UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

GINA KAY RAY, et al., Individually and on behalf of a class of similarly situated persons,	)	
Plaintiffs;	)	CIVIL ACTION NO.:
v.	)	2:12-cv-02819-RDP
JUDICIAL CORRECTION SERVICES, INC., et al.,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Defendant Judicial Correction Services, Inc. ("JCS") operated a for-profit probation enterprise throughout the State of Alabama, including in the City of Childersburg. JCS's scheme was designed to use threats, harassment, arrest, and jail to coerce extremely poor people into paying money they could not afford to pay for as long as possible. The system worked well for JCS: during its stint in Alabama, it extracted over $50 million from people so destitute they lacked the means to pay simple fines for infractions as minor as a traffic ticket. The system did not work as well for Plaintiffs and the putative class members, however. Despite doing their best to make the monthly payments JCS demanded, many fell behind and were arrested and jailed.

Plaintiffs and the putative class members they seek to represent were all assessed fines and/or court costs by municipal courts for misdemeanors. When they were unable to immediately pay the amounts due, the courts placed them on probation with JCS for the collection of that court debt. Pursuant to its contracts with Alabama cities, JCS collected debt at no cost to the municipalities, making its profits by tacking on monthly fees to each debtor's bill.

This proposed class action addresses three kinds of constitutional violations occurring between August 28, 2010 (two years prior to the filing of the original complaint) and November 2015 (when JCS left Alabama)—hereinafter the "class period." Two claims are on behalf of probationers sentenced by the Childersburg Municipal Court, and one claim is on behalf of all probationers statewide. First, when Plaintiffs and the Childersburg class members failed to pay the court debt and fees JCS demanded, they were arrested and jailed—sometimes for weeks at a time—without any determination of their ability to pay, in violation of their substantive due process and equal protection rights. Second, the Childersburg class members were denied counsel before they were jailed, in violation of their Sixth Amendment rights. Third, throughout

Alabama, JCS routinely extended probationers' sentences beyond the two-year statutory maximum without any notice or the opportunity for a hearing, in violation of their procedural due process rights. Plaintiffs bring this action under 42 U.S.C. § 1983, seeking compensatory damages for the injuries they suffered as a result of the violation of their constitutional rights.

Plaintiffs seek to certify two Rule 23(b)(3) damages classes:

> **1. Childersburg Jail Class:** All individuals who, as of August 28, 2010 or thereafter, were assigned by the Childersburg Municipal Court to JCS probation for the collection of court debt and jailed after an alleged probation violation.
>
> **2. Statewide Due Process Class:** All individuals who, as of August 28, 2010 or thereafter, were assigned by Alabama municipal courts to JCS probation for the collection of court debt and who served more than 24 months on any single probation sentence.

Class treatment suits this case well: The testimony of JCS's designees, extensive data from JCS's own records, and JCS's own forms, written policies, and instructions all confirm that JCS employed a common course of conduct that applied to the members of each class in the same manner.

This action satisfies all the prerequisites for a class action under Rule 23(a). The proposed Childersburg Jail Class is comprised of approximately 275 members, and the proposed Statewide Due Process Class is comprised of over 33,000 members. All four named plaintiffs are appropriate class representatives for the Childersburg Jail Class; they were jailed by the Childersburg Municipal Court after JCS sought to revoke their probation due to an alleged probation violation and none had an ability-to-pay determination or counsel. And at least three of the four named plaintiffs are appropriate representatives for the Statewide Due Process Class; JCS extended their probation sentences past the statutory maximum of two years. Plaintiffs will adequately represent the Classes and have retained counsel who have the resources and experience to represent the Classes effectively.

This action also warrants certification under Rule 23(b)(3). The questions concerning whether JCS reached an agreement with the Childersburg Municipal Court to deny counsel and ability-to-pay determinations to the class members, and whether JCS had a custom or policy of extending probationers' sentences beyond two years without notice or a hearing, will be answered through common proof, and those questions predominate over any individual questions that might arise with respect to damages. A class action will be far superior to litigating a multitude of separate actions and will present the most efficient structure to resolve this dispute.

Class certification should therefore be granted.

II. STATEMENT OF RELEVANT FACTS

The undisputed facts concerning JCS's relationship with, and services to, the Childersburg Municipal Court are set out in detail in the Court's summary judgment order. *See* Doc. 626 at 8-19. This section, therefore, is intended only to highlight facts that are particularly relevant to the classes and claims on which Plaintiffs now seek class certification.

A. JCS's Operations in Childersburg and Throughout Alabama

JCS marketed its debt collection services to cities and towns throughout Alabama by presenting them to city mayors and city councils as "offender paid."[1] The company's standard contract JCS provided that JCS would, among other things, "collect from probationers Court ordered fines, restitutions and other costs associated with the Court, and disburse said monies."[2] JCS "agree[d] that it w[ould] not invoice the City or Court for its services."[3] In exchange for these free services, the municipal courts agreed that, when sentencing people to JCS probation,

[1] *See* Deposition of Colleen Ray JCS's Person Most Knowledgeable under Rule 30(b)(6) (June 20, 2014) ("Colleen Ray 2014 Depo.") at Depo. 192-93 (Doc. 392-11).

[2] *See, e.g.*, JCS Client Agreement with Childersburg at 5 (Doc. 392-16).

[3] *See id.* at 6.

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they would use orders requiring probationers to pay a "$35.00 per month flat fee" and an additional "[o]ne time probationer set-up fee of $10.00."[4] However, the contract provided that "indigent cases" would "not be charged the standard probation fees."[5]

The City of Childersburg accepted JCS's proposal and entered into the company's standard contract in 2005. The city's municipal court judge, Larry Ward, had previously worked with JCS in other cities.[6] Although the contract bound the city and its municipal court to the exclusive use of JCS, no bids were solicited from other companies.[7]

Once the JCS system was implemented, people in Childersburg and other Alabama cities who appeared in municipal court to answer for traffic tickets or other minor municipal charges were divided into two groups. Anyone who was able to pay the entire amount owed for the fine and/or any associated court costs was free to go with no further obligation. But anyone who was *not* able to pay the full amount was assigned by the municipal court to "probation" supervised by JCS. As JCS's Alabama State Director and the company's 30(b)(6) representative, Colleen Ray, explained, "Most defendants in Alabama get placed on probation with JCS because they can't pay their fine in full . . . ."[8] JCS was then responsible for collecting the outstanding court debt from the probationer, plus the additional monthly fees payable to JCS.[9]

JCS policies, practices and customs throughout Alabama were highly standardized and

[4] *Id.* The $35 monthly fee was later increased to $45 per month.

[5] *Id.* at 4.

[6] Deposition of Larry Ward in *Ray v. JCS* (Feb. 11, 2016) at Depo. p. 18 (Doc. 392-5).

[7] Deposition of B.J. Meeks, Mayor of Childersburg and the City of Childersburg's Person Most Knowledgeable under Rule 30(b)(6) at Depo. p. 48 (July 18, 2014) (Doc. 329-9 at 13); Deposition of Sandra Donaho at Depo. p. 52-54 (April 30, 2015) (Doc. 273-1 at 13-14).

[8] *See* Ex. 2, Memo from Colleen Ray to Karen Lloyd (Sept. 4, 2014) (Doc. 402-13); Deposition of Misty Hepp, JCS Clerk ("Hepp 4/29/2015 Depo.") (Apr. 29, 2015) at 224-25 (Doc. 194-1 at 56-57).

[9] *See* Hepp 4/29/2015 Depo. at 224-25 (Doc. 194-1 at 56-57).

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uniform.[10] The company's policies and practices were set out in three main sources: (1) the JCS form contract; (2) the JCS software program Probation Tracker, which was used to manage all probation cases; and (3) the JCS Training Manual, which was used to train all employees. As Colleen Ray explained, every employee was trained using the JCS Training Manual, a copy of which was kept at every office, and every employee had access to Probation Tracker.[11]

The JCS Training Manual contains samples of the forms that can be generated using Probation Tracker. These forms include letters threatening arrest, delinquency letters, violation of probation letters; petitions for revocation of probation requesting that an arrest warrant be issued for the probationer, warrants for arrest, and recall of warrants.[12] The manual also provides a flow chart for "Working a Typical Case" illustrating the JCS collection system from the point at which a person is sentenced to probation to the point at which an arrest warrant is issued.[13] It describes how to perform all the required tasks in Probation Tracker, including the use of various codes to indicate each probationer's status and associated actions taken by JCS.

After JCS employees were trained, they were referred to as "probation officers." Because the training and system were uniform, employees could easily work for JCS in multiple cities and be relocated as the need arose.[14] However, JCS employees did not receive the training, qualifications, or certifications that are required of real probation officers in the federal and state systems.[15]

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[10] *See generally* Plaintiffs' Exhibit 1, Declaration of Peter Coons in Supp. of Plaintiffs' Motion for Class Certification (Oct. 22, 2018) ("Coons Decl.").

[11] *See* Colleen Ray 2014 Depo. at 65-66, 77, 107-108 (Doc. 392-11 at 18, 21, 28).

[12] *See* Coons Decl. Ex. 2 Part 1 at PDF pp. 98-101; Part 2 pp. 1-51 (JCS Training Manual). (Bates pp. Ray v. JCS000087-141)

[13] *See* Coons Decl. Ex. 2 Part 1 at PDF p. 76 (JCS manual) (Bates p. Ray v. JCS000065)

[14] *See* Colleen Ray 2014 Depo. at 70 (Doc. 392-11 at 19).

[15] *Id.* at 69 (Doc. 392-11 at 19).

Probation Tracker was a paperless system that could be used to generate the forms specified in the manual as well as various reports. Once a city contracted with JCS, JCS provided all necessary forms probation orders. Probation Tracker also contains a case file for each person on probation, with a page where JCS employees chronicled the collection efforts and information gathered. Any hard documents generated by the city court were scanned into Probation Tracker and linked to the person's case file.[16] JCS would then shred the hard copy.

When a municipal court assigned a person to JCS for collection of court debt, it used a JCS probation order.[17] The form probation orders, which were pre-printed by JCS in a three part form, included the "conditions of probation."[18] JCS employees filled out the probation orders, calculating the monthly payment amounts based on the total court debt and the JCS monthly fees.[19] JCS employees were directed that monthly payments should not be less than "$135/$140/$145."[20] Once JCS started charging its monthly fees, a person on probation could not end her sentence by paying off the amount of the original debt.[21]

In Childersburg and other cities, the JCS probation order contained a single line printed at the bottom of the page stating, "I have counsel or have waived my right to counsel for all proceedings to this date and have received a copy of this ORDER."[22] The form contained no explanation of the right to counsel. And there is no evidence in the record that the Childersburg

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[16] *Id.* at 170-72 (Doc. 392-11 at 44); Deposition of Lisha Kidd (June 25, 2014) ("Kidd 6/25/2014 Depo.") at 232 (Doc. 195-1 at 58).

[17] Kidd 6/25/2014 Depo. at 146 (Doc. 195-1 at 37).

[18] Coons. Decl. Ex. 2 Part 1 (JCS Training Manual) at PDF p. 89, (Bates p. Ray v. JCS 000078). The Court found that the evidence in the record does not support JCS's assertion that Judge Ward approved the probation orders and other JCS form documents. *See* Doc. 626 at 9.

[19] Coons. Decl. Ex. 2 Part 1 (JCS Training Manual) at PDF p. 25 (Bates p. Ray v. JCS 000014).

[20] *Id.*

[21] *See* Kidd 6/25/2014 Depo. at 109-10 (Doc. 195-1 at 28).

