No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALDARESS CARTER, et al.,
Plaintiff-Petitioner,

vs.

THE CITY OF MONTGOMERY, JUDICIAL CORRECTION SERVICES, and BRANCH KLOESS,
Defendants-Respondents.

Petition to Immediately Appeal from an Order Denying
Plaintiff/Petitioner's Motion for Class Certification
by the United States District Court for the Middle District of Alabama
Case No. 2:13-cv-00555-RCL
(Hon. Royce C. Lamberth)

PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Petitioners Aldaress Carter (named plaintiff in *Carter v. City of Montgomery*, M.D. Ala. Case No. 2:13-cv-00555) and Angela McCullough (named plaintiff in related case *McCullough v. City of Montgomery*, M.D. Ala. Case No. 2:13-cv-00463) are individuals with no corporate affiliations.

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned hereby discloses the following list of known persons, associated persons, firms, partnerships and corporations that have an interest in the outcome of these two appeals:

1. Lamberth, Royce C., District Judge, United States District Court for the Middle District of Alabama
2. Agee, Levon (Plaintiff-Petitioner, *McCullough v. City of Montgomery*, No. 2:15-cv-00463)
3. Bailey, Leslie (counsel for Plaintiff-Petitioner Aldaress Carter)
4. Barrett, Jennifer (counsel for Plaintiffs-Petitioners Angela McCullough et al.)
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6. Brodsky, Alexandra (counsel for Plaintiff-Petitioner Aldaress Carter)
7. Brymer, Michael (counsel for Defendant the City of Montgomery)
8. Caldwell, Hassan (Plaintiff-Petitioner, *McCullough v. City of Montgomery*, No. 2:15-cv-00463)
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10. CHC Companies, Inc. (corporate affiliate of Defendant Judicial Correction Services)

11. CHC Pharmacy Services, Inc. (corporate affiliate of Defendant Judicial Correction Services)

12. Chestnut, Sanders & Sanders, LLC (counsel for Plaintiffs-Petitioners Angela McCullough et al.)

13. City of Montgomery, Alabama (Defendant)

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15. Correctional Healthcare Companies, Inc. (corporate affiliate of Defendant Judicial Correction Services)

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17. Dawson, William (former counsel for Plaintiff-Petitioner Aldaress Carter)

18. Dentons US LLP (counsel for Plaintiffs-Petitioners Angela McCullough et al.)

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25. Floyd, Adrian Eddie (dismissed Plaintiff, *McCullough v. City of Montgomery*, No. 2:15-cv-00463)

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27. Gill, Richard (counsel for Defendant the City of Montgomery)

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36. Jackson, Michael (counsel for Defendant Judicial Correction Services)

