Nos. 21-12468 and 21-12469

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALDARESS CARTER,
Plaintiff-Appellant,
vs.
THE CITY OF MONTGOMERY, et al.,
Defendants-Appellees

– consolidated with –

ANGELA McCULLOUGH, et al.,
Plaintiffs-Appellants,
vs.
THE CITY OF MONTGOMERY, et al.,
Defendants-Appellees

Appeals from Orders Denying Plaintiffs' Motions for Class Certification
by the United States District Court for the Middle District of Alabama
Case Nos. 2:13-cv-00555 & 2:13-cv-00463 (Hon. Royce C. Lamberth)

APPELLANTS' CONSOLIDATED OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants 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 *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-Appellant, *McCullough v. City of Montgomery*, No. 2:15-cv-00463)
3. Bailey, Leslie (counsel for Plaintiff-Appellant Aldaress Carter)
4. Barrett, Jennifer (counsel for Plaintiffs-Appellants Angela McCullough et al.)
5. Bass, Greg (counsel for Plaintiffs-Appellants Angela McCullough et al.)
6. Berger, Jordan (counsel for Plaintiffs-Appellants Angela McCullough et al.)
7. Brodsky, Alexandra (counsel for Plaintiff-Appellant Aldaress Carter)
8. Brymer, Michael (counsel for Defendant the City of Montgomery)
9. Caldwell, Hassan (Plaintiff-Appellant, *McCullough v. City of Montgomery*, No. 2:15-cv-00463)

10. Carter, Aldaress (Plaintiff-Appellant, *Carter v. City of Montgomery*, No. 2:15-cv-00555)

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

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

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

14. City of Montgomery, Alabama (Defendant)

15. Copeland Franco Screws & Gill, P.A. (counsel for Defendant the City of Montgomery)

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

17. Correctional Healthcare Holding Company, Inc. (corporate affiliate of Defendant Judicial Correction Services)

18. Dawson, William (former counsel for Plaintiff-Appellant Aldaress Carter)

19. Dentons US LLP (counsel for Plaintiffs-Appellants Angela McCullough et al.)

20. Edwards, Algia (Plaintiff-Appellant, *McCullough v. City of Montgomery*, No. 2:15-cv-00463)

21. Evans Law Firm (counsel for Plaintiff-Appellant Aldaress Carter)

22. Evans, G. Daniel (counsel for Plaintiff-Appellant Aldaress Carter)

23. Evans, Maurine (counsel for Plaintiff-Appellant Aldaress Carter)

24. Fehl, Kimberly (counsel for Defendant the City of Montgomery)

25. Fleenor & Green LLP (counsel for Defendant Judicial Correction Services)

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

27. Georgia Probation Services, Inc. (corporate affiliate of Defendant Judicial Correction Services)

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

29. Green, Wilson (counsel for Defendant Judicial Correction Services)

30. Griffith, Jonathan (counsel for Defendant Judicial Correction Services)

31. Hardingham, Brian (counsel for Plaintiff-Appellant Aldaress Carter)

32. Harwood, Robert Bernard (counsel for prior defendants Hayes and Westry)

33. He, John (counsel for Plaintiff-Appellant Aldaress Carter)

34. Health Professionals, Ltd. (corporate affiliate of Defendant Judicial Correction Services)

35. Hirshman, Harold (counsel for Plaintiffs-Appellants Angela McCullough et al.)

36. Holliday, Shannon (counsel for Defendant the City of Montgomery)

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

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

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

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

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

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

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

44. Kloess, Branch (Defendant)

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

46. Lotto, Leah (counsel for Plaintiffs-Appellants Angela McCullough et al.)

47. Marshall, Toby (counsel for Plaintiff-Appellant Aldaress Carter)

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

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

50. Morgan, Martha (counsel for Plaintiffs-Appellants Angela McCullough et al.)

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

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

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

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

55. Parrish, Alexandria (counsel for Plaintiff-Appellant Aldaress Carter)

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

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

58. Public Justice (counsel for Plaintiff-Appellant Aldaress Carter)

59. Sanders, Henry (counsel for Plaintiffs-Appellants Angela McCullough et al.)

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

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

62. Terrell Marshall Law Group (counsel for Plaintiff-Appellant Aldaress Carter)

63. Toure, Faya Rose (counsel for Plaintiffs-Appellants Angela McCullough et al.)

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

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

66. Wilner, Claudia (counsel for Plaintiffs-Appellants Angela McCullough et al.)

67. Winborn, Wesley (counsel for Defendant Judicial Correction Services)

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants respectfully submit that oral argument is necessary to the just resolution of this appeal and will significantly enhance the Court's decision-making process, due both to the complexity of the record and procedural history and the complexity and importance of the legal issues.