[22] *See* Coons. Decl. Ex. 2 Part 1 (JCS Training Manual) at PDF p. 27, (Bates p. Ray v. JCS 000016).

Municipal Court engaged in a dialog with defendants to ensure that they understood their right to counsel and waived that right knowingly and voluntarily.

People were put on JCS probation regardless of whether the offense with which they were charged was punishable by jail and regardless of whether they actually received a suspended jail sentence. In fact, many people in Alabama were put on JCS probation despite the municipal court dismissing all charges against them, solely for the collection of court costs. Meanwhile, anyone who had the means to pay could avoid JCS probation regardless of the severity of the offense. In this way, JCS probation had nothing to do with public safety or culpability—and everything to do with whether the person had money.[23]

And people on JCS probation simply did not have the money. The median income for a male resident in Childersburg from 2012-16 was $24,239, and over 30% of people were below the poverty line.[24] For example, evidence in JCS's records strongly indicated that many of the probationers placed on JCS probation were obviously indigent and could not pay their court debt and mounting JCS fees. For example, JCS's records indicate a large number of people sentenced to JCS probation by the Childersburg Municipal Court were collecting SSI or unemployed.[25] These clear signs of poverty-related inability to pay are consonant with a wealth of research showing that court-related fines and fees cause significant hardship for the people least able to afford them. A recent report by a collaborative of academics, faith groups, and lawyers surveyed 1,000 Alabamians with criminal justice debt, and found that over 80% of the debtors reported

[23] Consistently with this, Colleen Ray testified that once all fines, costs, and fees were collected, the probation sentence would end. *See* Colleen Ray 2014 Depo. at 262 (Doc. 392-11 at 67). But JCS continued to accept payments from people whose sentences had ended. *See* Coons Decl. Part 2, Ex. 2, PDF p. 38 (Ray v. JCS000128)

[24] U.S. Census Bureau, *Data for Childersburg, Alabama* https://www.census.gov/data.html (search for Childersburg, AL).

[25] Coons Decl. ¶ 58 & Ex. 15.

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giving up necessities like rent, food, medical bills, and child support to pay down court debt.[26] Furthermore, though almost 70% of the debtors had at some point been declared indigent by a court, over 70% of all the debtors did not know they could ask to have their payments reduced or deferred, and almost 50% of all the debtors had been jailed for failure to pay.[27]

Despite the fact that JCS's fees significantly increased the total amount each debtor owed, and despite the fact that JCS was contractually obligated not to collect fees from debtors who were indigent, there is no evidence that either JCS or the Childersburg Municipal Court had a practice of inquiring into whether people had the ability to pay the court debt or fees at any point. *See* Doc. 626 at 81.[28] Instead, people were simply arrested and jailed. Colleen Ray acknowledged that JCS has a financial interest in collecting fees, but she denied any responsibility on JCS's part to investigate whether anyone assigned to JCS probation actually had the means to pay.[29]

JCS did not provide traditional probation services to the debtors from whom it collected. Rather, once a person was on JCS probation, JCS's focus was collecting the court debt and its own fees. *See* Doc. 626 at 10. But because virtually all the people assigned to JCS probation were very poor, many of them could only afford to pay a fraction of the monthly payment amount JCS had chosen, and many missed payments altogether. When people couldn't make a

[26] Plaintiffs' Ex. 4 , Alabama Appleseed, Greater Birmingham Ministries, UAB-TASC, Legal Services Alabama, *Under Pressure: How fines and fees hurt people, undermine public safety, and drive Alabama's racial wealth divide* 31 (2018).

[27] *Id.* at 29, 30, 33.

[28] *See* Colleen Ray 2014 Depo. at 161 (Doc. 392-11 at 42); Kidd 6/25/2014 Depo. at 232 (Doc. 195-1 at 58).

[29] *See* Colleen Ray 2014 Depo. at 160-61, 242-43 (Doc. 392-11 at 41-42, 62).

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payment, JCS threatened to have them arrested.[30] And when they could only make a partial payment, JCS often allocated as much of the payment (or more) to its own fees as it did to the court's fine, thereby prolonging the amount of time it took for debtors to satisfy their underlying debts to the city.[31]

If a debtor repeatedly failed to make payments, JCS generated a petition for revocation requesting that the municipal court revoke the debtor's probation and issue an arrest warrant.[32] Neither JCS nor the Childersburg Municipal Court informed probationers that they could lawfully be jailed only if they were able to pay but willfully refused. The Childersburg Municipal Court would invariably issue a warrant for the person's arrest shortly after the judge signed the JCS petition for revocation, and JCS employees knew that once they submitted the petition, a warrant would be issued for the individual's arrest.[33]

Once arrested, people who couldn't pay money were jailed overnight, while others were detained until they paid and then set free. And once jailed, many people were held for days or even weeks—until they or their family members could scrape together enough for a payment. The payments probationers made to buy their freedom went, in large part, to JCS's profits.[34]

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[30] *See* Kidd 6/25/2014 Depo. at 304 (Doc. 195-1 at 76); Deposition of Kristy Fugatt (May 8, 2015) at 131 (Doc. 641-46 at 34).

[31] *See, e.g.*, Doc. 697 at 73-75, 88, 104, 122 (Probation Tracker records showing multiple dates where JCS kept half of debtors' total payments for its probation fee); Doc. 697-7 at 1; Doc. 697-1 (JCS kept large portions of fees paid by debtors to gain release from jail).

[32] *See, e.g.*, Doc. 697-11 at 46; *see also* Doc. 626 at 15-16, 66, 80.

[33] *See* Kidd 6/25/2014 Depo. at 134 (Doc. 195-1 at 34) (petition "is what we give the Court to be used for them to establish a warrant"); *id.* at 273 (Doc. 195-1 at 69); Coons Decl. Ex.1, Part 1 at PDF p. 76 (Bates p. Ray v. JCS000065) (JCS Training Manual shows no steps taken between submission of revocation petition and issuance of warrant). *See also* Doc. 626 at 66.

[34] *See, e.g.*, Doc. 697-7 at 1 (Probation Tracker records showing portion of each payment made to secure release was allocated to fee type 1; for example, debtor with "ProbID" 248506 paid $227 on Sept. 1, 2010 "to be release from jail," of which JCS pocketed $105; and debtor with "ProbID" 245601 paid $232 for release, of which JCS took $180); Doc. 697-1 at 1 (JCS fee type 1 means "Probation Fee").

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JCS would submit a bi-monthly remittance of the court debt collected to each city treasurer.[35] The company had discretion to determine how the payments each debtor actually made would be allocated between the persons' court debt and JCS's fees, and JCS did not inform its city clients how much money total it collected from probationers—or how much in fees the company kept for itself.[36] Cities typically did not monitor or audit JCS's activities and often did not keep records of who was assigned to JCS, let alone how long each person had been on JCS probation.[37] As a result of these and other factors, people on JCS probation often ended up paying much more than the amount of their original court debt—and many stayed on probation for years, all while being threatened with arrest or even jailed.[38]

JCS employees also routinely extended probationers' sentences, sometimes extending them beyond the two-year statutory limit.[39] They did this in a number of ways, including extending the sentence 24 months from the reinstatement date when marking a person's probation sentence as reinstated, even if the person had served time toward those probation sentences;[40] extending sentences for existing charges by 24 months when the municipal court issued probation orders in a different case; placing probation sentences on hold and then starting them long after the sentence date; and entering a longer sentence in Probation Tracker than the sentence ordered by the municipal court. *See* Doc. 626 at 62-63. And these practices were sanctioned by official JCS policy: the Training Manual, used by all JCS probation officers,

[35] *See* Colleen Ray 2014 Depo. at 188 (Doc. 392-11 at 48).

[36] *See* Hepp 4/29/2015 Depo. at 288 (Doc. 194-1 at 72).

[37] *Id.* at 69-70 (Doc. 194-1 at 18-19); Kidd 6/25/2014 Depo. 93 (Doc. 195-1 at 24).

[38] *See* Hepp 4/29/2015 Depo. at 180-94, 196-206 (Doc. 194-1 at 45-52).

[39] *See* Coons. Decl. ¶¶ 38-44 & Exs. 4, 5; *see* Letter from Misty Hepp to Lisha Kidd (Nov. 12, 2014) (Doc. 187-3); Doc. 183-4.

[40] *See, e.g.*, Doc. 697 at 62 (Ms. Ray); *id.* at 100-101 (Mr. Fugatt); id. at 116 (Mr. Jews).

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provided clear instructions

on how to recalculate a probation start date so that a person's sentence would be extended by two years from the date it was reinstated, even if the person had already served part of their sentence.[41] The Training Manual also instructed employees to place subsequent probation sentences "on hold until the defendant completed paying all amounts owed on the first case" and only then "activat[ing] the second probation sentence," so that people remained on probation for consecutive terms. *Id.* at 64. JCS even had a policy of continuing to collect fees from debtors *after* their probation terms had ended. *See id.* at 13. As of April 2014, JCS identified over 20,000 people whom it had kept on probation for longer than two years.[42]

After the institution of this and other civil rights lawsuits against JCS and various Alabama cities, Childersburg terminated its relationship with JCS effective June 20, 2015,[43] and JCS withdrew from Alabama in November 2015.[44] By the time JCS ceased operations in Alabama, well over 100,000 people in Alabama had been put on JCS probation[45]—including over 1,100 people in the small town of Childersburg[46]—and JCS had collected over $29 million in fees from some of the poorest people in the state during the class period.[47]

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[41] Coons Decl. Ex. 1 Part 2, PDF p. 44 (Bates Ray v. JCS 000134) (JCS Training Manual).

[42] *See* Plaintiffs' Ex. 5 (JCS response to interrogatories April 2014); Coons Decl. ¶ 38 & Ex. 4.

[43] *See* Plaintiffs' Ex. 6.

[44] *See* Bill Riales, *JCS Leaving Alabama* (Oct. 29, 2015), at https://www.wkrg.com/news/jcs-leaving-alabama_20180207084152841/957044076; Blake Deshazo, *Private Probation Company Stops State Operations After SPLC Lawsuit*, Selma Times-Journal (Oct. 23, 2015), at https://www.selmatimesjournal.com/2015/10/23/private-probation-company-stops-state-operations-after-splc-lawsuit/.

[45] Coons Decl. ¶ 17.

[46] Coons Decl. ¶ 54 & Ex. 12. The population of Childersburg was just over 5,000 in 2010. *See* U.S. Census Bureau, American Fact Finder, at https://factfinder.census.gov/faces/nav/jsf/pages/guided_search.xhtml.

[47] Coons Decl. ¶ 19.

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B. The Named Plaintiffs' Experiences

Each of the named plaintiffs—Timothy and Kristy Fugatt, Gina Ray, and Deunate Jews—appeared before the Childersburg Municipal Court to answer for minor charges such as driving with a suspended license and driving with expired registration.[48] Each was placed on JCS probation after being unable to make court-ordered payments on the spot.[49] Three of the four named plaintiffs were put on JCS probation without any underlying conviction or jail sentence whatsoever: Mr. Jews was assessed court costs even though his underlying charges were dismissed, and the charges against both Mr. And Mrs. Fugatt were *nolle prossed*, yet the Childersburg Municipal Court nonetheless assessed costs against them.[50] The municipal court did not engage in the constitutionally-required dialogue to ensure they understood the charges against them and the risks of self-representation to ensure they freely chose to waive their right to counsel. Instead, each was simply required to sign the probation order with its form language on waiver of counsel. When each of them was later unable to make the monthly payments demanded by JCS, JCS submitted petitions for revocation of probation, and each plaintiff was when arrested and jailed, some multiple times—without the constitutionally-required inquiry to determine whether their failure to pay the court debt was willful or due to indigence.[51] In addition, despite Alabama law limiting probation sentences for municipal defendants to a maximum of two years, JCS has admitted that three of the named plaintiffs were kept on probation for longer.[52]

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[48] *See* Plaintiffs' Ex. 7 ¶ 1 (Affidavit of Gina Ray); Ex. 8 ¶ 1 (Affidavit of Timothy Fugatt, Oct. 21, 2018); Ex 9 ¶ 1 (Affidavit of Kristy Fugatt, Oct. 21, 2018); Ex. 10 ¶ 1 (Affidavit of Deunate Jews, Oct. 22, 2018).