37. Jackson, Micheal (counsel for Defendant Branch Kloess)

38. James, Devron (dismissed Plaintiff, *McCullough v. City of Montgomery*, No. 2:15-cv-00463)

39. Johnson, Marquita (Plaintiff-Petitioner, *McCullough v. City of Montgomery*, No. 2:15-cv-00463)

40. Jones, Joshua Lane (Alabama Department of Human Resources)

41. Jones, Kenny (Plaintiff-Petitioner, *McCullough v. City of Montgomery*, No. 2:15-cv-00463)

42. Judicial Correction Services, LLC (fka Judicial Correction Services, Inc. (Defendant)

43. Kloess, Branch (Defendant)

44. Logsdon, Larry (counsel for Defendant Judicial Correction Services)

45. Lotto, Leah (counsel for Plaintiffs-Petitioners Angela McCullough et al.)

46. Marshall, Toby (counsel for Plaintiff-Petitioner Aldaress Carter)

47. McCullough, Angela (Plaintiff-Petitioner, *McCullough v. City of Montgomery*, No. 2:15-cv-00463)

48. Mooney, Christopher (Plaintiff-Petitioner, *McCullough v. City of Montgomery*, No. 2:15-cv-00463)

49. Morgan, Martha (counsel for Plaintiffs-Petitioners Angela McCullough et al.)

50. Murphy, Kevin (dismissed Plaintiff, *McCullough v. City of Montgomery*, No. 2:15-cv-00463)

51. National Center for Law and Economic Justice (counsel for Plaintiffs-Petitioners Angela McCullough et al.)

52. O'Brien, Stephen (counsel for Plaintiffs-Petitioners Angela McCullough et al.)

53. Parker, Dennis (executive director of NCLEJ, counsel for Plaintiffs-Petitioners Angela McCullough et al.)

54. Parrish, Alexandria (counsel for Plaintiff-Petitioner Aldaress Carter)

55. Physicians Network Association, Inc. (corporate affiliate of Defendant Judicial Correction Services)

56. Professional Probation Services, Inc. (corporate affiliate of Defendant Judicial Correction Services)

57. Public Justice (counsel for Plaintiff-Petitioner Aldaress Carter)

58. Sanders, Henry (counsel for Plaintiffs-Petitioners Angela McCullough et al.)

59. Scott, Ashley (dismissed Plaintiff, *McCullough v. City of Montgomery*, No. 2:15-cv-00463)

60. Segall, Robert David (counsel for Defendant the City of Montgomery)

61. Terrell Marshall Law Group (counsel for Plaintiff-Petitioner Aldaress Carter)

62. Toure, Faya Rose (counsel for Plaintiffs-Petitioners Angela McCullough et al.)

63. Wallace Jordan Ratliff & Brandt (counsel for Defendant Judicial Correction Services)

64. Webster, Henry, Lyons, Bradwell, Cohan & Black, PC (counsel for Defendant Branch Kloess)

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INTRODUCTION

Plaintiffs-Petitioners seek review of decisions denying class certification in two related cases brought on behalf of low-income Alabamians who were unlawfully jailed for not paying court fines.[1] From 2009 through 2014, the City of Montgomery and Judicial Correction Services (JCS) operated a debtors' prison. Pursuant to a contract between the City and JCS, the Montgomery Municipal Court (MMC) sentenced hundreds of people who could not pay fines to JCS "probation." JCS, a for-profit company, charged "probationers" $40 in fees every month. After squeezing as much money as possible from them, JCS petitioned the court to revoke probation. If the probationers couldn't pay enough to buy their freedom, the MMC systematically "commuted" their fines to days in jail without determining that nonpayment was willful, in violation of *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983), and state law.

JCS made its profits—over $15.5 million—solely from fees probationers paid. C274 ¶ 97. JCS's operations drastically increased the City's collections, and the City turned a blind eye to JCS's unlawful conduct. This case represents the class

[1] This petition and the simultaneously filed petition in *McCullough v. City of Montgomery* (No. 2:15-cv-00463) arise out of parallel decisions in both cases. Documents on the *Carter* and *McCullough* dockets are designated "C" and "M," respectively. For example, *Carter* ECF No. 397 is cited as "C397." The district court's primary class opinion is M374 ("Op."), attached as Exhibit 1; *see also* C397, attached as Exhibit 2. "Plaintiffs" refers to the plaintiffs in both cases.

members' last chance to receive compensation for their injuries.

The district court below initially applied the wrong ascertainability standard and denied certification based on an unwarranted concern that it would not be administratively feasible to identify class members using Defendants' records. This Court vacated those decisions and remanded for reconsideration in light of *Cherry v. Dometic Corp.*, 986 F.3d 1296 (11th Cir. 2021). *See* Orders of Remand, Nos. 21-90002-H & 21-90003-H (Feb. 3, 2021).

The district court has abused its discretion again. First, the court held the process for identifying class members raises individual issues that weigh against predominance even though, under *Cherry*, administrative feasibility is a matter of manageability (not predominance) and cannot be a requirement for certification. The court also refused to recognize that a jury can infer from common evidence that no class members received *Bearden* hearings, especially given (1) the court's conclusion that *Bearden* violations were systemic, (2) the requirement that ability-to-pay findings be made on the record, and (3) the fact that Defendants have produced *no evidence* showing the MMC made *Bearden* findings before jailing even a single class member. The court also held that whether JCS was a but-for cause of injuries arising from the *Bearden* violations is individualized even though the systemic deprivation of due process alone establishes liability and, at a minimum, entitles each class member to nominal damages. Finally, the court held that the False Imprisonment

class lacks commonality despite conceding that class members experienced a common practice and shared a common legal theory.

These errors constitute an egregious abuse of discretion, and this Court's immediate review is again necessary.