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INTRODUCTION

For years, the City of Montgomery and Judicial Correction Services, LLC (JCS) operated a debtors' prison. Under a contract between the City and JCS, the Montgomery Municipal Court (MMC) sentenced thousands of people who could not afford to pay fines from traffic tickets and other minor misdemeanors to "probation" supervised by JCS. During its time in Montgomery, JCS, a for-profit company, made over $15.5 million in profits from the fees it charged each "probationer" every month. After squeezing as much money as possible from probationers, JCS regularly petitioned the MMC to revoke probation. If probationers couldn't pay enough to buy their freedom, the court routinely "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. Although the City contracted with attorneys, including Branch Kloess, to serve as public defenders in the MMC, Mr. Kloess and the other attorneys consistently failed to request *Bearden* hearings or raise inability to pay as a defense for probationers facing jail due to nonpayment. Meanwhile, JCS's operations dramatically increased the City's collections, and the City allowed the scheme to continue.

The class procedure represents the last chance for the victims of this scheme to receive compensation for the injuries they suffered. In the district court, Plaintiffs demonstrated that certification of the proposed classes is appropriate because they

meet all the requirements of Rules 23(a) and 23(b)(3). Plaintiffs showed that their claims arise from Defendants' uniform courses of conduct and generate predominating common questions of liability and damages. They also demonstrated that they will prove each claim—including that each Defendant was the factual and proximate cause of the violations every member of the classes experienced—on a class-wide basis using generalized evidence that does not vary from one member to the next.

Nonetheless, the court below has twice refused to certify the classes. Initially, the court applied the wrong ascertainability standard and denied certification based on an unwarranted concern that it was not administratively feasible to identify class members using Defendants' records. C369; M349.[1] This Court vacated those decisions and remanded for reconsideration in light of *Cherry v. Dometic Corp.*, 986 F.3d 1296 (11th Cir. 2021).

The district court has now abused its discretion again. First, the court held that individual issues predominate for Plaintiffs' *Bearden* Class, despite overwhelming and uncontradicted evidence of uniform, systemic conduct. This was error. Plaintiffs intend to prove at trial that the MMC had a custom or policy of systemically jailing

[1] Documents on the *Carter* and *McCullough* dockets are designated "C" and "M," respectively. For example, *Carter* ECF No. 369 is cited as "C369." "Plaintiffs" refers to the plaintiffs in both cases.

JCS probationers without *Bearden* determinations, and Defendants will argue that the MMC always complied with *Bearden*. There are no individual issues to resolve. Nor is there individualized evidence to present. Defendants have failed to identify a single class member who received a *Bearden* determination.

The district court repeatedly acknowledged that "the [MMC] systemically ignored Bearden" and "routinely jailed [probationers] for failing to pay fines without inquiring into their ability to pay." M374 at 1, 30. And it is undisputed that Defendants' records, which clearly show the commutation of probationers' fines to days in jail, contain no evidence that the MMC inquired into the class members' ability to pay before jailing them. *Bearden* requires that ability-to-pay findings be made on the record before a probationer is jailed for nonpayment. But rather than draw (or permit the jury to infer) the obvious conclusion from the undisputed facts in the record—that the MMC uniformly failed to comply with *Bearden*—the district court held that the hypothetical possibility that the MMC *could have* made off-the-record *Bearden* findings in some cases necessitates an individual mini-trial for each class member. The district court then denied class certification for lack of predominance. This was an abuse of discretion.

Second, repackaging its overturned ascertainability ruling, the district court held that individual questions as to class membership predominate because the *jury* would have difficulty deciding *at trial* whether each putative class member meets the

class definitions. This holding flatly conflicts with Rule 23 and *Cherry*, both of which make clear that the court may consider class member identification only as part of manageability under Rule 23(b)(3)(D), and certainly not as part of commonality or predominance. If the routine task of reviewing Defendants' records to confirm class membership could defeat predominance, few classes would ever be certified.

Third, when assessing predominance for the Abuse of Process Class, the district court improperly ignored Plaintiffs' trial plan to present evidence of JCS's systemic misappropriation of class members' payments in favor of individualized considerations that are irrelevant to Plaintiffs' theory of the case.

Fourth, based in part on its erroneous predominance rulings, the district court found class treatment inferior to the alternatives. Because the court failed to conduct the analysis mandated by *Cherry*, it did not even consider the fact that the only way individual cases would be more manageable than a class action is if very few cases are filed—which would mean only a handful of the hundreds of people wrongly jailed could have any hope of receiving justice.

Fifth, the district court held that the False Imprisonment Class lacks commonality despite concluding, correctly, that class members experienced a common practice and shared a common legal theory. Plaintiffs identified multiple common legal questions that would drive the resolution of the litigation.

Sixth, the court held that Aldaress Carter is not typical of the Kloess Subclass despite the fact that Mr. Carter suffered the exact same injury alleged by all Subclass members: contract public defender Branch Kloess failed to advocate for *Bearden* hearings in violation of their Sixth Amendment and Due Process rights.

Finally, applying a heightened adequacy standard that has no basis in law, the district court rejected Kenny Jones as a representative for the False Imprisonment Class based on symptoms of his disability. Mr. Jones has participated in the litigation for seven years, fulfilled every obligation asked of him, and has no conflicts with the class.

Given the district court's clear and repeated abuses of discretion, this Court need not ask the lower court to reconsider its previous rulings. Rather, the Court should reverse these erroneous rulings and remand for the district court to consider only the issues it did not already reach.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The *Carter* and *McCullough* Plaintiffs brought claims for constitutional violations under 42 U.S.C. § 1983 and related state law claims. The district court had subject matter jurisdiction over Plaintiffs' federal claims under 28 U.S.C. §§ 1331 and 1343. The district court had supplemental jurisdiction over Plaintiffs' state law claims under 28 U.S.C. § 1367 because the state and federal claims form part of the same case or controversy.

