make its determination based solely on this one-sided version of events, and may choose to indict on that basis alone. However, the standards are only relaxed to that extent because probable cause is such a low bar.

DHA contends in this case that because Yarbrough was indicted, and not merely arrested, that they have met their burden of proof in terminating her benefits. (Doc 17 – Pg 7). The Department of Housing and Urban Development has recently issued guidance to correct similar misuse of arrest records by explaining why an arrest without conviction is insufficient to terminate a Section 8 voucher.[11] The guidance provides,

> [B]efore a PHA…terminates the assistance of…an individual or household on the basis of criminal activity by a household member…the PHA must determine that the relevant individual engaged in such activity…HUD has reviewed the relevant case law and determined that the fact that an individual was arrested is not evidence that he or she has engaged in criminal activity…[T]he fact that there has been an arrest for a crime is not a basis for the requisite determination that the relevant individual engage in criminal activity warranting…termination of assistance.
>
> Id. at 3.

[11] U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, Notice PIH 2015-19, Issued November 2, 2015.

This HUD guidance was not a new statement of the law, but rather an explanation to the various PHAs that believed arrest records were sufficient. Cases such as The *Estates New Orleans v. McCoy* had already held that a simple arrest, even combined with a police officer's testimony that the public housing resident was publicly intoxicated and engaged in a violent interaction, was insufficient without a subsequent conviction to meet the Housing Authority's burden in terminating that resident from the program, 162 So. 3d 1179 (La. Ct. App. 2015). In that case, the police officer testified as to his observations of what occurred that night. Both the resident and the person she allegedly fought with were arrested. *Id*. The criminal charges against the resident defendant in that case were dropped; however, the Housing Authority went forward with terminating her public housing. *Id*. On appeal, the Court reversed the lower court's decision. *Id*.

The HUD guidance further provides that for Section 8 programs, a "preponderance of the evidence" standard must be met in order to terminate assistance based on criminal activity.[12] The guidance states that when terminating a Section 8 voucher, the PHA must provide the tenant with "notice and the opportunity to dispute the accuracy and relevance of a criminal record before they…terminate the tenant's assistance on the basis of such record." *Id*. at 5. The tenant must also be

[12] U.S. Department of Housing and Urban Development, Notice PIH 2015-19, at 4.

afforded due process, including "the right to be represented by counsel, to question witnesses, and to refute any evidence presented by the PHA or owner." *Id*.

The HUD guidance reaffirms the Supreme Court's prior findings in *Goldberg v. Kelly*, 397 U.S. 254, 260-66 (1970), where the Court sets out due process standards for terminations of public benefits. *See* discussion *supra*. The Court similarly explains there that a recipient must have adequate notice giving the reasons for the proposed termination, as well as an "effective opportunity" to confront any adverse witnesses. *Id.*

The Supreme Court has contrasted probable cause with both the "reasonable doubt" and "preponderance of the evidence" standards:

> The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. This is not to say that confrontation and cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.

Gerstein v. Pugh, 420 U.S. 103, 121-122 (1975) (citations omitted).

In this case, the only evidence presented by DHA was the fact of Yarbrough's indictment. (Doc 17-6 - Pg 2). This one piece of evidence falls short of meeting DHA's burden, by a preponderance of the evidence, that Yarbrough engaged in

criminal activity sufficient to terminate her benefits. Even in a case with live testimony by the arresting officer, an appellate court found that the mere fact of the resident's arrest, when the charges were subsequently dropped, was insufficient to sustain termination of her benefits. In this case, there was no live testimony or opportunity to cross-examine the witness who provided evidence against Yarbrough; the fact of her indictment alone clearly falls short of DHA's burden of proof. DHA did not have any witnesses present at the hearing, including the officer listed on the indictment or any of the witnesses who may have testified before the grand jury. *Id.* Yarbrough has never been given an opportunity to know what evidence was presented at the indictment against her, due to the nature of grand jury proceedings in Alabama, but also because DHA presented no other evidence. Yarbrough was never given any meaningful notice or opportunity to dispute the allegations brought against her, because DHA never provided any independent basis for the criminal allegations against her. Nor was Yarbrough ever given the opportunity to question any witnesses against her, because again, DHA did not present any witnesses at the hearing. Yarbrough also had no meaningful opportunity to subpoena any witnesses against her or bring any of her own. Yarbrough was never given sufficient notice of the allegations against her, such that she could bring her own rebuttal witnesses to her hearing. DHA's actions in this case clearly did not afford Yarbrough her federally mandated due process rights.

Federal due process clearly enumerates the elements required before Yarbrough's benefits can be terminated. None of those elements are present in grand jury proceedings. Grand jury proceedings are inherently non-adversarial, with no opportunity for the defendant to cross-examine witnesses. Thus, the burden of proof in terminating one's federal benefits is much higher than that of indicting a criminal defendant. An indictment alone, then, simply cannot meet the Housing Authority's burden to prove, by a preponderance of the evidence, that criminal activity occurred.

Moreover, DHA's offer of Yarbrough's indictment did not go unaddressed by Yarbrough. At her hearing, Yarbrough provided a court order that indicated that her criminal charges had been dismissed. (Doc 17-6 - Pg 2). Although DHA never met its burden of proof in terminating Yarbrough's benefits, Yarbrough did provide evidence to controvert the one piece of evidence offered by DHA.

In light of the inherent unreliability of indictments in cases where the charges are ultimately dismissed, DHA clearly has not met its burden by a preponderance of the evidence in proving that the criminal conduct Yarbrough was accused of occurred in this case, and the district court erred in upholding the hearing officer's decision to the contrary.