QUESTIONS PRESENTED

1. Did the district court abuse its discretion by incorporating class member identification concerns into the predominance analysis in violation of *Cherry*?
2. Did the court abuse its discretion by refusing to allow class members to rely on common proof of systemic practices to establish liability and classwide injury?
3. Did the district court abuse its discretion by holding the False Imprisonment class meets the typicality requirement but lacks commonality?

RELIEF REQUESTED

The Court should grant the petition, reverse the district court's order denying class certification, and remand for additional proceedings.

RELEVANT PROCEDURAL BACKGROUND

A. The district court's findings of systemic *Bearden* violations.

In July 2020, the district court denied Defendants' motions for summary judgment. The court found the MMC "engaged in a systemic practice of jailing traffic offenders for failing to pay fines without inquiring into their ability to pay" and, in doing so, "deprived offenders of their due process and equal protection rights

not to be incarcerated for their poverty." C296 at 1.[2] The court further held that Plaintiffs had presented sufficient evidence for a reasonable jury to find the defendants liable for these violations. *See id.* at 15; 20–21.

B. Plaintiffs' motion for class certification.

Plaintiffs sought to certify several classes under Rule 23(b)(3), including a *Bearden* class with claims against the City and JCS consisting of "all individuals the [MMC] placed on JCS-supervised probation, who (1) had debt commuted to jail time in a JCS-supervised case after JCS petitioned the court to revoke probation; and (2) served any of that jail time on or after July 1, 2013." Op. at 20. Plaintiffs also sought to certify a False Imprisonment class against JCS with similar criteria.[3] *Id.*; C348/ M322 at Addendum.

To identify class members meeting the objective criteria of the *Bearden* class, Plaintiffs cross-referenced three types of records: (1) JCS Petitions for Revocation of probation in JCS's ProbationTracker database; (2) MMC Jail Transcripts showing the commutation of each class member's fines to days in jail; and (3) Orders of Release showing when each class member was freed from jail. C358-15; C392 at 3–5; *id.* at

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

[3] The proposed *Bearden* and False Imprisonment classes in *Carter* and *McCullough* were identical except for the dates on which the class periods began; the *McCullough* class periods are used here. *See* Op. at 37–38.

12–35. Plaintiffs produced that list to the court. C358-27; C358-18; C358-27. A similar methodology identified members of the other classes. *See* C392 at 35–45.

C. The district court's first class certification decision.

On December 23, 2020, the court denied class certification, applying a heightened ascertainability standard. M349 at 28–37. Plaintiffs petitioned this Court for review under Rule 23(f). After deciding *Cherry*, this Court granted Plaintiffs' petition, vacated the district court's opinion, and remanded for reconsideration.

D. The district court's second class certification decision.

On May 21, 2021, the district court again denied certification, this time on predominance and commonality grounds. The court conceded "the proposed *Bearden* class meets the *Cherry* ascertainability standard." Op. at 20–22; *see also* id. at 38, 44–45. But the court ignored *Cherry*'s holding that class member identification concerns are relevant (if at all) only to manageability under Rule 23(b)(3)(D) and weighed administrative feasibility as a predominance issue, conflating the objective criteria for class membership—even criteria no Defendant disputed, such as whether members were placed on JCS-supervised probation—with "elements" of Plaintiffs' claims. *Id.* at 28–30. Even though the *Bearden* class members had already been identified through Defendants' records, the court held the jury must determine

membership on an individual basis.[4] *Id.* at 21, 38, 45, 50.

Second, despite overwhelming evidence that the MMC systematically jailed probationers without *Bearden* findings—and no evidence such findings were ever made—the court held that whether each class member suffered a constitutional violation is an individualized issue that can only be resolved at trial "by asking what happened at each [proceeding]." *Id.* at 31. The court likewise held that whether JCS was a but-for cause of the *Bearden* class members' injuries is an individualized question even though the constitutional deprivation itself establishes liability and damages. *Id.* at 32 n.10.

Finally, the court denied certification of the False Imprisonment class, holding that while members of this class share "a common practice and a common legal theory" for typicality purposes, *id.* at 42, the class lacks commonality because of minor factual differences among members. *Id.* at 41.