This Court has appellate jurisdiction under 28 U.S.C. § 1292(e) and Rule 23(f), which authorizes a permissive appeal from a grant or denial of class certification.

The district court denied class certification on May 21, 2021. C397; M374. Following a timely petition for leave to appeal, this Court granted leave to appeal on July 23, 2021.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion by holding that individual issues predominate for Plaintiffs' *Bearden* Class despite common, uncontradicted proof of systemic failures to comply with *Bearden*.

2. Whether the district court abused its discretion by incorporating administrative feasibility concerns into its commonality and predominance analyses, contrary to *Cherry*.

3. Whether the district court abused its discretion by holding that the Abuse of Process Class lacks predominance without considering how Plaintiffs intend to prove their claims at trial.

4. Whether the district court abused its discretion by holding that for the *Bearden* and Abuse of Process Classes, class treatment is inferior to other methods based solely on the manageability factor.

5. Whether the district court abused its discretion when it held that the False Imprisonment Class lacks commonality, despite the presence of questions of common law and fact and despite holding that the Class satisfies typicality.

6. Whether the district court abused its discretion when it held that the Kloess Subclass lacks typicality, despite the fact that the claims of the class and the class representative arise from the same pattern or practice and are based on the same legal theory.

7. Whether the district court abused its discretion by holding that Kenny Jones is not an adequate representative for the False Imprisonment Class.

STATEMENT OF THE CASE

A. Facts Relevant to Class Certification

At all times relevant to this action, the Montgomery Municipal Court (MMC)—under Presiding Judge Les Hayes—adjudicated criminal misdemeanors and traffic violations. M374 at 3, 6. MMC judges routinely sentenced defendants to pay fines and court costs. *Id*.

From 2009–2014, the City contracted with JCS, a for-profit probation company, to provide collection services to the MMC under the guise of probation. The MMC assigned people to JCS only when they could not pay fines and costs in full, *id.* at 4, and JCS "acted as a service to monitor defendants solely in connection with the collection of outstanding fines and costs." M252-2 at 4. The City paid JCS nothing; the system was "an offender-paid model." M374 at 5.

Under the contract, each probation order included a $40 monthly probation fee and a one-time $10 set-up fee—both payable to JCS. *Id*. While probationers could avoid the $40 monthly fee by paying in full within one week (later thirty days), thousands of probationers—including all members of the putative classes here—could not do so. *See* C73-17 at 1; C253-12 at 2; C73-1 at 154:8–14; C278-14 at 18. Once probationers paid off their debts, probation terminated and JCS could no longer collect fees from them, even if the court had initially sentenced them to longer terms. C73-19; C73-16 at 237:20–238:6.

JCS relied on standardized forms and procedures, including a Training Manual and Standard Operating Procedures specific to Montgomery, for every aspect of its work. M282 at 5–12; M257-89; M257-101; M246-98. The Training Manual directed the steps each probation officer was required to take at each stage of collection and included examples of the related forms and reports in ProbationTracker, JCS's proprietary database. *Id*. The Training Manual and the SOP instructed JCS employees to document in ProbationTracker every action they took. *Id*.; M246-98 at 38–62.

ProbationTracker is JCS's repository for all data on probationers. C73-3 at 107:6–19; C73-8 at 397:1–18. For each probationer, ProbationTracker contains a unique Probation ID, personal and employment information, the dates and amount of each payment made and missed, the dates and description of all actions taken by JCS employees to collect MMC debt, and records of all mailings, court filings, court appearances and commutations. C118-19 at 22:9–13; 94:6–95:3. JCS employees scanned hard copies of court records into ProbationTracker. C73-3 at 170:10–171:23; C 73-9 at 108:4–21.

JCS set the terms of the probation orders, including the payment amounts, using standard forms that it provided to the court. M257-101; M257-89; M261-2 at 145:15–20. JCS calculated monthly payment amounts by dividing the probation term by the fine amount, adding its own monthly fee, and rounding up to the nearest $5.

M246-98 at 15. The defendant's income and ability to pay did not factor into the calculation. *Id*. More than 90% of the payments JCS received were for less than the amount specified in the probation order. M283-1 at ¶ 31. When people paid less than the full amount, JCS required them to appear more often—up to several times each week. M374 at 5. The Manual did not instruct JCS employees to ask why a probationer could not make a full payment. M246-98. Nevertheless, JCS's records contain evidence that many class members lacked the ability to pay because they were unemployed or on disability. M374 at 6–7.