[49] Ex. 7 ¶¶ 1-2 (G. Ray); Ex. 8 ¶¶ 1-2 (T. Fugatt); Ex. 8¶ 2 (K. Fugatt); Ex. 10 ¶ 2 (Jews)

[50] Ex. 8 ¶ 1-2 (T. Fugatt); Ex. 9 ¶ 2 (K. Fugatt); Ex. 10 ¶ 2 (Jews).

[51] Ex. 7 ¶¶ 4-5 (G. Ray); Ex. 8 ¶¶ 6-7 (T. Fugatt); Ex. 9 ¶¶ 5-6 (K. Fugatt); Ex. 10 ¶ 6 (Jews).

[52] *See* Coons Decl. ¶ 38 & Ex. 4 (Peltz Report, "GT 24 Spreadsheet"); *see also* Ex. 7 ¶ 6 (G. Ray); Ex. 8 ¶ 7 (Jews).

C. Procedural Background

Plaintiffs filed this putative class action against JCS, its corporate affiliates, and the City of Childersburg on August 28, 2012. Doc. 1. They alleged that the defendants had deprived them of numerous constitutional rights under color of law, asserting claims under 42 U.S.C. § 1983. *See id.*; Doc. 50. They sought damages as well as declaratory and injunctive relief, on behalf of two state-wide classes and two city-wide subclasses. Doc. 67 at 2 & n.5; Doc. 50 ¶ 9. After the Second Amended Complaint was filed, JCS and Childersburg moved to dismiss.

On September 26, 2013, the Court substantially denied both motions to dismiss, holding, among other things, that Plaintiffs' § 1983 claims are not barred by *Heck v. Humphrey*, 512 U.S. 477 (1994); that JCS is not shielded from liability by absolute quasi-judicial immunity; and that the *Rooker-Feldman* doctrine did not preclude jurisdiction. Docs. 65, 66, 67, 68. Plaintiffs filed a Fourth Amended Complaint on February 1, 2016. Doc. 305. Plaintiffs, JCS, and Childersburg all filed motions for summary judgment.[53]

On February 17, 2017, the Court granted the City's motions for summary judgment. Docs. 569, 570. The Court held that there was "no question that the City's Municipal Court operated in fundamental violation of Alabama law," Doc. 569 at 40, but that the Municipal Court judge was acting not on behalf of the city, but as a state policymaker. *Id.* at 24-27. On that basis, the Court concluded that the City was due to be dismissed from the case. *Id.* at 41. The Court also held that Plaintiffs lacked standing to request a declaration that the contract between the city and JCS was void because the contract had been terminated. *Id.* at 40; Doc. 570.[54]

[53] Plaintiffs initially filed a motion for class certification on August 11, 2016 (Doc. 401), but the Court administratively terminated that motion subject to refiling after the Court ruled on the defendants' motions to dismiss and for summary judgment. Doc. 496.

[54] While the Court initially denied the motion to dismiss filed by JCS's corporate affiliates, *see* Doc. 299, it ultimately granted their motion for summary judgment. *See* Doc. 682.

On September 12, 2017, the Court ruled on JCS's motions for summary judgment. Docs. 626, 627. The Court rejected JCS's argument that is entitled to quasi-judicial immunity and qualified immunity. Doc. 626 at 38, 40. The Court held that, with limited exceptions, the *Rooker-Feldman* doctrine does not preclude it from having jurisdiction, because "by and large, Plaintiffs' § 1983 claims do not challenge the probation orders" imposed by the municipal courts, and the plaintiffs who were sentenced to JCS probation without any underlying offense "lacked any ability to directly appeal" their probation orders. *Id.* at 42, 45; *see generally id.* at 40-46. The Court concluded, however, that Plaintiffs' requests for declarations that certain municipal court orders were void are barred by *Rooker-Feldman*. *Id.* at 45. The Court also reaffirmed its ruling that *Heck v. Humphrey* and immunity do not apply. *Id.* at 35-40, 46-49.

The Court ruled that Plaintiffs have presented sufficient evidence to proceed to trial on three constitutional claims. First, the Court held that a reasonable jury could conclude from the record that Plaintiffs' substantive due process rights were violated when they were jailed without an ability-to-pay determination as required by *Bearden v. Georgia*, 471 U.S. 606, 610 (1985).[55] Doc. 626 at 52-53; 80-82. Second, the Court held that Plaintiffs' Sixth Amendment rights were violated when they were jailed without being afforded—or validly waiving the right to—counsel. *Id.* at 68-70; 82-83. And third, the Court ruled that a reasonable jury could find that Plaintiffs' procedural due process rights were violated when JCS unilaterally extended their probation sentences beyond the two-year statutory maximum without notice or the opportunity for a hearing. *Id.* at 62-63.

[55] On reconsideration, the Court agreed that the failure to conduct the ability-to-pay determinations required by *Bearden* also constituted an equal protection violation. Doc. 685 at 10. However, the Court reaffirmed its ruling that disparate treatment of municipal defendants based on wealth that falls short of imprisonment does not violate the Equal Protection Clause. *Id.* at 6-10. For simplicity's sake, the hybrid substantive due process/equal protection claim concerning jailing probationers for nonpayment of court debt without an ability-to-pay determination is referred to as the *Bearden* claim throughout this brief.

With respect to Plaintiffs' procedural due process claim, the Court held that Plaintiffs had submitted sufficient evidence from which "a reasonable jury could find that JCS's customs and policies were the moving force behind [this] constitutional harm. *Id.* at 64. With respect to Plaintiffs' *Bearden* and Sixth Amendment claims, the Court reasoned that, while the evidence in the record was not sufficient to show that JCS policies or customs alone were the moving force behind these two violations (*see id.* at 53-54; 70-71), a reasonable jury could find that they were caused by an agreement between JCS and the Childersburg Municipal Court. *Id.* at 80-83. The Court ruled, therefore, that Plaintiffs may proceed to trial on their *Bearden* and Sixth Amendment claims against JCS under a § 1983 conspiracy theory. *Id.* at 83. The Court later granted Plaintiffs leave to amend the complaint to allege a conspiracy between JCS and the Childersburg Municipal Court.[56] *See* Doc. 687 at 3-5.

The Court granted JCS summary judgment on Plaintiffs' other claims and denied Plaintiffs' motions for summary judgment. *See generally* Doc. 626.

Plaintiffs filed their Fifth Amended Complaint on July 6, 2018. Doc. 691. In compliance with the Court's prior orders (Doc. 626, 685, 687), Plaintiffs limited their *Bearden* and Sixth Amendment conspiracy allegations against JCS to Childersburg. However, because Plaintiffs' procedural due process claim arising from JCS's extension of probation sentences past two years is predicated on JCS's own customs and policies, that claim remains on behalf of a putative statewide class. *See* Doc. 626 at 64; Doc. 687 at 4.

[56] At the hearing on Plaintiffs' motion to amend the complaint, the Court reiterated that Plaintiffs' claim for declaratory judgment on the validity of the contract between JCS and Childersburg is moot. See Plaintiffs' Ex. 11 (Tr. of Proceedings June 14, 2018) at 38-40. The Court emphasized, however, that the jury may consider the fact that "there wasn't a competitive bid" for the JCS contract as evidence of a conspiracy between JCS and the Childersburg Municipal Court. *Id.* at 40-41.

III. ARGUMENT

A. Plaintiffs' Legal Contentions Relevant to Commonality and Predominance Under Rule 23

Before addressing how Plaintiffs satisfy the requirements of Rules 23(a) and 23(b)(3), it will be useful to set out the legal arguments underlying each of the three claims. This section does not comprehensively address all liability issues, but is intended to provide legal background relevant to the Rule 23 commonality and predominance analyses.

1. Childersburg Jail Class – Bearden *Claim*

Under *Bearden v. Georgia*, a court may not jail a probationer for nonpayment of court debt without first inquiring into whether she had the means to pay. *Bearden*, 461 U.S. at 672. If the person had the means to pay but "willfully refused," the court may lawfully jail her "within the authorized range of [the court's] sentencing authority."[57] *Id.*[58] But "[i]f the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment." *Id.* Jailing a person for failure to pay court debt without first making these findings required under *Bearden* violates her rights under the Fourteenth Amendment. *See United States v. Satterfield*, 743 F.2d 827, 842 (11th Cir. 1984); *United States v. Johnson*, 983 F.2d 216, 220 (11th Cir. 1993); *see also Snipes v. State*, 521 So.2d 89, 90-91 (Ala. Crim. App. 1986); Ala. R. Crim. Pro. 26.11(d).

The government bears the burden of proving that nonpayment was willful before the probationer can lawfully be jailed. *See United States v. Mojica-Leguizamo*, 447 F. App'x 992,

[57] Under Alabama law, "[m]unicipal courts may suspend execution of [a jail] sentence and place a defendant on probation[.]" Ala. Code § 12-14-13(a). As the Court recognized, "it defies logic, fact, and law to revoke probation if there is no underlying imprisonment sentence to execute." Doc. 626 at 83. Three of the four named plaintiffs (and many class members) did not have jail sentences—for example, because the charges against them were dropped or *nolle prossed*, or because they were not convicted of a jailable offense. Nonetheless, the Childersburg Municipal Court "effectively revoked" Plaintiffs' probation sentences when it had them arrested and jailed. Doc. 626 at 80.

[58] Citations, internal quotations, and alterations are omitted throughout unless otherwise indicated.

996 (11th Cir. 2011) (reversing revocation of probationer's supervised release based in part on the government's failure to prove willful failure to pay).

In its summary judgment ruling, this Court held that Plaintiffs presented sufficient evidence for a jury to find that Plaintiffs' constitutional rights were violated when the Childersburg Municipal Court "effectively revoked their probation sentences" and jailed them for failure to pay their court debt without first determining their ability to pay. Doc. 626 at 80-81. The Court further held that a reasonable jury could conclude that these *Bearden* violations were caused by an unlawful agreement between JCS and the Municipal Court. *Id.* at 78-81.

To prevail on their claim that the violation of their *Bearden* rights was caused by an unlawful agreement, Plaintiffs must demonstrate that JCS and the municipal court "reached an understanding" to violate their constitutional rights. *Bailey v. Bd. of Cty. Comm'rs of Alachua Cty.*, 956 F.2d 1112, 1122 (11th Cir. 1992); Doc. 626 at 77-78. There is no requirement that a plaintiff "produce a smoking gun." *Bendiburg v. Dempsey*, 909 F.2d 463, 469 (11th Cir. 1990). Rather, "a jury may infer the existence of an agreement from evidence that the conspirators committed acts that are unlikely to have been taken in the absence of such an agreement." Doc. 626 at 78 (citing *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1301 (9th Cir. 1999)). For example, the existence of an agreement "may be inferred from the relationship of the parties, their overt acts and concert of action, and the totality of their conduct." *Am. Fed'n of Labor & Cong. of Indus. Orgs. v. City of Miami*, 637 F.3d 1178, 1192 (11th Cir. 2011).