ARGUMENT

I. This Appeal Meets the Standard for Immediate Review Under Rule 23(f).

This Court has established five factors to serve as "guideposts . . . in determining whether to grant an interlocutory appeal under Rule 23(f)." *Prado-*

[4] The court reached similar conclusions with respect to the other classes, based on the same fundamental misstep: conflating class membership criteria with elements of claims a jury would need to decide.

Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1274–76 (11th Cir. 2001). Here, all five factors present a compelling case for immediate appeal.

A. Immediate review is required to prevent the death knell of absent class members' claims.

First, the district court's ruling creates a "death knell" for the claims of absent class members who will suffer irreparable harm if appellate review is denied. *Prado-Steiman*, 221 F.3d at 1274. This is often the "most important" consideration in determining whether to grant an interlocutory appeal. *Id.*; *see also Ocwen Loan Servicing., LLC v. Belcher*, 2018 WL 3198552, at *5 (11th Cir. June 29, 2018).

While a risk of irreparable harm exists "where a denial of class status means that the stakes are too low for the named plaintiffs to continue the matter," *Prado-Steiman*, 221 F.3d at 1274, the same is true of putative class members whose claims are effectively extinguished by the denial of class certification. *See, e.g.*, *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d. Cir. 2001); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 8 (1st Cir. 2008).

Here, the putative class members were put on probation and jailed solely because they were too poor to pay fines, and their indigency creates obvious barriers to individual suits. *See Prado-Steiman*, 221 F.3d at 1274. Thus, they are severely prejudiced by the erroneous denial of certification.

Furthermore, the relevant conduct ended in 2014, and these lawsuits were filed in 2015. Alabama's two-year statute of limitations for § 1983 has already started

running for absent class members under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). Thus, the members have little time left to file a claim. Similarly, additional plaintiffs may have difficulty intervening into these cases given that the court delayed consideration of certification until after it ruled on summary judgment. Without the class notice process, many victims of Defendants' unconstitutional scheme will not know they have claims.

Even if an individual plaintiff could overcome these obstacles, she would have to prevail on numerous difficult legal questions—including complex jurisdictional issues and federal court doctrines such as *Monell*, judicial immunity defenses, and *Rooker-Feldman*—not to mention a complicated factual record. The difficulty of bringing such claims against large, well-funded defendants would deter many, especially those with limited potential damages.

The "nature and status" of this litigation make clear that unless the district court's errors are corrected now, they never will be. *Prado-Steiman*, 221 F.3d at 1276. Unlike cases where certification "happens early enough in litigation that the parties will generally have just begun the discovery process," *Ocwen*, 2018 WL 3198552 at *5, discovery here ended in December 2019; dispositive motions have concluded; and the court expects the parties to go to trial shortly. The propriety of the court's order should be decided now, rather than on final appeal, to save the time and expense of litigating this matter to a jury trial twice.

B. The importance of the issues and the seriousness of the court's errors also warrant immediate review.

The other Rule 23(f) factors also support interlocutory appeal. First, the district court's decision involved glaring legal errors evidencing the kind of "*substantial* weakness" that "constitutes an abuse of discretion." *Prado-Steiman*, 221 F.3d at 1274; *see also Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1169 (11th Cir. 2010) (district court abuses discretion if it "applies an incorrect legal standard . . . , [or] appl[ies] the law in an unreasonable or incorrect manner") These errors "relate[] specifically to the requirements of Rule 23 [and] the mechanics of certifying a class." *Id.* at 1275. "A

Second, this appeal raises important, outcome-determinative legal issues that, without this Court's intervention, could lead to erroneous results in other class actions. *See Prado-Steiman*, 221 F.3d at 1275. The issues take on "particular importance and urgency" given that these cases both "involve[] a governmental entity" and have "a strong public interest component." *Id.*

II. Immediate Review is Needed to Correct the Court's Erroneous Ruling that Reviewing Records to Determine Class Membership Defeats Predominance.

"[A] district court abuses its discretion when in assessing predominance it improperly categorizes a question as presenting a common or an individualized issue." *Sellers v. Rushmore Loan Mgmt. Servs., LLC*, 941 F.3d 1031, 1042 (11th Cir. 2019). Here, the district court not only miscategorized common questions—it

analyzed the administrative feasibility of identifying class members under the predominance prong and held simple membership questions create individualized issues for the jury, creating an unprecedented barrier to class certification.