The section of the Manual called "Working A Typical Case," M246-98 at 66, dictated how to handle missed payments and appointments. If a person missed two appointments, JCS would send the "failure to report" or "FTR" letter. *Id*. at 91. Failure to respond to the FTR letter resulted in a "Delinquency Letter." *Id*. at 103. Both letters—standard forms stored in ProbationTracker—threatened arrest or return to court if the person did not appear and/or make a payment. As long as people made some appointments or paid any amount of money, JCS kept them on probation, racking up more fees. M246-83 at 3–4; M257-93 at 7–10; M246-23 at 3–4; M246-100 at 4; M246-69 at 5–6; C174-3 at 2–12. When probationers paid less than the full amount, JCS had discretion to allocate the payment between fines owed to the City and its fees. M374 at 5. JCS routinely allocated large percentages of these payments towards its own fees, which prolonged probation and enhanced JCS's profits at the

expense of paying down probationers' debts to the City. M246-98 at 125. JCS ultimately kept $15.5 million, more than half of the funds collected, for itself. M374 at 5.

When probationers stopped paying or appearing, JCS would change the case status in ProbationTracker to "VOP" (Violation of Probation), schedule a court date, and generate a form notice to show cause or petition to revoke probation requesting that the defendant's probation be revoked and a warrant issued for their arrest. M374 at 5. The form petition did not include a statement that the defendant had willfully failed to pay. *Id.* Instead, JCS alleged appointments missed and amounts unpaid but omitted exculpatory information available in ProbationTracker that demonstrated probationers' genuine efforts to comply. M282 at 16–27.

On the hearing date noticed in the petition for revocation, JCS presented the petition to the court. M246-98 at 114. If the person appeared, JCS would demand payment in exchange for having the hearing dismissed. M 246-98 at 117. The Training Manual provides a sample recommendation in the event the hearing moved forward: "Your Honor, I recommend the defendant serve 5 days in jail and pay at least $145 to be released." *Id.* The Training Manual also instructed employees to withhold relevant information in its files demonstrating lack of willfulness and inability to pay, such as that the probationer was "looking for employment." *Id.* If the person did not appear at the noticed hearing, as often occurred, JCS presented the

petition or notice to show cause on an *ex parte* basis, and a warrant would issue. M246-17 at ¶ 9.

When people appeared before the MMC on unpaid tickets—whether by warrant, petition for revocation, or notice to show cause—the court followed the same procedure. M246-6 at 18:9; M374 at 6. The court asked whether the probationer had the money to pay. M246-6 at 9:6–10:3; 29:18–23. If the answer was "no," the court "commuted" the defendant's sentence to jail time at the rate of $25, or later $50, per day. M374 at 6.

The district court made the following factual findings concerning the MMC's systemic practices:

> At revocation and commutation hearings, the Municipal Court routinely failed to inquire as to whether a defendant could pay his fines before sentencing him to jail time. *In re Hayes*, No. 49, slip op. at 2–3 (Ala. Ct. Judiciary Jan. 5, 2017). Though the Alabama court system has created a standard form to allow defendants to show their indigency, the Municipal Court did not use that form. 2014 Nixon Dep. 88:4–12. And the Municipal Court judges did not tell defendants that they could not be jailed if they could not afford to pay their fines. *See* Hayes Dep. 40:10–14. The Municipal Court's conduct was so egregious that the Alabama Court of the Judiciary suspended Municipal Court Presiding Judge A. Lester Hayes III from the bench for eleven months for failing to conduct indigency hearings and for other ethics violations stemming from the Montgomery probation system. *In re Hayes*, slip op. at 2–7. In addition, the Municipal Court judges agreed in settling a lawsuit challenging its traffic ticket procedures to refrain from incarcerating defendants for inability to pay. *See Mitchell v. City of Montgomery*, No. 2:14-cv-186-MHT, 2014 WL 11099432, at *2–3, 5–10 (M.D. Ala. Nov. 17, 2014). They also agreed to train themselves, court staff, and public defenders to protect defendants' rights not to be jailed for inability to pay. *Id.*

M374 at 6.

There are no written or oral records documenting the MMC's reasons for commuting fines to days in jail, let alone any record of the key finding required by *Bearden*: that the probationer's nonpayment was willful. *See Bearden*, 461 U.S. at 668. *See* M252-2 at 5. Instead, the bailiff or clerk created a "jail transcript" for each probationer, which was simply a document indicating, for each case a defendant had before the court that day, whether it had resulted in a mandatory term of confinement, a fine with a future due date, or a commutation of outstanding court debt to days in jail (along with the amount of the underlying fine). *Id.* at 5–6; *See, e.g.*, C308-3 at 2. The jail transcript reflected the fact of the commutation but not any reasons for it. M251-1 at 88:19–89:8; M251-2 at 41:6–22; 44:2–45:5.

Alabama requires municipalities that operate municipal courts to provide counsel to indigent defendants. Ala. Code § 12-14-9. The City purported to meet that obligation through a pair of contracts: one with attorney Branch Kloess and one with a small Montgomery law firm. C397 at 2. Each contract public defender covered the MMC's docket every other day, and each handled an enormous caseload. For example, in 2012, Mr. Kloess handled 16,436 cases over 127 days in court.[2] *Id.* The