Furthermore, while the municipal court is not a defendant—and could have judicial immunity from the claims—the court's failure to conduct ability-to-pay determinations can be attributed to JCS if the court and JCS "reached an understanding" that *Bearden* determinations would not be conducted. *See Dennis v. Sparks*, 449 U.S. 24, 27 (1980) (judicial immunity was no

bar to § 1983 claim against parties that conspired with judge).

2. Childersburg Jail Class – Sixth Amendment Claim

It is black-letter law that, "absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial." *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). The right to counsel attaches to any proceeding that raises the "possibility of imprisonment" or the "threat of imprisonment." *Howard v. United States*, 374 F.3d 1068, 1075 (11th Cir. 2004) (citing *Alabama v. Shelton*, 535 U.S. 654, 662 (2002)).

To be valid, a waiver of the right to counsel must be "knowing and voluntary." *United States v. Stanley*, 739 F.3d 633, 645 (11th Cir. 2014) (citing *Faretta v. California*, 422 U.S. 806, 834 (1975)). That means the court must make sure the defendant is informed of the "possible range of punishment," *United States v. Cash*, 47 F.3d 1083, 1088 (11th Cir. 1995), and "aware of the dangers of proceeding *pro se*," *Strozier v. Newsome I*, 871 F.2d 995, 998 (11th Cir. 1989). Moreover, the waiver must be made "at the time *pro se* representation is first permitted"—not after the person has been sentenced. *Stanley*, 739 F.3d at 646. A single line on a form document that contains no explanation whatsoever of the probationers' right to counsel and is presented to probationers *after* they appear before a court cannot replace a judge's inquiry to ensure a waiver is knowing and voluntary. *See, e.g.*, *United States v. Ramirez-Delores*, 445 F. App'x 274, 275-76 (11th Cir. 2011) (signed waiver of counsel valid because it enumerated all rights including the right to appointed counsel and the judge verbally advised defendant of his right to counsel).

This Court made four key determinations on Plaintiffs' Sixth Amendment claim. First, the Court held that the named plaintiffs were entitled to representation by counsel "before being sentenced to suspended imprisonment terms," Doc. 626 at 82, and "before being imprisoned," *id.* at 70. Second, the Court held that the Municipal Court denied all of the named plaintiffs their constitutional right to counsel. *Id.* at 82-83. Third, the Court found that the printed

acknowledgement on JCS's standard probation order "d[id] not contain any explanation of [the] right to counsel." *Id.* at 70. And fourth, the Court ruled that a reasonable jury could conclude based on the record—particularly in light of the JCS form acknowledgement—that the Municipal Court's denial of the Plaintiffs' Sixth Amendment rights was "caused by the agreement [the court] entered with JCS." *Id.* at 83. As with Plaintiffs' *Bearden* claims, the jury may infer the existence of an agreement between JCS and the municipal court to deny the class members' their right to counsel from circumstantial evidence.

3. Statewide Procedural Due Process Claim

"To show a violation of procedural due process, a plaintiff must present '(1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process.'" Doc. 626 at 58-59 (quoting *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003)).

The elements of Plaintiffs' procedural due process claim are clearly met.[59] As to the first element, the Court held that "a defendant sentenced to probation has a liberty interest in being released at the end of his or her probation sentence, which is a significant imposition on his or her liberty." Doc. 626 at 62 (citing *Calhoun v. N.Y. State Div. of Parole Officers*, 999 F.2d 647, 653 (2d Cir. 1993)). Under Alabama law, a municipal court may not sentence a defendant to a term of probation that exceeds two years. Ala. Code § 12-14-13(a). The Court held that there is sufficient evidence in the record for a reasonable jury to conclude that, by extending the plaintiffs' probation terms beyond the statutory maximum, JCS deprived them of a constitutionally-protected liberty interest. Doc. 626 at 62. This makes sense: people on probation

[59] The element of state action is not in dispute. Because JCS was acting as "the functional equivalent of the municipality," it was acting under color of law when it extended the class members' probation sentences for purposes of liability under § 1983. *See* Doc. 626 at 51.

"do not enjoy the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special probation restrictions." *United States v. Godsey*, 224 F. App'x 896, 898 (11th Cir. 2007) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)). Consistent with that principle, courts have recognized that damages are appropriate to compensate people for being kept on probation unlawfully. *See, e.g., Betances v. Fischer*, 304 F.R.D. 416, 431 (S.D.N.Y. 2015) (granting class-wide general damages against state department of corrections for imposing unlawful terms of post-release supervision).[60]

As to the third element, constitutionally inadequate process, due process requires an "opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). To determine the process due, courts must balance "the private interests at stake in a governmental decision, the governmental interests involved, and the value of procedural requirements . . . ." *Whitehorn v. Harrelson*, 758 F.2d 1416, 1425 (11th Cir. 1985). As the Court noted, the private interest at stake in being released from probation is "significant." *See* Doc. 626 at 62. As for the "governmental" interests, JCS has not identified any legitimate "institutional needs or goals" served by the company's practice of unilaterally extending people's probation without notice or a hearing. *Whitehorn*, 758 F.3d a 1425. There is certainly no evidence that extending these people's probation was "in the best interest[s] of society." *United States v. Silver*, 83 F.3d 289, 290-92 (9th Cir. 1996). Indeed, all available evidence strongly suggests the reason for such extensions was to maximize JCS's profit.

Finally, the value of procedural requirements under this circumstance is plain. JCS was

[60] While, as the Court observed, the former Fifth Circuit has held that the Constitution does not require due process when a probationer's sentence is extended "to a term *within* the statutory limits," *United States v. Cornwell*, 625 F.2d 686, 688 (5th Cir. 1980) (emphasis added), Plaintiffs' due process claim rests on JCS's extension of their probation sentences *beyond* the statutory maximum. Doc. 626 at 62. *Cornwell*'s holding strongly implies that such an extension *would* implicate a protected liberty interest. *See Hunter v. Etowah Cty. Court Referral Program, LLC*, 309 F. Supp. 3d 1154, 1179 (N.D. Ala. 2018).

unilaterally extending probation sentences without the municipal courts' involvement or approval. "There is a great potential for prejudice in ex parte extensions of probation." *United States v. Cornwell*, 625 F.2d 686, 688 (5th Cir. 1980). Here, the prejudice was more than just potential. Had Plaintiffs been given notice that their probation was being extended, they could have objected, and could have raised the expiration of their probation sentence as a defense when they were arrested and jailed. Without procedural protections, however, class members continued reporting to JCS and paying JCS monthly fees—and remained at constant risk of being arrested and jailed—unaware that the lawful term of their probation had ended.

Under these circumstances, the Court held that the named plaintiffs were entitled to, at minimum, notice of the extension and an opportunity to be heard. *See* Doc. 626 at 62; *cf. Calhoun*, 999 F.2d at 653. But, as the Court observed, there is no evidence in the record that JCS even *informed* the named plaintiffs—let alone permitted them to be heard—before it extended their probation terms. *See* Doc. 626 at 62-63. On this basis, the Court held that a reasonable jury could find that JCS deprived the named plaintiffs of procedural due process. *Id.* at 62-63.

To prevail on this claim on a classwide basis, Plaintiffs must show, using common evidence, that (1) JCS had a policy or custom of extending class members' probation terms beyond the statutory maximum without notice or a hearing; and (2) the JCS policy or custom was the "moving force" behind the constitutional harm. Doc. 626 at 51 (citing *Bd. of Cty. Comm'rs of Bryan Cty., Okla. v. Brown*, 520 U.S. 397, 404 (1997)). To establish a JCS policy or custom, Plaintiffs must "identify either (1) an officially promulgated . . . policy or (2) an unofficial custom or practice . . . shown through the repeated acts of a final policymaker." *Grech v. Clayton Cty., Ga.*, 335 F.3d 1326, 1329 (11th Cir. 2003). And to establish causation, Plaintiffs must show that there is "an affirmative causal connection between the defendant's acts or omissions

and the alleged constitutional deprivation." *Troupe v. Sarasota Cty., Fla.*, 419 F.3d 1160, 1165 (11th Cir. 2005). As explained below, JCS's own records and materials demonstrate that the company had a policy of extending probation sentences by, among other things, changing probation start dates and running terms consecutively. Likewise, the same evidence that led this Court to conclude that "a reasonable jury could find that JCS's customs and policies were the moving force behind the constitutional harm" suffered by the named plaintiffs, Doc. 626 at 64, will support the same finding with respect to all the members of this class.

B. The Classes Are Ascertainable.

"[A] plaintiff seeking to represent a proposed class must establish that the proposed class is adequately defined and clearly ascertainable." *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 984 (11th Cir. 2016). "Class members need not actually be ascertained prior to certification." *Moore v. Walter Coke, Inc.*, 294 F.R.D. 620, 625 (N.D. Ala. 2013). Rather, it must simply be "administratively feasible for the court to determine whether a particular individual is a member" and to identify class members at "some stage in the proceeding" using "objective criteria." *Id.*

Here, the classes are easily ascertainable. Using the extensive data collected in Probation Tracker, the underlying database, and JCS's own codes, it is possible to identify with great precision people sentenced to JCS probation by the Childersburg Municipal Court who were jailed and for how long they were jailed.[61] It is also possible, using JCS data, to identify people throughout Alabama who remained in probation for a single sentence longer than two years—as well as who among that group was subsequently jailed or charged JCS fees.[62] Indeed, JCS provided a list of everyone it had kept on probation longer than 24 months as of April 2014.[63]

[61] Coons Decl. ¶¶ 54-58 & Exs. 13-A, 14.
[62] Coons Decl. ¶¶ 38-52 & Exs. 4, 5, 6, 7, 8, 9, 10, 11.
[63] Coons Decl. ¶ 38 & Ex. 4.

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The data also contains extensive information about class members' probation, including employment (or lack thereof) and whether they received public benefits while they were on JCS probation.[64] For members of the Childersburg Jail Class, additional corroborating data from the City of Childersburg can be used to verify and refine the identification of class members and to determine the length of their unlawful jailing. Very few class actions have such abundant and consistent data about the entire class.

C. The Named Plaintiffs Have Standing.

"[A] plaintiff who wishes to bring a lawsuit on behalf of a class of individuals similarly situated . . . must have standing to bring the claim." *City of Hialeah, Fla. v. Rojas*, 311 F.3d 1096, 1101 (11th Cir. 2002). This means the named plaintiff must have sustained an injury that is "fairly traceable to the defendant's allegedly unlawful conduct" and "likely to be redressed by the requested relief." *Pettco Enters., Inc. v. White*, 162 F.R.D. 151, 156 (M.D. Ala. 1995). Here, as explained above, all four named plaintiffs were sentenced to JCS probation by the Childersburg Municipal Court and subsequently jailed for failure to pay court debt, without counsel or a *Bearden* determination. In addition, at least three of them were kept on probation by JCS for longer than two years. And one of them, Mr. Jews, paid fees to JCS—and was jailed—after his probation was extended past two years. Accordingly, the named plaintiffs have standing.

D. Plaintiffs Satisfy the Requirements for Class Certification Under Rule 23(a).

All class actions in federal court must meet the four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a). Each is satisfied here.

1. Numerosity

Rule 23(a)(1)'s numerosity requirement is satisfied if joinder would be impractical. *See*

[64] Coons Decl. ¶ 59 & Ex. 15.

Fed. R. Civ. P. 23(a)(1). Although there is no strict numerical threshold, classes containing more than 40 members are generally found adequate to warrant class certification. *See, e.g.*, *Vega v. T–Mobile USA, Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009) (citing *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986)).