The Supreme Court has instructed that the predominance analysis focuses on "the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011); *see also Sellers*, 941 F.3d at 1040. For example, to prevail on a § 1983 claim, one "must demonstrate both (1) that the defendant deprived her of a right secured under the Constitution or federal law and (2) that such deprivation occurred under color of state law." *Arrington v. Cobb Cnty.*, 139 F.3d 865, 872 (11th Cir. 1998). But the criteria for membership in a class are distinct from the elements of the claims being asserted on behalf of that class. Accordingly, the administrative feasibility of identifying class members is considered as part of manageability, not predominance. *See Cherry*, 986 F.3d at 1304 ("[A]side from its limited relevance to Rule 23(b)(3)(D), administrative feasibility is *entirely unrelated* to either Rule 23(a) or (b).") (emphasis added).

In addition to erroneously treating class membership as a predominance issue, the court opined that questions as to whether individuals fall within the class definition must be resolved by the jury at trial. *See, e.g.*, Op. at 21, 38, 45, 50. This makes no sense. If the routine task of reviewing records to confirm class membership always created an individualized question for the jury, many class actions would

never be certified. As this Court has emphasized, the type of "file-by-file" review performed here is commonplace. *Ocwen*, 2018 WL 3198552 at *3; *see also Belcher v. Ocwen Loan Serv., LLC*, 2018 WL 1701963, at *7 (M.D. Fla. Mar. 9, 2018), report and recommendation adopted in part, 2018 WL 1701964 (M.D. Fla. Apr. 2, 2018) (contrasting ordinary "file-by-file review" to identify class members with mini-trials needed to determine "the merits of each [class member]'s claim"). Accordingly, courts in this Circuit consistently certify class actions requiring individualized review with no suggestion that such a process defeats predominance or turns the matter into a jury question. *See, e.g.*, *Collins v. Quincy Bioscience*, *LLC*, 2020 WL 3268340, at *21 (S.D. Fla., Mar. 19, 2020); *Cox v. Porsche Fin. Servs., Inc.*, 330 F.R.D. 322, 331 (S.D. Fla. 2019); *Owens v. Metro. Life Ins. Co.*, 323 F.R.D. 411, 416–17 (N.D. Ga. 2017); *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 317 F.R.D. 675, 691–92 (N.D. Ga. 2016).[5]

[5] Furthermore, there is no requirement that class members be identified before or during trial. "The drafters of Rule 23(c)(3) were careful not to require in a final class judgment that all class members be specifically identified. Rather, even in classes under Rule 23(b)(3), all that is required is that the class be *described* in the final judgment." *Barfield v. Sho-Me Power Elec. Co-op.*, 309 F.R.D. 491, 493 (W.D. Mo. 2015) (*emphasis added*), *vacated on other grounds* 852 F.3d 795 (8th Cir. 2017). Moreover, "courts have not found that due process or any other principle entitled defendants to a jury trial on individual class members' identity." *Krakauer v. Dish Network, LLC*, 2017 WL 3206324, at *4–5 (M.D.N.C. July 27, 2017) (citing cases and holding that "[as] the trial already established all of the elements necessary to prove a violation . . . [defendant] is not entitled to discovery and trials on the identities of class members").

Finally, the district court's ruling that class membership questions create individualized issues for the jury is particularly absurd in light of the ease with which Defendants' records can be used to identify class members. In fact, with respect to the *Bearden* class, records review has already confirmed that every member meets the class definition.

In sum, the routine process of reviewing Defendants' records to identify class members does not transform class member identification into an individualized question for the jury. The decision below is a dangerous and unprecedented interpretation of Rule 23 that cannot be squared with the text of the Rule or this Court's precedent. The Court's correction is urgently needed.

III. Immediate Review is Needed to Correct the Court's Erroneous Ruling that Proof of Plaintiffs' Systemic Claims Requires Mini-Trials.

A. *Bearden* and Alabama law require courts to make findings on the record before jailing a probationer for failure to pay, and the municipal court's failure to record any such findings compels the conclusion that it did not make any.