[2] The evidence shows that between January 2012 and July 2014, Mr. Kloess alone was assigned to more than 45,000 cases on the MMC's jail docket—an average exceeding 15,000 cases per year. C278-1 ¶ 17 (with calculation method explained in preceding paragraphs ¶¶ 7–16); C278-2; C278-3; C278-4; C278-5; C278-6; C278-7; C278-8. This figure dwarfs the American Bar Association's recommendation that a full-time public defender handle no more than 400 misdemeanor cases a year. ABA,

district court found that while the probationers appearing before the MMC were generally poor, there is no evidence that Mr. Kloess routinely asked the Municipal Court to consider their inability to pay. *Id.* at 3. And neither Mr. Kloess nor the other Defendants could identify a single putative class member for whom an indigency determination was requested or a motion filed, let alone any class member who actually received a *Bearden* determination. *See id.*

The MMC assigned each of the Named Plaintiffs to JCS-supervised probation because they could not afford to pay traffic tickets in full. C296 at 12; M269 at 6–10. When the Named Plaintiffs did not pay JCS the amounts specified in the probation orders, they endured JCS's standard collection practices including frequent appointments, misallocation of partial payments, threats of arrest, collection calls, and FTR and delinquency letters, finally culminating in a petition to revoke probation that requested a warrant for arrest. C296 at 12–14; M269 at 6–10. Each Named Plaintiff appeared before the MMC pursuant to a JCS-obtained warrant, and none had the money to pay the amounts due. *Id*. Plaintiff Caldwell's mother paid his debt for him, sparing him from jail. M246-2 at 244:18–249:1.[3] But for each of the

Ten Principles for a Public Defense Delivery System at 5 n.19 (2002), at https://www.nacdl.org/getattachment/49867dc1-1655-4337-9dfc-ce095ce544e8/aba-ten-principles.pdf (adopting the 1973 recommendation of the DOJ-funded National Advisory Commission on Criminal Justice Standards and Goals).

[3] Because of JCS, Mr. Caldwell and his mother paid $287 on a $175 ticket. M246-89 at 3, 7; M246-93; M246-2 at 244:18–249:1.

remaining Named Plaintiffs, an MMC judge commuted their fines to jail time without an ability to pay determination.[4] C296 at 12–14; M269 at 6–10. As a result, these Named Plaintiffs served jail time. *Id*.

The MMC's commutation practices long pre-dated the City's contract with JCS. M246-6 at 84:4–8. They were "not a secret to the court staff" or "the police force or the jailers or . . . anybody within the City[.]" *Id.* at 160:21–161:21. Likewise, JCS knew the court's practices. Hundreds of ProbationTracker files dating from before February 2012 reference commuted sentences. M283-1 at ¶ 23. JCS staff worked in the courthouse every day. M246-5 at 106:16–107:1. A JCS representative would typically sit next to the judge in the courtroom when court was in session. *Id.* at 121:7–23; M257-89; M281-17; M246-98 at 117.

As for the City, Mayor Todd Strange never attempted to conduct a municipal investigation of JCS's activities, and he did not know "whether they did a good job or a bad job." M261-7 at 100:1–8. The City simply expected JCS to do its job under the contract: "collect those moneys . . . [and] remit those collections." M261-4 at 210:19–212:22.

By July 16, 2012, the City had ample warning that JCS and the municipal court systematically violated probationer's *Bearden* rights. C296 at 29. On that date,

[4] Defendant Branch Kloess was assigned to represent Plaintiff Carter on the date the MMC commuted Carter's fines to days in jail. C296 at 13.

JCS sent an email to Ken Nixon notifying him of a lawsuit that challenged JCS's probation operations in another Alabama municipal court, "including incarcerating certain probationers solely for their failure to pay court ordered fines and fees." M257-102. On September 20, 2012, Nixon emailed Wes Ennis about a recently filed lawsuit, *Thurman v. Judicial Correction Services*, M.D. Ala. No. 2:12-cv-00724, which alleged that JCS charged unlawful probation fees and coerced payments from probationers. M257-103. In August 2013, the City, along with Judges Hayes and Westry, was sued for *Bearden* violations in *Cleveland v. City of Montgomery*, M.D. Ala. No. 2:13-cv-00732, and *Watts v. Montgomery*, M.D. Ala. No. 2:13-cv-00733 (). And on December 25, 2013, Mayor Strange, Nixon and Ennis exchanged emails about a Fox News report describing JCS as contributing to the operation of "debtors' prisons" in Alabama. M257-76. Throughout this time, the City could have terminated its contract with JCS, but it chose to maintain its relationship with JCS until July 2014. The City ended its relationship with JCS only after the City was named as a defendant in a putative class action lawsuit, *Mitchell v. City of Montgomery*, M.D. Ala. No. 2:14-cv-00186. The City's use of JCS was an issue in the lawsuit, and as part of the settlement, the City agreed not to contract with any private probation company for at least three years. M257-123 at 5.

B. Procedural History

1. These lawsuits seek damages for the violation of the class members' constitutional and state law rights.

The *McCullough* and *Carter* lawsuits were filed in July and August 2015, respectively, against the City of Montgomery and its contractors JCS and attorney Branch Kloess, seeking damages under 42 U.S.C. § 1983 and state law for unlawful jailing and JCS's abuse of probation orders to collect fees.