Here, the Childersburg Jail Class is comprised of approximately 275[65] people, and the Statewide Due Process Class is comprised of over 33,000 people.[66] Given the size of the proposed classes, numerosity is easily satisfied. *See, e.g.*, *Napoles-Arcila v. Pero Family Farms, LLC*, No. 08-80779-CIV, 2009 WL 1585970, at *6 (S.D. Fla. June 4, 2009) (class of 150 and subclass of 50 satisfied numerosity requirement); *Kreuzfeld A.G. v. Carnehammar*, 138 F.R.D. 594, 599 (S.D. Fla. 1991) (class of 130 satisfied numerosity). Furthermore, JCS has agreed that the classes are sufficiently numerous under Rule 23.

2. Commonality

Rule 23(a)(2) requires plaintiffs seeking class certification to show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). There is no requirement "that all the questions of law and fact raised by the dispute be common." *Vega*, 564 F.3d at 1268. Instead, "[c]ommonality requires [only] that there be at least one issue whose resolution will affect all or a significant number of the putative class members." *Williams v. Mohawk Industries, Inc.*, 568 F.3d 1350, 1355 (11th Cir. 2009). Indeed, "even a single common question will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011).

Here, both the Childersburg Jail Class and the Statewide Class present common questions of law and fact. Common issues of law *or* fact are sufficient to satisfy Rule 23(a), and here critical and dispositive issues of both law *and* fact abound.

[65] Coons Dec. ¶ 55 & Ex. 13-A; Plaintiffs' Ex 14.

[66] Coons Decl. ¶ 45, *see generally id.* ¶¶ 38-52 & Ex. 4, 5.

Childersburg Jail Class

The members of the Childersburg Jail Class have two claims in common: the *Bearden* claim and the Sixth Amendment claim. Both claims will be proven through common evidence.

1. To prevail on their *Bearden* claim, Plaintiffs will demonstrate that (1) the members of the Childersburg Jail Class were arrested and jailed for failure to pay court debt; (2) they were jailed without the required *Bearden* determination; and (3) the moving force behind these constitutional violations was an agreement between JCS and the Childersburg Municipal Court.

First, evidence common to all class members will show that JCS and the Municipal Court worked together to arrest and jail them when they failed to pay court debt. As explained above, JCS and the court systematically took the same agreed-upon series of steps with every class member, beginning when the person failed to make payments and culminating in their jailing. This is corroborated by the JCS forms, Probation Tracker entries, and Training Manual.

Second, just as with the named plaintiffs, common evidence will show that JCS and the Childersburg Municipal Court took no steps whatsoever—before submitting petitions for revocation, before issuing arrest warrants, or before jailing the class members—to ensure that only those who were able to pay and willfully refused were imprisoned. *See* Doc. 626 at 81. JCS's own records showed that many of the people from whom it was attempting to collect this money were disabled, living on SSI, or unemployed.[67] But while Probation Tracker had a specific code to designated "indigence," virtually no one on JCS probation in Childersburg was marked ever as indigent during the entire class period.[68] Likewise, JCS's Training Manual instructed employees to provide testimony and information about probationers when seeking

[67] Coons Decl. ¶ 59 & Ex. 15.

[68] *See* Deposition of Peter Coons (Aug. 2, 2016), Exhibit 9 (Doc. 435-6).

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revocation.[69] Yet JCS's probation officer and office manager for Childersburg admitted that she had never, when petitioning the court to revoke probation, alleged that failure to pay was willful.[70] Instead of advising probationers that they could not lawfully be jailed if they were too poor to pay, JCS warned them they could face "incarceration due to the inability"—not refusal, but *inability*—to pay court fines and costs[.]"[71] Meanwhile, Judge Ward, who had a "close working association" with JCS, was unaware that courts may not legally jail people for failure to pay court debt unless the nonpayment is willful.[72]

Third, proof concerning conspiracy with respect to this claim is also common to the class. If JCS and the Childersburg Municipal Court had an understanding to deny probationers' *Bearden* rights, that understanding affected every probationer. The evidence will emphatically show that both JCS and the court benefitted financially by arresting and jailing class members rather than accommodating their inability to pay. As this Court noted, "[i]n light of the financial incentive to not declare defendants indigent, a jury could view Judge Ward's consistent failure to conduct indigency determinations as circumstantial evidence of an agreement between his court and JCS to not address probationers' indigency before imposing additional probation supervision fees." Doc. 626 at 79.

Furthermore, Plaintiffs' *Bearden* claim will not require an inquiry into whether any individual plaintiff was actually indigent. Plaintiffs' claim is based on the municipal court's categorical failure to make the necessary findings concerning their ability to pay before jailing them. These findings are a *mandatory* precursor to jailing a probationer for failure to pay: the

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[69] Coons Decl. Ex. 1 Part 2 at PDF p. 26 (JCS Training Manual) (Bates Ray v. JCS 000116)

[70] *See* Kidd 6/25/2014 Depo. at 138-39 (Doc. 195-1 at 35)

[71] *See* JCS Marketing Materials, Doc. 421-6 at 10.

[72] Doc. 626 at 79 n. 34; Deposition of Larry Ward in *Garrett v. Town of Harpersville*, Circuit Ct. of Shelby Cty., Alabama, Case no. CV-2010-900183 at 15 (May 16, 2012) (Doc. 402-36 at 5).

law is clear that jailing a debtor without making the required findings violates due process. Plaintiffs are not arguing that any particular ability-to-pay determination was improperly conducted or insufficient; rather, they are arguing that they were *not made at all*. As a result of that constitutional violation, each and every plaintiff in the class suffered concrete harm: They were illegally jailed for periods ranging from hours to weeks. JCS and the Municipal Court's conspiracy to strip Plaintiffs of their liberty without making the necessary findings about their ability to pay does not turn on whether any given probationer was indigent.

2. The evidence that JCS is responsible for the Childersburg Municipal Court's denial of the class members' Sixth Amendment rights is also common to all members of the Childersburg Jail Class. JCS and the court used the same JCS form probation order for every class member, with the same one-line acknowledgement. And all the class members were jailed after JCS filed a petition for revocation of probation for them. JCS and Childersburg records both show that the class members were jailed—without first being brought before the court—for periods ranging from hours to weeks, typically until they managed to scrape together enough money to pay some portion of their outstanding probation fines and fees. And, as with Plaintiffs' *Bearden* claim, the evidence of JCS's agreement or understanding with the Childersburg Municipal court is common to all class members.

While JCS might argue that the Childersburg Jail Class members all validly waived their right to counsel, the only evidence in the record that could plausibly support such an argument is the language on JCS's form probation orders—language that is identical on every single order signed by every single class member. Thus, the question of whether this form acknowledgement passed constitutional muster, too, presents only issues common to the class.

Nor is there any need for individual indigency determinations with respect to the denial

of class members' Sixth Amendment right to counsel. Though it is probable to the point of near certainty that people placed on probation because they could not afford a $300 fine would have qualified for court-appointed counsel, here Plaintiffs contend that *all* Childersburg Jail Class members, regardless of indigence, were denied the right to counsel because they appeared *pro se* with no valid waiver of the right to counsel and were then jailed. Supreme Court and Eleventh Circuit precedent makes no distinction between the waiver for *pro se* criminal defendants who can afford their own counsel and those entitled to court-appointed counsel. In sum, all the class members who were jailed without validly waiving their right to counsel were deprived of their Sixth Amendment rights.

* * *

Common factual and legal questions concerning the *Bearden* claim and Sixth Amendment claim abound. The questions common to all members of the Childersburg *Jail* Class include, but are not limited to:

- Whether JCS consistently submitted petitions for revocation of probation when probationers failed to pay court debt and fees;
- Whether JCS sought to revoke debtors' probation despite having information in its possession that those debtors lacked the ability to pay;
- Whether the Childersburg Municipal Court jailed probationers for failure to pay court debt and fees;
- Whether probationers could avoid being arrested by paying court debt and fees;
- Whether probationers who were arrested could avoid being jailed simply by paying money;
- Whether probationers who were jailed could get out of jail by paying money;
- Whether the Childersburg Municipal Court conducted ability-to-pay determinations before probationers were jailed;
- Whether, given its contractual agreement not to charge indigent probationers fees, JCS had a financial interest in not having probationers deemed indigent;

- Whether JCS had a financial interest in seeing debtors arrested and jailed;
- Whether the actions taken by JCS and the Childersburg Municipal Court with respect to jailing probationers without an ability-to-pay determination were unlikely to have been taken in the absence of an agreement or understanding between them;
- Whether JCS conspired with the Childersburg Municipal Court to jail probationers for failure to pay court debt and fees without first determining whether the nonpayment was willful;
- Whether probationers were provided counsel before they were jailed;
- Whether the Childersburg Municipal Court or JCS consistently informed class members of their constitutional right to counsel, including their right to appointed counsel if they could not afford one, and engaged class members in a dialogue to determine if they understood the charges against them and the risks of self-representation and thus freely chose to waive their right to counsel;
- Whether a one-line statement on a form document given to criminal defendants after their court proceedings can ever constitute a knowing, voluntary, and intelligent waiver of the right to counsel;
- Whether JCS conspired with the Municipal Court to deny class members their constitutional right to counsel;
- Whether JCS had a financial interest in limiting probationers' access to counsel because probationers with legal representation would be more likely to assert their inability to pay, thereby obligating JCS to collect their court debt without collecting monthly fees under its contract with Childersburg;
- How much weight to attribute to the lack of a competitively bid contract as evidence of conspiracy between JCS and the Municipal Court;
- How much weight to attribute to Judge Ward's ongoing relationship with JCS and his role in bringing JCS to Childersburg as evidence of conspiracy between JCS and the Municipal Court;

Statewide Due Process Class

JCS's liability to the members of the Statewide Due Process class can also be proven with common evidence. First, database queries can be used to identify everyone in Alabama who was on JCS probation on or after August 10, 2010 and whose probation sentence for a single

case lasted longer than two years.[73] JCS identified over 20,000 probationers as of spring 2014 who had remained on probation for more than 24 months.[74] A more thorough query of the data, based on the same parameters but adjusting for the fact that JCS employees often manipulated the probation start dates and including data through spring 2015, revealed over 38,000 individual probationers in this category.[75] The vast majority of these extensions—over 33,000—were done by JCS without a modification order from a municipal court.[76]

The data on these class members can be broken down in any number of ways. For example, it is possible to identify how many people were jailed after serving more than 24 months on JCS probation,[77] and how much in fees were paid to JCS by people who had served more than two years of a sentence.[78]

As if the data weren't conclusive enough, JCS's own documents make clear that these extensions were not aberrations, but were pursuant to official JCS policy and practice. The JCS Training Manual, which was used throughout the state to instruct the company's employees on the standard procedures for managing each debtor's probation, instructed JCS employees entering reinstatements to "chang[e] the probation date" and "calculate[e] the new [expiration] date" in order to extend sentences by 24 months from the reinstatement Doc. 626. Likewise, "JCS policies instructed employees to extend the length of probation cases until all amounts owed were paid, prevented probation terms from running consecutively, and granted

[73] *See* Coons Decl. ¶¶ 38-45 & Ex. 4, 5.

[74] See Coons Decl. ¶ 38 & Ex. 4.

[75] See Coons Decl. ¶ 44.

[76] *See* Coons Decl. ¶ 45 & Ex. 5. Importantly, it is unlawful to extend a probation sentence for longer than 24 months even with a modification order from the court.

[77] *See* Coons Decl. ¶¶ 46-51 & Ex. 6, 7, 8, 9, 10.

[78] See Coons Decl. ¶ 52 & Ex. 11.