It is an established fact in this case that the MMC "routinely failed to inquire as to whether a defendant could pay his fines before sentencing him to jail time." Op. at 7. And it is *undisputed* that the MMC never recorded findings justifying its commutation decisions. *Id.* at 31. As the Judicial Inquiry Commission found, the MMC made no records "set[ting] out the basis for the . . . decision to convert fines and costs to jail time" or any "inquiry into the reasons the individual did not pay."

C93-3 at 3 ¶¶ i-j. Under longstanding due process principles, these facts compel the conclusion that the MMC unlawfully jailed every class member—or, at minimum, a ruling that the jury can infer that conclusion at trial. The district court's rejection of this argument was an abuse of discretion.

The district court wrongly asserted—without any analysis—that "nothing in *Bearden* requires written findings," a sweeping statement that conflicts with decades of federal and Alabama law. *Bearden* "followed from" Supreme Court precedent requiring written findings for the decision to revoke probation as part of the "minimum procedural safeguards required by due process." *Black v. Romano*, 471 U.S. 606, 610–12 (1985) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *Morrisey v. Brewer*, 408 U.S. 489, 489 (1972)).[6] Thus, *Bearden* encompassed *already established* due process law requiring "a written statement by the factfinders as to the evidence relied on and reasons for revoking probation." *Gagnon*, 411 U.S. at 786; *see also Black*, 471 U.S. at 614–15. Together, *Bearden* and *Gagnon* require the court to create a record of the ability-to-pay determination.

Bearden itself demonstrates that if a court fails to record the willfulness

[6] The Eleventh Circuit subsequently held that "oral findings, if recorded and transcribed" may satisfy due process, but only if they "create a record sufficiently complete to advise the parties and the reviewing court of the reasons for the revocation . . . and the evidence the decision maker relied upon." *United States v. Copeland*, 20 F.3d 412, 414 (11th Cir. 1994). A complete lack of any recorded findings at all, as in this case, does not meet the *Copeland* standard.

finding, it cannot be found to have happened. In *Bearden*, the state argued that the sentencing court must have made the required findings before revoking probation, but the Supreme Court rejected this assumption, holding that in the absence of a record, "we cannot read the opinion of the sentencing court as reflecting such a finding." 461 U.S. at 673–74.

Alabama law applying *Bearden* is also clear: not only must the court inquire into the reasons for failure to pay and "make appropriate findings," but the court's written order must contain "specific determinations and findings, supported by the evidence." *Taylor v. State*, 47 So.3d 287, 289–90 (Ala. Crim. App. 2009) (reversing and remanding because order did not contain ability-to-pay findings).

Here, the MMC unquestionably had an obligation under federal and state law to record the findings and evidence underlying its commutation decisions. Because it failed to do this, it is impossible that the jailing of any class member could have complied with *Bearden*. Individualized testimony is unnecessary.[7]

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[7] The district court further erred in its apparent belief that *Rooker-Feldman* bars this argument. Plaintiffs do not "question the form" of the Jail Transcripts recording the fact that commutations occurred. Op. at 31 n.13. Rather, Plaintiffs take them at face value. The MMC records do not show that any *Bearden* hearing ever took place, and it does not violate *Rooker-Feldman* to conclude that if the court did not record an ability-to-pay determination, it did not make one.

Here, Plaintiffs do not seek to invalidate state court judgments, but instead bring independent claims for damages against independent actors. *See Nivia v. Nation Star Mortg., LLC*, 620 Fed. Appx. 822, 824 (11th Cir. 2015). Furthermore, Plaintiffs could not have raised their *Bearden* claims before the state court because Alabama

B. The jury can infer from common evidence that no class member received a *Bearden* hearing.

The district court wrongly held that "the only way to resolve the question" whether *Bearden* violations occurred in individual cases "is by asking what happened at each hearing," Op. at 31, despite repeatedly acknowledging that "[t]he record contains enough evidence for a reasonable jury to find that the [MMC] systemically ignored *Bearden*." Op. at 30. Under Eleventh Circuit precedent, the jury may infer classwide injury from "circumstantial evidence" and "legitimate inferences." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1254, 1259 (11th Cir. 2004). Here, Plaintiffs presented powerful circumstantial evidence that the MMC jailed every class member without a *Bearden* hearing. Meanwhile, Defendants presented no opposing evidence but merely speculated that unidentified class members could have received *Bearden* hearings despite all evidence to the contrary.