2. The district court found Plaintiffs submitted sufficient evidence for a reasonable jury to find Defendants liable for systemic *Bearden*, Sixth Amendment, and state-law 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; *see also id.* at 26 (describing a "widespread pattern of unlawful incarceration"). As the district court explained:

> JCS ran a business premised on the fact that many traffic offenders in Montgomery could not afford to pay their fines. They extracted as much cash as they could from probationers—some of whom they knew to be disabled, unemployed, or dependent on government benefits—and then tossed them back to the Municipal Court. That court, in turn, routinely jailed traffic offenders without inquiring into their ability to pay their fines. And if the City knew what was happening and did nothing to stop it, the City is liable as well. They cannot point the finger at the Municipal Court and feign innocence. For JCS and the City to walk out of the casino professing shock that gambling was occurring while pocketing millions in winnings beggars belief.

C296 at 38.

The court concluded that Plaintiffs had presented sufficient evidence for a reasonable jury to find Defendants liable for four claims:

- Claims against JCS, the City, and Mr. Kloess[5] under § 1983 for violating Plaintiffs' *Bearden* rights;
- Claims against the City and Mr. Kloess under § 1983 for violating Plaintiffs' Sixth Amendment right to counsel[6];
- Claims against JCS for false imprisonment; and
- Claims against JCS for abuse of process.[7]

See C296 at 15; 20–21; M269 at 14–15; 20.

3. Plaintiffs moved for class certification.

Plaintiffs sought to certify four classes under Rule 23(b)(3):

- ***Bearden* Class** (against the City and JCS):[8] 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;
- **Kloess Subclass** (against Branch Kloess): all individuals in the *Bearden* Class whose debt was commuted to jail time on a date when Branch Kloess was the public defender assigned to the jail docket or for whom [Defendants' records] indicate the individuals were represented by Branch Kloess for the commutation;

[5] Kloess is named as a defendant in *Carter* only.

[6] The Sixth Amendment claim is alleged in *Carter* only.

[7] The abuse of process claim is alleged in *McCullough* only.

[8] *Carter* proposed to certify a City Class (with both *Bearden* and Sixth Amendment claims) and a JCS *Bearden* Subclass; *McCullough* proposed to certify a *Bearden* Class against both the City and JCS. The definitions of these proposed classes (collectively, "*Bearden* Class") are identical except for the dates on which the class periods began. The *McCullough* class periods are used here.

- **False Imprisonment Class** (against JCS): 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, 2009;[9] and

- **Abuse of Process Class** (against JCS): all individuals the MMC placed on JCS-supervised probation, (1) who at any time paid less than the minimum monthly payment ordered by the court; and (2) from whom JCS continued to collect or attempt to collect after July 1, 2013.

C348 at 89 (Addendum).

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

To identify *Bearden* Class members, Plaintiffs started with the universe of people whom the MMC sentenced to probation with JCS during the relevant class period—over 23,000 people, all identified in JCS's ProbationTracker database. C358-15. Then Plaintiffs implemented a two-step methodology to compare those ProbationTracker records with MMC and jail records the City produced in 2019.

[9] The proposed False Imprisonment Classes in the two cases are identical except for the class periods; again, the *McCullough* class period is used here.

Step 1. Using the unique MMC case number assigned to each case and contained in both JCS's ProbationTracker database and in Benchmark, the MMC's case database, Plaintiffs' consultant John Rubens cross-referenced the JCS records with the MMC records to identify cases where JCS petitioned the MMC to revoke probation and the probationer later had a Jail Transcript filed in the case. *See* C307 at 35–36; M282 at 31–32; M283-1 at ¶¶ 13–19.

Step 2. For each probationer on the list generated by Step 1, Plaintiffs' attorneys visually inspected three documents contained in the ProbationTracker and Benchmark records: JCS's Petition for Revocation of Probation or Notice to Show Cause, the corresponding MMC Jail Transcript, and the MMC Order of Release (or comparable document showing release date). This review identified whether: (1) the Jail Transcript showed commutation of fines to days in jail on the relevant JCS-related case(s), and (2) some of that commuted time was served. If the records confirm both (1) and (2), the person is a member of the *Bearden* Class. Those same documents provide the information needed to calculate the duration of jailing and allocation of jail time between JCS cases and any other cases. *See* C307 at 35–36; C348 at 34–40, 55–57, 64–65; C312 at 15–17; M282 at 31–32; M283-1 at ¶¶ 3–21; M322 at 34–40, 55–57, 64–65.

Using named Plaintiff Aldaress Carter's Petition for Revocation, Jail Transcript, and Order of Release as an example, Plaintiffs demonstrated how for each

class member those three documents confirm that (1) JCS sought revocation of probation, (2) the MMC commuted debt to jail on the same case or cases for which JCS sought revocation, (3) the date the person's debt was commuted to jail time, and (4) the dates spent in jail attributable to the JCS-related release. C307 at 36–37; C308-3; C348 at 35–36.

Initially, both Rubens and attorneys carried out Step 2's visual review of the records to determine whether the probationer definitively meets the criteria. But as the process continued, Rubens focused on the details of Step 1. The attorneys took on almost all the review in Step 2, which simply checked whether documents confirmed that the objective class criteria are met for each probationer identified by Step 1. Step 2 reduces the size of the pool of probationers identified in Step 1—no probationer is added at that stage. As of the December 16, 2020 hearing, Rubens and Plaintiffs' counsel had used this methodology to identify 516 individuals who meet the objective criteria of the *Bearden* Class. C358-27; C358-18.