III. The district court erred in upholding the hearing officer's decision because he could not possibly have made a credibility determination about testimony that was not taken.

Both DHA and the District Court have relied upon Yarbrough's supposed "testimony" at the hearing as evidence that the Hearing Officer could consider in determining that she had committed a crime. The Court also used this as the basis for the denial of Yarbrough's injunction, stating, "Based on the underlying conduct in the indictments, the Hearing Officer's evaluation of the plaintiff's demeanor and credibility, and the reasons outlined in open court, the court finds that the plaintiff has failed to establish a substantial likelihood of success on the merits." (Doc 23). In the Court's decision, the judge goes into great length in a footnote explaining that part of the "evidence before the hearing officer" was Yarbrough's demeanor, which could be used to judge her credibility. The Court discusses, in great detail, that the determinations of hearing officers regarding demeanor and credibility are given great deference.

In DHA's Motion for Summary Judgment, DHA asserts that the "proper way to conduct credibility determinations is to weigh the testimony of all of the witnesses, take into account the interests of the witnesses, the consistencies or inconsistencies in their testimonies, and their demeanor on the stand." (Doc 31). That is undoubtedly true and not in question in this case. What is in question is DHA's assertion that the hearing officer, based on this credibility determination, "was entitled to rely upon the contradiction between Plaintiff's statements, and the actual

evidence presented, in determining that she engaged in drug-related activity" (Doc 31).

The simple fact in this case is that Yarbrough's benefits were terminated because she is accused of committing a crime and she was never questioned about these accusations, nor did she make any statement about the accusations other than to relate that the charges were being dismissed (which the hearing officer accepted as true). Since Yarbrough was never questioned about this matter, there was no testimony for the hearing officer to find lacking in credibility or from which to determine that any activity occurred. Such a determination would not only be unreliable but also appears substantially similar to the "sit and squirm" test regarding Social Security applicants which held hearing officers should not base their factual determination on mere observances of an individual. See *Wilson v. Heckler*, 734 F.2d 513 (11th Cir. 1984) (where the Eleventh Circuit stated that although it was within the providence of an administrative hearing officer to evaluate testimony, they may not independently draw their own conclusions about a Social Security applicant's pain simply by observing them without using medical information).

To the extent that the law requires DHA to present a prima facie case, it is illogical for them to assert that part of their case was her silence, her demeanor, or her testimony, when they elected not to question her on the matter. DHA's attempt to rely upon Yarbrough's silence as proof of their case lacks merit since DHA has

the burden of persuasion and must initially present sufficient evidence to establish a prima facie case at an administrative hearing. DHA can therefore neither claim that her undisputed testimony is sufficient to confirm her guilt in this matter nor that her silence is sufficient to carry their burden at the hearing.

Furthermore, the Code of Federal Regulations section related to the hearing decision (24 CFR 982.555(e)(6)) requires that:

> The person who conducts the hearing must issue a written decision, **stating briefly the reasons for the decision**. Factual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing. A copy of the hearing decision shall be furnished promptly to the family. (emphasis added)

Although the hearing officer did state the reasons for his decision at fairly good length, he does not mention any indication that the Yarbrough's behavior or demeanor played any part in his decision. (Doc 17-6 - Pg 3-4). In his decision, it is clear that the only evidence he reviewed on this matter was the indictment offered by DHA.

In contrast, a hearing officer in another Section 8 program termination case made specific findings regarding credibility when terminating an individual's benefits over her testimony. *Gammons v. Mass. Dept. of Hous. & Comm. Dev.*, 502 F. Supp. 2d 161 (D. Mass. 2007). In that case, the hearing officer upheld a PHA's decision to terminate Section 8 benefits based on an unauthorized occupant living in

the home. He heard from from two investigators for the PHA and examined numerous documents (bills, mail, driver's license, etc.) indicating that the unauthorized individual resided at the property. *Id*. In reviewing the program participant's testimony, the hearing officer stated in his decision that, "I am led to believe you provided false statement, omission, or concealment of substantive fact, made with intent to deceive or mislead; and that you did not list Andrew Williams on your household, knowing he was a permanent resident of your household, as you knew and understood that doing so would increase your family contribution to the rent." *Id*. at 164.

In this case, the hearing officer claims in his affidavit, created after this case was filed, that he did not find Yarbrough's testimony to be credible although each issue of fact he attributes to her is accepted by the parties as the unopposed truth. (Doc 32-13 - Pg 5). At the hearing, the hearing officer claims that Yarbrough testified that 1) she was arrested and indicted, 2) she had entered an agreement for the charges to be dismissed upon payment of court costs, and 3) that DHA had previously reviewed this issue and had agreed to await the outcome of the matter before proceeding with the issue. *Id.* at 3-5. None of those facts is in question. In fact, the documentary evidence of these facts is indisputable.

Neither the Court's order nor DHA's Motion for Summary Judgment address the fact that in each of the 11th Circuit cases cited by Yarbrough – *Basco*, *Lane*,

Ervin, *Sanders* and *Taylor* – the court has found a lack of due process in spite of the fact that the hearing officer was able to observe the recipient testifying. To the extent that the District Court has found that a hearing officer may determine the credibility of a witness when they are not questioned about a subject, this position is clearly in conflict with this line of cases. In each of these cases, the hearing officer was able to observe the witness, and if it were legally permissible to establish guilt based solely on their testimony then each of these holdings would have been resolved in favor of the Housing Authority instead of the recipient.

Conclusion

The Court should reverse the district court's finding that DHA properly terminated Yarbrough's federal housing subsidy. The district court erred in granting DHA's motion for summary judgment.

Respectfully submitted this 24th day of July, 2017.

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Dated: July 24, 2017.

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