The record shows the MMC "routinely jailed [probationers] for failing to pay fines without inquiring into their ability to pay" (Op. at 1) and that the MMC's "conduct was so egregious" that its presiding judge was suspended for violating

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does not provide for direct review of commutations. Alabama allows direct appeal only of the original judgment and conviction and applies a strict 14-day deadline, which expired long before the commutations occurred. *See Dixon v. City of Mobile*, 859 So. 2d 462, 463 (Ala. Crim. App. 2003); Ala. Code § 12-14-70(c); Ala. R. Crim. P. 30.1(a). *Rooker-Feldman* does not divest a federal court of jurisdiction to hear claims that could not reasonably have been raised in state court. *Target Media Partners v. Specialty Mktg. Corp.,* 881 F.3d 1279, 1286 (11th Cir. 2018); *Wood v. Orange Cty.*, 715 F.2d 1543, 1548 (11th Cir. 1983); *see also* M329-1 at 69–72.

Bearden and the judges of the MMC agreed in settling a lawsuit to stop "incarcerating [probationers] for inability to pay." *Id.* at 6. The court further noted that "at least 217 probationers whom JCS listed as unemployed, disabled, or receiving Supplemental Security Income benefits served jail time after the [MMC] revoked their probation," which highlights the MMC's routine failure to establish that nonpayment was willful. *Id.* at 6–7. The district court also recognized that class members assert that "systemic practices" by Defendants "caused their injuries," *id.* at 25, and that the named plaintiffs' experiences matched Plaintiffs' systemic allegations. *Id.* at 30. Finally, the court acknowledged that the Jail Transcripts showing commutations are "silent as to any underlying findings." *Id.* at 31.

The Eleventh Circuit has long held that where the defendant engages in systemic wrongdoing, class members may rely on common evidence to establish liability. Thus, in *Klay*, common issues predominated because "while each plaintiff must prove his own reliance, . . . the circumstantial evidence that can be used to show reliance is common to the whole class." 382 F.3d at 1259; *Menocal v. GEO Group, Inc.*, 882 F.3d 905, 920 (10th Cir. 2018) ("[B]ecause the . . . allegations are based on a single, common scheme, class members share the relevant circumstantial evidence in common, thus making class-wide proof possible."). Here, as in *Klay* and *Menocal*, each class member can use the same circumstantial evidence to establish the lack of a *Bearden* hearing in their individual case. The issue is thus common, not individual,

and this case differs substantially from *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000), and *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997), where individualized questions of intentional discrimination were at issue.

Defendants have utterly failed to rebut Plaintiffs' systemic evidence. After completing discovery and a two-day evidentiary hearing, Defendants could not identify any putative class members who had received a *Bearden* hearing. Defendants' failure to present even a single counter-example further demonstrates the predominance of common issues in this litigation. *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 (11th Cir. 1987) (common issues predominated where defendants "engaged in a common course of conduct" and evidence did not show that class members' experiences "varied materially from . . . defendants' common schemes"); *see also Menocal*, 882 F.3d at 921 (defendants' "speculative assertions" and "hypothetical alternative explanations" would not prevent factfinder from drawing "class-wide inference of causation from common evidence"); *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 644 (5th Cir. 2016) ("[S]uch sheer speculation as to the improbable motivations of an undefined, but likely minute number of class members does not cause individual issues of reliance to predominate").[8]

[8] In a closely analogous situation, the Supreme Court endorsed using a "representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records." *Tyson Foods v. Bouaphakeo*, 577 U.S. 442, 455 (2016)

The district court also wrongly concluded that "[w]hether JCS was the but-for cause of class members' injuries" is an individualized question defeating predominance. Op. at 33. The denial of a *Bearden* determination is "a completed violation of a legal right" that establishes injury because "every violation of a right imports damage." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021). JCS's role in those constitutional deprivations turns on systemic policies and practices common to the class. *See* Op. at 32. Thus, Plaintiffs can prove liability on a classwide basis.