In multiple briefs before the court below, Defendants challenged Plaintiffs' method for identifying class members by pointing to specific probationers and arguing that one detail or another of their case files was not considered. Plaintiffs rebutted each of these challenges at length, with extensive citation to the record, to demonstrate that (1) their method for class member identification is objective, and (2) the method can be used to calculate the precise number of days in jail attributable

to any given probationer's JCS-related commutation. C348 at 34–40, 55–57, 64–65; C312 at 15–17; M282 at 31–32; M283-1 at ¶¶ 3–21; M322 at 34–40, 55–57, 64–65.

Plaintiffs presented similarly objective methodologies to identify the members of the other classes. Data stored in ProbationTracker enables Plaintiffs to identify members of the Abuse of Process Class. C392 at 44–46. ProbationTracker data, along with a cross check against MMC data, identifies members of the False Imprisonment Class. *Id*. at 35–37. And identification of Kloess Subclass members simply requires identifying the subset of *Bearden* Class members represented by Kloess, using Kloess's timesheets and MMC records. C307 at 37–39.

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

On December 23, 2020, the district court denied class certification based solely on a heightened ascertainability standard that would have required all class members to be definitively—and easily—identified before certification. *See* M349 at 28–37. Specifically, the court questioned whether Defendants' records conclusively show that probationers meet the criteria in the class definitions. *Id.* at 32–34. After deciding *Cherry*, this Court granted Plaintiffs' petition for review under Rule 23(f), vacated the district court's opinion, and remanded for reconsideration. *See* Orders of Remand, Nos. 21-90002-H & 21-90003-H (Feb. 3, 2021).

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

On May 21, 2021, the district court again denied certification. This time, the court held that all the proposed classes are ascertainable under *Cherry*. M374 at 20–22, 37–38, 43–45, 51; C397 at 14, 17, 22. The court also held that all the proposed classes are sufficiently numerous (M374 at 24, 37, 40, 43, 47, 51; C397 at 14, 15, 18, 21, 22); that proposed class counsel will fairly and adequately represent the classes (M374 at 36–37; C397 at 13); that all proposed class representatives except for one are adequate (M374 at 37; 43; 44; 48; 52; C397 at 14; 15; 21; 22); and that commonality was satisfied for the *Bearden* Class, Kloess Subclass, and Abuse of Process Class (M374 at 24; 47; C397 at 18). However, the court:

- Denied certification of the *Bearden* Class on predominance and superiority grounds (M374 at 27–37; C397 at 14, 16);
- Denied certification of *Carter*'s Kloess Subclass on typicality grounds (C397 at 2–4, 19–20);
- Denied certification of the False Imprisonment Class on commonality, predominance, and superiority grounds (M374 at 40–42, 44; C397 at 22);[10]
- Denied certification of *McCullough*'s Abuse of Process Class on predominance and superiority grounds (M374 at 51–52); and
- Held that symptoms of Kenny Jones's intellectual disability render him inadequate to serve as a representative for the False Imprisonment Class (M374 at 42–44).

[10] The district court also purportedly denied certification of the False Imprisonment Class on predominance and superiority grounds, although the court's opinions lack any analysis of Rule 23(b)(3) with respect to this class. *See* C397 at 22.

This Court granted review of Plaintiffs' Rule 23(f) petitions and consolidated the cases for purposes of this appeal.

STANDARD OF REVIEW

This Court reviews a district court's class certification order for abuse of discretion. *Heffner v. Blue Cross & Blue Shield of Ala., Inc*., 443 F.3d 1330, 1337 (11th Cir. 2006). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in ruling on class certification, makes clearly erroneous fact findings, or applies the law in an unreasonable or incorrect manner." *Little v. T-Mobile USA, Inc*., 691 F.3d 1302, 1305–06 (11th Cir. 2012).[11] Under this standard, factual determinations are reviewed for clear error, and legal determinations are reviewed *de novo*. *Vega v. T–Mobile USA*, *Inc.,* 564 F.3d 1256, 1264–65 (11th Cir. 2009).

SUMMARY OF ARGUMENT

The district court abused its discretion in several ways.

1. Despite finding that the MMC "routinely failed to inquire as to whether a defendant could pay his fines before sentencing him to jail time," C296 at 9 and holding that "[t]he record contains enough evidence for a reasonable jury to find that the [MMC] systemically ignored *Bearden*," M374 at 30, the court held that "the only

[11] Unless otherwise indicated, citations, internal quotations, and alterations are omitted throughout.

way to resolve the question" of whether *Bearden* violations occurred "is by asking what happened at each [commutation proceeding]." *Id.* at 31. That was error. The factual question whether the MMC failed to conduct *Bearden* inquiries is common to all class members, and a reasonable jury can infer from common evidence that the answer to this question is "no." *Bearden* requires that ability-to-pay findings be made on the record before a probationer is jailed for nonpayment. No such records exist, and Defendants have presented no evidence showing that the MMC made a *Bearden* finding before jailing even a single class member. A reasonable jury can thus conclude from the lack of records that no such findings were made.