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considerable discretion to JCS employees to determine the amount of time left on a reinstated probation case." *Id.* The Training Manual also shows that JCS had a policy of continuing to collect fees from debtors even after their probation term had ended: "[I]f the probationer continued making payments after the expiration of his or her probation term, JCS instructed its employees to keep the probation in an active status." Doc. 626 at 13.[79]

Meanwhile, the complete lack of *any* instructions in the Training Manual setting out when and how to notify probationer that their probation sentences were being extending—and the absence of any relevant entries in Probation Tracker showing people were given notice and an opportunity to be heard—shows that JCS had a policy or custom of not informing the people affected by its actions. JCS may argue that the instructions in the Training Manual do not constitute a custom or policy—but it cannot deny that the questions of whether such customs or policies exist, and whether they caused the constitutional violations, is common to all the members of the Statewide Due Process Class.

The factual and legal questions common to all members of the Statewide Due Process Class include, but are not limited to:

- Whether JCS extended class members' probation terms so that they were kept on probation for a total of more than two years;
- Whether, following purported reinstatements, JCS calculated probation start and expiration dates by extending sentences for two years from the reinstatement date;
- Whether JCS had a policy or custom of instructing or training employees to change class members' probation dates;
- Whether JCS had a policy or custom of allowing employees to determine the amount of time left on a probationer's sentence when probation was reinstated;
- Whether, when municipal courts issued new probation orders for distinct charges, JCS recalculated probation dates in order to extend prior probation sentences;

[79] Coons Dec. Ex. 1 Part1 PDF p. 59 (Bates p. Ray v. JCS 000048)

- Whether JCS directed its employees that, if a court imposed multiple probation sentences on a particular defendant, the employee should place the later probation sentence on hold until the defendant paid all amounts owed on the first case;
- Whether JCS had a policy of setting probation terms to run consecutively rather than concurrently in order to maximize fees collected;
- Whether, if a defendant completed payments for one case, JCS would activate the second sentence and calculate the length of the probation term;
- Whether JCS had a policy or custom of instructing or training employees to extend the length of probation cases for as long as possible or until all amounts owed were paid;
- Whether JCS policies or customs were the moving force behind the extension of class members' probation terms for more than two years;
- Whether JCS notified class members or permitted them to be heard before it extended their probation terms;
- Whether extension of a defendant's probation terms beyond the statutory maximum implicates a constitutionally-protected liberty interest;
- Whether, by extending probation terms beyond the statutory maximum without notice or a hearing, JCS violated the class members' procedural due process rights.

3. Typicality

The proposed classes meet the typicality requirement because the named Plaintiffs and class members share the same core constitutional claims. Typicality is satisfied if the class representatives' claims are "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The purpose of the typicality requirement is to "ensure that . . . the interests of the class representatives are closely aligned with those of the class." William B. Rubenstein, Newberg on Class Actions § 3.31 (5th ed. 2011). It is not "not [a] demanding" test. *Id.* § 3:29 at 267. The court need only ask whether each named plaintiff's claim arises from "the same event or pattern or practice and are based on the same legal theory" as the claims of the class members. *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984); *see also Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985) (typicality depends on "whether named

representatives' claims have the same essential characteristics as the claims of the class at large"). Even "substantial factual differences" do not destroy typicality so long as "there is a 'strong similarity of legal theories.'" *J.W. v. Birmingham Bd. of Educ.*, No. 2:10-CV-03314, 2012 WL 3849032, at *9 (N.D. Ala. Aug. 31, 2012) (quoting *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001)).

Here, the typicality requirement is easily satisfied. Plaintiffs' claims are typical of the claims of the classes because they all arise out of JCS's uniform conduct towards the class members. *See, e.g.*, *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 698 (N.D. Ga. 2001) (typicality met where "claims arise out of and involve application of the same" company-wide policies and systems); *J.W.*, 2012 WL 3849032 at *9 (typicality met where "the proposed class and Plaintiffs' claims arise from the same allegedly unconstitutional practices" and "are premised around the same injury . . . and the same legal theory"). As explained above, all four named plaintiffs are typical of the members of the Childersburg Jail Class: they were sentenced to JCS probation by the Childersburg Municipal Court for the collection of court debt; they were arrested after they failed to make payments and JCS submitted petitions for revocation of their probation; none of them were afforded counsel or validly waived their counsel before they were jailed; and none received a *Bearden* determination before being detained or jailed.[80] This Court's summary judgment order contains detailed factual discussions concerning each named plaintiff's experience with JCS. Doc. 626 at 19-30. And this Court concluded that—based on those facts—a jury could reasonably reach a verdict that JCS, acting in conspiracy with the Childersburg Municipal Court, violated each named plaintiff's right to an indigency determination under *Bearden* and Sixth Amendment right to counsel. Doc. 626 at 80-83.

[80] *See* Ex. 7 ¶¶ 4-5 (G. Ray); Ex. 8 ¶¶ 6-7 (T. Fugatt); Ex 9 ¶¶ 5-6 (K. Fugatt); Ex. 10 ¶ 6 (Jews).

Furthermore, JCS's State Director, Colleen Ray, testified that JCS's treatment of the named plaintiffs was consistent with its policies and procedures regarding probationers generally.[81] And the JCS Training Manual and Probation Tracker data confirm that the actions of JCS and the Childersburg Municipal Court that led to the jailing of the named plaintiffs was completely typical of all the members of the Childersburg Jail Class: they were sentenced to JCS probation when they couldn't pay fines or court costs; once on probation, they missed payments; JCS submitted petitions for revocation of probation; the Childersburg Municipal Court issued warrants for their arrest; they were arrested and jailed; and then they were eventually released after either paying a portion of their court debt and fees or being referred back to JCS.[82]

In addition, three of the four named plaintiffs all had their probation terms for a single case extended beyond the two-year statutory maximum.[83] Their claims are thus typical of those of the members of the Statewide Due Process Class, and they have standing to seek general damages for the loss of liberty resulting from being unlawfully kept on probation. Although all three class representatives were in Childersburg, their procedural due process claim arises from JCS's uniform, statewide policies and customs of extending probationers' sentences beyond the statutory maximum.[84] *See* Doc. 626 at 62. And, as Colleen Ray explained, JCS's operations in Childersburg were typical of its operations throughout Alabama.[85] In addition, one named plaintiff, Mr. Jews, had additional injuries resulting from this constitutional violation: He paid

[81] *See* Colleen Ray 6/20/2014 Depo. at 340-41] (Doc. 392-11 at 86-87).

[82] *See* Coons Decl. ¶¶ 18-25 & Ex.1Part 1 at PDF p. 76 (Bates Ray v. JCS 000065) (JCS Manual, "Working a Typical Case"); Colleen Ray 6/20/2014 Depo. at 109-10 (Doc. 392-11 at 29).

[83] *See* Coons Decl. ¶ 38 & Ex. 4.

[84] *See* part III.3, above.

[85] *See* Colleen Ray 6/20/2014 Depo. at 267 (Doc. 392-11 at 68); Coons. Decl. Ex 2 Part 1, PDF p. 75 (Ray v. JCS000065) (JCS Training Manual).

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fees to JCS after his probation for a single case was extended by JCS beyond two years, and he was jailed after his probation was extended.[86] Accordingly, Mr. Jews has standing to represent other members of the Statewide Due Process Class with these additional injuries in seeking additional damages. Different damages amounts do not change the fact that the named plaintiffs' claims are typical of those of the class members. *See Kornberg*, 741 F.2d at 1337.

4. Adequacy

Rule 23(a)(4) requires the court to find that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This analysis "encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Valley Drug Co. v. Geneva Pharm.*, 350 F.3d 1181, 1189 (11th Cir. 2003). As JCS has previously conceded, the adequacy prong is met.[87]

First, there are no conflicts between the proposed class representatives and the members of the classes they seek to represent. Minor conflicts are insufficient to defeat class certification; for a conflict to bar certification, it must be so "fundamental" that "some party members claim to have been *harmed* by the same conduct that *benefitted* other members of the class." *Id*. (emphasis added). Here, the named plaintiffs do not have interests that are antagonistic to the other class members. Furthermore, they are prepared to adequately pursue this case through resolution; they are familiar with and understand the focus of this lawsuit; and they understand their responsibilities as class representatives.[88]

Second, Plaintiffs' counsel are well-qualified to represent the Classes. With respect to

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[86] *See* Doc. 697-14 at 8, 10-15; Coons Decl. Ex. 5 at p. 266 (showing that Mr. Jews, who started probation in January 2009, was jailed in 2012).

[87] Plaintiffs' Ex. 12 (Tr. of Proceedings, Jan. 7, 2015, at 56).

[88] *See* Ex ¶ 7 (Ray); Ex. 8 ¶ 11 (T. Fugatt); Ex. 9 ¶ 9 (K. Fugatt); Ex. 10 ¶ 8 (Jews).

class counsel, "[t]he adequate representation requirement involves questions of whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation[.]" *Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985). As the Court has previously recognized, the Evans Law Firm, which has served as lead counsel in this case since shortly after it was filed, "are experienced class action attorneys who have successfully litigated major consumer class actions" and "[t]here is no reason to believe that Plaintiffs' counsel will not prosecute this case with their usual high degree of diligence and vigor." *Winston v. Jefferson Cty., Ala.*, No. 2:05-CV-0497, 2006 WL 6916381, at *8 (N.D. Ala. June 26, 2006). The Court has had many months to observe the efforts and perseverance of the Evans Law Firm in this litigation.[89] In addition, Plaintiffs are now represented by the national public interest law firm Public Justice, which has extensive experience both in class action litigation and handling appeals involving cutting-edge legal issues. Public Justice has agreed to act jointly as class counsel if the Court so designates them.[90]

E. Plaintiffs' Proposed Classes Satisfy the Requirements of Rule 23(b)(3).

In addition to the Rule 23(a) requirements, plaintiffs seeking certification of a damages class must satisfy the requirements of predominance and superiority. Fed. R. Civ. P. 23(b)(3).

1. Predominance

"Common issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to . . . relief." *Williams*, 568 F.3d at 1357. "A common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). Rule 23(b)(3) "does not

[89] See Affidavit of G. Daniel Evans; Affidavit of Alexandria Parrish. Ex. 13.

[90] See Decl. of Leslie A. Bailey. Ex. 13

require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013). Rather, so long as "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3)," even if matters related to affirmative defenses or damages must be tried separately. *Tyson Foods*, 136 S.Ct. at 1046.

The predominance prong is met here. First, the key factual and legal questions related to JCS's liability can all be resolved through common evidence because they focus on routine, uniform practices of JCS (and, for the Childersburg Jail Class, the Childersburg Municipal Court). With respect to each of Plaintiffs' three claims, "proof of the common liability issues will, at the same time, prove that [JCS's] actions affected every member of [each] class." *Winston v*, 2006 WL 6916381 at *12. For the reasons discussed above, JCS's Training Manual, which was used throughout the state and which instructed employees on how to extend probation sentences, is plainly an "officially promulgated . . . policy" for purposes of liability under *Monell v. Dept. of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 690 (1978). *See Grech*, 335 F.3d at 1329. In short, if Plaintiffs prove that JCS engaged in the practices and policies Plaintiffs allege, JCS is liable to all class members with that claim.

Second, the question of whether JCS's policies and customs (with respect to the Statewide Due Process Class) or JCS's conspiracy with the Childersburg Municipal Court (with respect to the Childersburg Jail Class) caused the harms alleged will be resolved for all members of each class with the same evidence. Accordingly, no individualized causation questions will predominate over common questions. In other words, if Plaintiffs prove that a JCS policy, custom, or conspiracy caused each constitutional violation, "the policy itself may satisfy the

causation requirement." *Roy v. Cty. of Los Angeles*, No. CV1209012, 2016 WL 5219468, at *20 (C.D. Cal. Sept. 9, 2016).