Moreover, under *Carey*, each class member is also entitled to lost-liberty damages unless JCS demonstrates they would have been jailed even without the constitutional violations. *Carey v. Piphus*, 435 U.S. 247, 260 (1978). JCS has not put forward evidence to establish this for any class member, let alone most. *See Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1241 (11th Cir. 2016) (affirmative defenses can defeat predominance only if they "apply to the vast majority of cases"). The district court has conceded that lost-liberty damages "can be determined on a classwide basis using a per diem approach." Op. at 31–32.

(*citing* Manual of Complex Litigation §11.493, p. 102 (4th ed. 2004)). The Court held that the employer's failure to keep required records did not entitle it to defend itself by cross-examining individual class members on their hours worked. *Id.* at 455–57. So too, here, the MMC's failure to record anything other than the outcomes of commutation proceedings does not entitle Defendants to go fishing for defenses at individual mini-trials that would not even be contemplated had the MMC complied with its constitutional obligations.

The district court violated clear direction from this Court to classify questions as common or individual "by predicting how the parties will prove them at trial." *Brown*, 817 F.3d at 1234. A jury could reasonably infer classwide injury based on the systemic evidence Plaintiffs intend to present. The district court abused its discretion in refusing to certify these classes.[9]

IV. Immediate Review is Warranted to Correct the District Court's Clear Error that the False Imprisonment Class Lacks Commonality.

The district court held that the False Imprisonment class—alone among all the proposed classes—lacks commonality. This ruling represents a glaring abuse of discretion.

Under the commonality requirement, Plaintiffs need only identify "at least one issue whose resolution will affect all or a significant number of the putative class members." *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1355 (11th Cir. 2009). Plaintiffs identified numerous common legal questions that would "resolve an issue

[9] A similar error infected the district court's refusal to certify the abuse of process class, when it wrongly determined that the "wrongful use of process" element requires individualized evidence. Op. at 49. Nothing in Alabama law demands this: "A wrongful use of process is quite simply the use of a lawful process for a purpose for which it was not designed." *Shoney's, Inc. v. Barnett*, 773 So. 2d 1015, 1025 (Ala. Civ. App. 1999). Plaintiffs clearly explained their intent to use JCS's standardized operating procedures, computerized systems, and standard forms to prove that JCS *systematically* perverted the probation orders to enhance its profits. M329-1 at 26–28. Likewise, JCS's supposed "good faith" defense would not vary from member to member. The only variance is in damages, but individualized damages do not defeat predominance. *Klay*, 382 F.3d at 1259.

that is central to the validity of . . . the claims in one stroke," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), including whether jailing class members without an ability to pay determination is "unlawful" and whether JCS "instigated" the detentions by filing petitions for revocation.[10] The district court's opinion ignored these basic common questions.

The district court's treatment of JCS's asserted "probable cause" defense exemplifies the problems with its commonality analysis. Probable cause has no bearing on Plaintiff's false imprisonment claims, which concern only post-commutation jailing and have nothing to do with arrest warrants. C296 at 40; M269 at 14–15. Nevertheless, the viability of the defense is itself a common question that would "generate common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350. The district court characterized this uniformly irrelevant and meritless defense as "an individual question requiring individual review of the relevant circumstances," wrongly importing its faulty predominance analysis into Rule 23(a).

The district court's finding that the named plaintiffs each met the typicality

[10] False imprisonment is "the unlawful detention of the person of another for any length of time whereby he is deprived of his personal liberty." Ala. Code § 6-5-170. JCS faces "instigator" liability by requesting or otherwise inducing the unlawful detentions in bad faith. *See Grant v. Dolgen Corp.*, 738 So. 2d 892, 896 (Ala. Civ. App. 1998).

requirement underscores the clear error of its ruling on commonality. As this Court has held, "the commonality and typicality requirements of Rule 23(a) overlap." *Prado-Steiman*, 221 F.3d at 1278. "A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3)." *Williams*, 568 F.3d at 1357. If the named plaintiffs "possess the same interest" and "suffer the same injury" as unnamed class members, they must necessarily share common questions of law and fact. The district court abused its discretion by ruling that the proposed False Imprisonment Class involved "no common issues of fact or law."

CONCLUSION

This Court should grant Plaintiffs' Rule 23(f) petition, vacate the district court's decision denying class certification, and remand with instructions to consider the motion under the correct legal standards.

Dated: June 4, 2021

Respectfully submitted,

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