Third, there are no individual damages issues that are sufficient to defeat causation. "Nothing in [Rule 23] requires plaintiffs to prove predominance separately as to both liability and damages." *Carriuolo*, 823 F.3d at 988. Here, however, common questions also predominate with respect to how most of the class-wide damages can be determined. Numerous courts have recognized that general compensatory damages are appropriate for losses of liberty such as those at issue here. *See, e.g.*, *Kerman v. City of New York*, 374 F.3d 93, 124-26 (2d Cir. 2004) (remanding for new trial after district court failed to properly instruct jury on general damages for unlawful confinement). And in cases like this one, class-wide general damages can be determined without the need for any testimony or proof about the extent of any individual injuries. While some class members will be entitled to greater damages than others based on the number of days they were jailed or the amount of fees they paid, the fact that JCS's unconstitutional conduct might have harmed different people to different degrees does not defeat predominance of class-wide issues where, as here, "damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical method." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259-60 (11th Cir. 2004); *see also Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1239 (11th Cir. 2016) (individualized issues of damages "easy to resolve" when "calculations are formulaic").

The number of days each class member spent wrongfully jailed or on probation can be determined using data obtained from JCS's own records and Childersburg municipal records.[91] The jury can be charged with determining the "cost" of each kind of loss of liberty—for

[91] *See* Ex. 1 - Coons Decl. ¶¶ 54-58 & Ex. 13-A

example, the particular dollar amount each wrongful day in jail (and on probation) is worth. *See Kerman*, 374 F.3d at 133 ("Placing a value on [the plaintiff's] loss of liberty—necessarily a subjective exercise—is the province of the jury . . . ."). Once that determination is made, it can be applied to every class member with each claim, and all individual issues will be immediately resolved. The only individualized damages needed will be those awarded to compensate members of the Statewide Due Process class for the fees they paid to JCS as a result of being kept on probation for longer than the law allows—and those, too, are easily calculable using JCS's own Probation Tracker data.[92]

Plaintiffs propose the following approach to damages for each claim:

Bearden Claim for Childersburg Jail Class	• General damages for days in jail without ability-to-pay determination. (Days in jail calculated using Probation Tracker and Childersburg data, multiplied by the jury-chosen per-day general damages rate for improper jailing)
Sixth Amendment Claim for Childersburg Jail Class	• General damages for days in jail where probationer did not have counsel and did not waive the right to counsel. (Days in jail calculated using Probation Tracker and Childersburg data, multiplied by the jury-chosen per-day general damages rate for improper jailing)[93]
Statewide Due Process Claim	• General damages for days on each probation JCS extended beyond a total 24 months. (Days on probation after 24 months calculated using Probation Tracker data, multiplied by the jury-chosen per-day general damages rate for improper probation) • General damages for days in jail for alleged violation of a probation that JCS extended beyond 24 months. (Days in jail after 24 months calculated using Probation Tracker data, multiplied by the jury-chosen per-day general damages rate for improper jailing) • Special damages to compensate each probationer for all fees collected by JCS for any probation JCS extended beyond 24 months.

[92] *See* Coons Decl. ¶¶ 52 & Ex. 11.

[93] It is possible that the same day in jail will be counted multiple times using these formulas; for example, a Childersburg probationer on a single probation for a total of more than 24 months who is jailed without a *Bearden* determination, without counsel or a valid waiver of the right to counsel, and after her probation was extended beyond 24 months, would have each day in jail counted three times. But safeguards can be used to prevent improper double or triple counting.

(Calculated down to the exact dollar using Probation Tracker data)

a) General damages can be tried on a class-wide basis and are appropriate to compensate class members for loss of liberty.

Plaintiffs intend to prove at trial that the members of the Childersburg Jail Class suffered actual harm in the form of physical detention as a result of the violation of their *Bearden* and Sixth Amendment rights. Likewise, Plaintiffs intend to demonstrate that the members of the Statewide Due Process Class suffered actual harm when they were kept on probation longer than permitted by statute without notice or a hearing. General damages are appropriate for both these losses of liberty and can be awarded on a class-wide basis.

General damages have long been recognized as an appropriate tool to compensate plaintiffs for loss of liberty such as unlawful jailing. *See* McCormick, *Handbook on the Law of Damages* § 107, at 375-77 (1935) (A person subject to "unlawful interference with his liberty" is "entitled to general damages.").[94] Accordingly, courts recognize that "[a] loss of time, in the sense of loss of freedom, is inherent in any unlawful detention and is compensable as general damages for unlawful imprisonment without the need for pleading or proof." *Kerman*, 374 F.3d at 130. This "loss of time" is independent from individualized, context-dependent factors like "physical harm, embarrassment, or emotional suffering." *Id.* at 125; *see also Wright v. Sheppard*, 919 F.2d 665, 669 (11th Cir. 1990) (recognizing compensatory damages for false imprisonment as a matter of law); *Gyzman v. City of Chicago*, 689 F.3d 740, 748 (7th Cir. 2012) ("[A]n unlawful search or seizure will often produce, at a minimum, a compensable claim for loss of time); *Randall v. Prince George's Cty., Md.*, 302 F.3d 188, 209 (4th Cir. 2002) (recognizing

[94] "Damages under § 1983 are determined by compensation principles brought over from the common law." *Wright v. Sheppard*, 919 F.2d 665, 669 (11th Cir. 1990). At common law, freedom from unlawful detention is protected by the tort of false imprisonment, which is "complete with even a brief restraint of the plaintiff's freedom." Prosser & Keeton, *The Law of Torts* § 11, at 48 (5th ed. 1984).

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compensatory damages for time lost for unconstitutional seizure and detention); *Dellums v. Powell*, 566 F.2d 216, 227 (D.C. Cir. 1977) (affirming compensatory damages award for "the duration of loss of liberty").[95]

The class members are not seeking damages for the intangible harm inherent in the violation of their rights to counsel or due process. Rather, they are seeking compensation for the concrete injuries *caused* by those constitutional violations: arrests, days spent detained and jailed, and days spent on probation. *See Slicker v. Jackson*, 215 F.3d 1225, 1230 (11th Cir. 2000) (explaining that "compensatory damages in a § 1983 suit [must] be based on actual injury caused by the defendant rather than on the 'abstract value' of the constitutional rights that may have been violated"); *Kerman*, 374 F.3d at 130 (distinguishing the "impermissible abstraction" of a damages "award based on the abstract societal value of constitutional protections" and "the traditionally permissible concept of presumed damages" used to "roughly approximate" harm and "thereby compensate for harms that may be impossible to measure" from "an anything-but-abstract physical detention"). If the jury "f[inds] a constitutional violation and there is no genuine dispute that the violation resulted in some injury to the plaintiff, the plaintiff is entitled to an award of compensatory damages as a matter of law." *Id.* at 124; *see also In re Nassau Cty. Strip Search Cases*, No. 99-cv-3126, 2008 WL 850268, at *4 (E.D.N.Y. Mar. 27, 2008).

General damages are also appropriate for losses of liberty short of actual detention, such as extension of a probation term. *See Betances*, 304 F.R.D. at 431 (granting class-wide general damages against state department of corrections for imposing unlawful terms of post-release supervision); *Hassell v. Fischer*, 879 F.3d 41, 44 (2d Cir. 2018) (awarding single plaintiff money

[95] New York courts, for example, have upheld awards of up to $10,000 for short periods of confinement, ranging from 3-5 hours of detention, without any proof of specific damages. *See Raysor v. Port Auth. of New York and New Jersey*, 768 F.2d 34, 39 (2d Cir. 2004) (collecting cases).

damages for unlawful continuation of post-release supervision). As a result of JCS extending their probation terms for longer than permitted by law without any notice or opportunity to be heard, the members of the Statewide Due Process Class were deprived of "significant" liberty interests. Doc. 626 at 62; *see also Westbrook v. Hutchison*, 3 S.E.2d 207, 209-10 (S.C. 1939) (quoting *Comer v. Knowles*, 17 Kan. 436 (1877) (explaining that the common-law tort of false imprisonment does not require that "the individual be confined within a prison, or within walls, or that he be assaulted, or even touched," just that "the individual be restrained of his liberty without any sufficient legal cause therefor, and by words or acts which he fears to disregard"); 22 Am. Jur. 361.

Furthermore, general damages for loss of liberty can easily be tried on a class-wide basis. Where "class members were aggrieved by a single, admittedly unlawful policy and there is a strong commonality between the [] violation and the harm. . . . [T]here is no reason that a jury . . . could not determine an amount of general damages awardable to each member of the class." *In re Nassau Cty. Strip Search Cases,* 2008 WL 850268 at *6-7. Because they do not require individualized proof or testimony, numerous courts have recognized that general damages for unlawful detention are well-suited to class-wide treatment. *See Dellums v*, 566 F.2d at 208; *Roy v. Cty. of Los Angeles*, No. CV1209012, 2018 WL 3436887, at *3 (C.D. Cal. July 11, 2018); *Rodriguez v. City of Los Angeles*, No. CV 11-01135, 2014 WL 12515334, at *1, *5-7 (C.D. Cal. Nov. 21, 2014); *Aichele v. City of Los Angeles*, 314 F.R.D. 478, 496 (C.D. Cal. 2013); *Barnes v. Dist. of Columbia*, 278 F.R.D. 14, 20 (D.D.C. 2011).

Here, the jury can assign a dollar value of general damages to be awarded for each day or hour a class member was illegally jailed, and then the Court can then allocate class-wide general damages for unlawful detention based on the duration of each member's detention or extended

probation, which can be easily determined using Probation Tracker and Childersburg records.

The *Dellums* court adopted just such an approach. In a case involving the wrongful arrest and jailing of protesters, the jury awarded damages on a variable scale: $120 for 12 hours or less in detention, $360 for 12 to 24 hours, $960 for 24 to 28 hours, and $1,800 for 48 to 72 hours.[96] 566 F.2d 167, 174, 208 (D.C. Cir. 1977); *see also Barnes*, 278 F.R.D. at 20 (adopting similar approach as "the most just and expeditious method" for determining class-wide general damages for over-detention); *Augustin v. Jablonsky*, 819 F. Supp. 2d 153, 176 (E.D.N.Y. 2011) (using similar method). Class-wide damages are also appropriate to compensate members of the Statewide Due Process Class for the extension of their probation. *See, e.g.*, *Betances*, 304 F.R.D. at 431.[97]

b) Individualized damages are appropriate to compensate class members for fees paid to JCS after JCS extended their probation terms for longer than two years.

Some members of the Statewide Due Process Class were charged fees by JCS after JCS

[96] The scale permitted the jury to consider both "the length of time the plaintiffs were held" and other factors such as "the treatment and conditions of detention to which they were subjected . . . without losing administrative feasibility." *Dellums*, 566 F.2d at 208. Here, since Plaintiffs do not intend to seek additional damages for worse conditions or other treatment, the damages formula for detention will be even simpler. Accordingly, at trial, the Court can opt to limit the testimony of class members who were jailed to confirming what class-wide data from JCS and government records has already shown, as testimony concerning individuals' particular backgrounds or how the detention uniquely impacted them will not be relevant to class-wide damages. *Cf. Barnes*, 278 F.R.D. at 21.

[97] Even if the Court decided general damages for class members' loss of liberty were inappropriate for some reason, common issues related to liability would still predominate over individual damages issues. "[N]umerous courts have recognized that the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate." *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir.), *aff'd sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (citing multiple cases). This is particularly true where, as here, the alternative would be to expect hundreds or thousands of class members to "repeatedly prove these complicated and overwhelming facts"—a prospect the Eleventh Circuit characterized as "ridiculous." *Klay*, 382 F.3d at 1273. A better alternative would be to certify the class as to liability and then use any one of the "many tools" district courts have to decide individual damages, such as "bifurcating liability and damage trials" or "appointing a magistrate judge or special master to preside over individual damages proceedings." *Electrolux*, 817 F.3d at 1239.

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extended their probation terms for longer than a total of two years on any single probation sentence, and these class members, in addition to compensation for losing their liberty, are entitled to damages equal to the fees JCS collected from them unlawfully. *See Betances*, 304 F.R.D. at 430 (certifying class-wide damages for "various injuries" suffered by plaintiffs as a result of the imposition of unlawful post release supervision terms, "including the collection of fees"). Accordingly, the Court should permit class members to seek special damages to compensate them for payments JCS extracted from them after they should have been released from probation.

Both the duration of probationers' terms and the exact dollar figures paid can be determined using JCS's own Probation Tracker database. Using that data, it will be possible to calculate each probationer's overpayment with great accuracy.[98] Courts routinely hold that such uniform, mechanical damages calculations do not defeat predominance of common issues. *See, e.g.*, *Carriuolo*, 823 F.3d at 987 (in case involving unfair automobile pricing, finding predominance met where damages could be calculated based on difference between market value and unlawful price, rather than having to measure each "individual consumer's direct pecuniary loss"); *In re Checking Account Overdraft Litig.*, 286 F.R.D. 645, 658 (S.D. Fla. 2012) (calling use of defendant's records to identify class members and compensate them for illegal overdraft fees "ministerial" and finding that the class action would be manageable); *Weekes-Walker v. Macon Cty. Greyhound Park, Inc.*, 281 F.R.D. 520, 528 (M.D. Ala. 2012) (common issues concerning liability predominated over individual damages issues based upon some class members' incurred medical expenses). Here, class members' monetary losses are easily calculable, and are therefore no hindrance to class certification at all. "The black letter rule

[98] *See* Coons Decl. ¶ 52 & Ex. 11.

recognized in every circuit is that individual damage calculations generally do not defeat a finding that common issues predominate." *Electrolux*, 817 F.3d at 1239 (quoting Newberg on Class Actions § 4:54 (5th ed.)).

2. Superiority

Rule 23(b)(3)'s second prong requires courts ordering the certification of a class to conclude that "a class action is superior to other available methods for the fair and efficient adjudication of the [claims]." *Klay v*, 382 F.3d at 1269. The focus of this inquiry is on "the relative advantages of a class action suit over whatever other forms of litigation might realistically be available to the plaintiffs." *Id.* "[O]nly when [management] difficulties make a class action less fair and efficient than some other method, such as individual interventions or consolidation of individual lawsuits," is class action improper. *Id*. (second alteration in original).

Rule 23(b)(3) directs courts to consider four nonexhaustive factors pertinent to the finding of superiority: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). These factors strongly favor class adjudication of Plaintiffs' claims—and the absence of any other superior method for resolving the putative class members' claims confirms that certification is the optimal way to proceed.

a) <u>Class Treatment is the Most Efficient and Beneficial Structure to Resolve this Dispute.</u>

Classwide treatment is clearly the superior means of resolving this matter. First, for a number of reasons, the class members here have a strong interest in *not* having to litigate their own separate actions. Fed. R. Civ. P. 23(b)(3)(A). Most, if not all, members of the Classes lack the resources necessary to litigate the complex claims at issue here on their own. It would be

unreasonable to expect people who lacked the means to pay simple court fines to take on a large, well-funded corporation by themselves. *See, e.g.*, *Gerardo v. Quong Hop & Co.*, No. C 08-3953, 2009 WL 1974483, at *2 (N.D. Cal. July 7, 2009) (certifying a class of 36 people where the potential class members lacked legal sophistication and the relatively small potential individual recoveries would make it difficult for the plaintiffs to bring separate suits); *Sherman v. Griepentrog*, 775 F. Supp. 1383, 1389 (D. Nev. 1991) (class action superior where proposed class consisted of poor and elderly or disabled people who would suffer great hardship if forced to bring their own lawsuits); *Jackson v. Foley*, 156 F.R.D. 538, 542 (E.D.N.Y. 1994) (granting class certification where it was "likely that the majority of the class members are from extremely low income households, thereby greatly decreasing their ability to bring individual suits"). Moreover, the fact that this case raises a host of highly complex legal issues and is built on a vast evidentiary record counsels in favor of a single class proceeding. *See, e.g.*, *McClendon v. Cont'l Grp., Inc.*, 113 F.R.D. 39, 45 (D.N.J. 1986) ("[T]he complexity and expense of these cases suggest that individual class members have an interest in a single adjudication" where separate actions "would require repetitive adducement of the same evidence.").

Furthermore, even if the class members did not lack resources, the potential recovery for any individual class member would be too small for individual Plaintiffs to retain attorneys committed to litigating the constitutionality of JCS's for-profit probation scheme, given the complexity and associated costs of the litigation. Accordingly, "class members who may not otherwise have the means to litigate their claims will likely benefit greatly from a class action, and a class action will ensure that class members who are otherwise unaware that they possess a claim will have their rights represented." *City of Farmington Hills Employees Ret. Sys. v. Wells Fargo Bank, N.A.*, 281 F.R.D. 347, 357 (D. Minn. 2012); *see also Amchem Prods., Inc. v.*

Windsor, 521 U.S. 591, 617 (1997) (the "policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive" for individuals to bring claims). Proceeding as a class would be a benefit to all potential class members here. *See Winston*, 2006 WL 6916381 at *12 (certifying a class whose members had little ability to prosecute their claims against a government defendant where the low value of the claims and the significant resources required to probe them would make retention of legal counsel "all but impossible").

The second factor, on other litigation, also demonstrates that class treatment is superior. *See* Fed. R. Civ. P. 23(b)(3)(B). While there are other putative class actions pending in Alabama presenting similar issues, no damages classes have yet been certified. The only other case pending in federal court that could significantly overlap with this one, *Thurman v. Judicial Correction Services* (M.D. Ala. No. 2:12-cv-00724), does not include all the same claims or parties and was dismissed by the Court on grounds not applicable here. And the present case is by far the most advanced.[99]

Third, both the parties and the Court would benefit from resolving the central factual and legal issues in one judicial proceeding, rather than in multiple proceedings with duplicative discovery and potentially conflicting legal resolutions. *See* Fed. R. Civ. P. 23(b)(3)(C). This Court has, over the course of this litigation, gained a great deal of knowledge concerning this matter, and judicial economy weighs in favor of resolving all the issues in this case in this forum. *See Groseclose v. Dutton*, 829 F.2d 581, 584 (6th Cir. 1987) (discussing how the alternative to a class action would result in an "inefficient situation, fraught with potential for inconsistency,

[99] While the Statewide Due Process Class will presumably include some members of the putative city-wide classes in *Carter v. Montgomery* and other city-wide cases, that does not present a bar to class certification. On the contrary, it would be more efficient for that claim against JCS to be resolved in this state-wide class action than for plaintiffs to pursue the claim city by city.

confusion, and unnecessary expense"). Adjudicating the claims before a single court would avoid duplicative efforts on the part of both parties and judges and eliminate the potential for inconsistent judgments. The efficiency gains for both the litigants and the judiciary as a whole weigh in favor of certification.

b) This Action is Manageable as a Class Action.

The fourth factor, manageability, also weighs in favor of class certification here. *See* Fed. R. Civ. P. 23(b)(3)(D). There is a "strong presumption against denying class certification for management reasons." *Winston*, 2006 WL 6916381 at *12. "The manageability inquiry is not whether there will be any manageability problems at all, but whether reasonably foreseeable difficulties render some other method of adjudication superior to class certification." *Id.*; *see also Klay*, 382 F.3d at 1273. And "where a court has already made a finding that common issues predominate over individualized issues," the Eleventh Circuit has stated it "would be hard pressed to conclude that a class action is less manageable than individual actions." *Klay*, 382 F.3d at 1273. For these two reasons, "manageability is ordinarily satisfied so long as common issues predominate over individual issues. *Williams*, 568 F.3d at 1358.

Prosecuting this case on a class-wide basis is clearly the best course from a manageability perspective. As explained above, JCS applied the same practices and policies to all members of each Class, all claims are susceptible to common proof, and common factual and legal questions predominate over any individualized issues. Furthermore, the classes are easily ascertainable from JCS's own database and city records already produced in discovery. The alternative—individual lawsuits—would create far worse manageability issues, such as duplicative discovery, repeated adjudication of identical issues, and excessive costs. Accordingly, class-wide treatment is superior.

c) If Necessary, Separate Classes Can Be Certified Under Rule 23(c)(4).

Where a court determines that trying the entire case on a class-wide basis would present manageability concerns, the court may, under Rule 23(c)(4), sever particular issues to be tried on a class-wide basis. Fed. R. Civ. P. 23(c)(4); *see Fisher v. Ciba Specialty Chemicals Corp.*, 238 F.R.D. 273, 316 (S.D. Ala. 2006) ("Rule 23(c)(4) may apply as simply a housekeeping rule that allows courts to sever the common issues for a class trial") (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996)).

If necessary, for example, the Court could certify a liability-only class for trial and focus on the monetary relief due to the Classes in a second phase. *See, e.g.*, *Navelski v. Int'l Paper Co.*, 244 F. Supp. 3d 1275, 1310 (N.D. Fla.), *recons. denied*, 261 F. Supp. 3d 1212 (N.D. Fla. 2017) (exercising "discretion under Rule 23(c)(4) to certify a liability-only class and bifurcate damages from liability"). Even if the Court were to bifurcate liability from damages, classwide treatment of liability would eliminate the need for individual determinations on a host of common issues, resulting in a sizable conservation of party and judicial resources. *Cf. Manno v. Healthcare Rev. Recovery Grp.*, LLC, 289 F.R.D. 674, 692 n.2 (S.D. Fla. 2013) (rejecting defendants' argument that superiority was not met because of "the specter of individual damages trials"). And a single trial would likely result in better accuracy than multiple individual suits, as it would permit a more thorough presentation of each side's evidence while eliminating the risk of multiple outcomes on key common legal issues. These are all significant considerations weighing in favor of finding superiority. *See* Newberg on Class Actions § 4:67 (5th ed.) (vindication of small claims, judicial economy, and uniformity of decision are factors supporting superiority); *id*. at § 4:87 ("core purpose" of class actions is for claims whose value would be "dwarfed by the costs of adjudicating it").

Alternatively, the Court could, if necessary, certify subclasses to resolve specific limited

issues. *See, e.g.*, *Walco Inves., Inc. v. Thenen*, 168 F.R.D. 315, 337-39 (S.D. Fla. 1996) (granting certification of a number of subclasses under Rule 23(c)(4) to "help[] reduce some of the difficulties that may arise in the management of this class action" and finding that prosecution of certain claims by subclass is "superior to other available methods for the fair and efficient adjudication of the controversy" because "[i]t would be highly inefficient and extremely costly to try the . . . claims individually several hundred times").

In sum, while Plaintiffs submit that there are no manageability concerns here that would necessitate separate issue classes or subclasses, the Court has discretion under Rule 23(c)(4) to proceed in phases for "housekeeping" reasons. *Fisher*, 238 F.R.D. at 316.

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that this Court certify the Classes, appoint Plaintiffs as class representatives, and appoint The Evans Law Firm, P.C. and Public Justice as Class Counsel.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2018, I electronically filed the foregoing Plaintiffs' Memorandum Brief and Points of Authority in Support of Plaintiffs' Motion for Class Certification with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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