2. Repackaging its overturned ascertainability ruling in the form of predominance, the district court held that a *jury* would need to decide whether each putative class member met the class definition, and it suggested—despite the clarity of Defendants' records—that this task could be difficult with respect to some class members. The court then weighed these so-called individual class membership questions against predominance. This ruling flies in the face of Rule 23 and *Cherry*, which make clear that administrative feasibility (including class member identification) is irrelevant to predominance and *cannot* be a requirement for certification.

3. When assessing predominance for the Abuse of Process Class, the district court improperly ignored Plaintiffs' trial plan to present evidence of JCS's

systemic misappropriation of class members' payments in favor of individualized considerations that are irrelevant to Plaintiffs' theory of the case.

4. Based in part on its erroneous predominance rulings, the district court found class treatment inferior to the alternatives. The court failed to conduct the analysis mandated by *Cherry* and did not even consider the fact that, absent a class action, only a handful of the hundreds of people wrongly jailed have any hope of receiving justice.

5. The court held that the False Imprisonment Class lacks commonality despite concluding that class members experienced a common practice and shared a common legal theory.

6. The court held that Aldaress Carter is not typical of the Kloess Subclass despite the fact that Mr. Carter suffered the same injury alleged by all Subclass members: contract public defender Branch Kloess failed to advocate for *Bearden* hearings in violation of their Sixth Amendment and Due Process rights.

7. The court erroneously rejected Kenny Jones as an adequate representative for the False Imprisonment Class based on a sweeping and discredited theory that would, if adopted, bar people with mental disabilities from representing classes even where they have demonstrated an understanding of the issues and the capacity to participate in the case.

These errors constitute an egregious abuse of discretion, and this Court should reverse these rulings and remand. Specifically, the Court should:

1. Hold that the *Bearden* Class meets the requirements of Rule 23(b)(3) because common issues predominate and a class action is superior to the alternatives;

2. Hold that the Abuse of Process Class meets the requirements of Rule 23(b)(3) because common issues predominate and a class action is superior to the alternatives;

3. Hold that the False Imprisonment Class satisfies the requirements of Rule 23(a) (reversing the ruling below that the Class had no common issues) and Rule 23(b)(3) (reversing the ruling below on predominance and superiority);

4. Hold that the Kloess Subclass meets the requirements of Rule 23(a) (reversing the ruling below that Mr. Carter is not a typical class representative) and remand for the district court to consider in the first instance whether the Subclass satisfies the requirements of Rule 23(b)(3); and

5. Hold that Kenny Jones is an adequate representative for the False Imprisonment Class.

ARGUMENT

I. The District Court Abused its Discretion by Holding that Individual Issues Predominate for Plaintiffs' *Bearden* Class Based on its Erroneous Conclusion that Mini-Trials Would be Needed to Prove Class Members Did Not Receive *Bearden* Determinations.

In the district court, Plaintiffs demonstrated that their *Bearden* claim is rooted in common courses of conduct that they will establish at trial using generalized, class-wide proof. *See generally* C348 at 14–17. The first common course of conduct Plaintiffs will prove at once for all members of the classes is that the MMC "engaged

in a systemic practice of jailing [members of the classes] for failing to pay fines without inquiring into their ability to pay," and, in doing so, deprived class members "of their due process and equal protection rights not to be incarcerated for their poverty." C296 at 1. Defendants, in turn, will argue that "*Bearden* hearings were held in *all* cases." C320 at 16 (emphasis added); *see also id.* at 12 (arguing that "[h]earings on ability to pay were held as a matter of general practice").

Regardless of which side will ultimately prevail on the merits, at trial, the jury will consider generalized evidence to decide whether the MMC had a systemic practice of jailing JCS probationers for nonpayment of court debt without considering ability to pay—and that decision will apply equally to all members of the class. This is a classic "binary and predominant" common issue appropriate for class treatment. *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1326 (11th Cir. 2008). Accordingly, given the parties' positions regarding the MMC's systemic compliance or noncompliance with *Bearden*, there are no individual issues to resolve.

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." M374 at 6. 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."

M252-2 at 5 ¶¶ i–j. Under longstanding due process principles, these facts compel the conclusion that the MMC unlawfully jailed every class member. At minimum, a jury could reasonably infer classwide injury based on these facts and the other systemic evidence Plaintiffs intend to present.

The district court nonetheless concluded that, because Defendants' records "contain[] only the outcomes of the commutation hearings" and are "silent as to any underlying findings or evidence," resolving whether the MMC might potentially have made an off-the-record *Bearden* determination is an individual question that defeats predominance. M374 at 31. This was abuse of discretion, and this Court should reverse. *See Sellers v. Rushmore Loan Mgmt. Servs., LLC*, 941 F.3d 1031, 1042 (11th Cir. 2019) ("[A] district court abuses its discretion when in assessing predominance it improperly categorizes a question as presenting a common or an individual issue.").

A. *Bearden* requires courts to make findings on the record.

The district court applied the incorrect legal standard to Plaintiffs' *Bearden* claims. The district 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)).[12] 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 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

[12] The Eleventh Circuit subsequently held that "oral findings, if recorded or 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.

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 had an obligation under federal and state law to record the findings and evidence underlying its commutation decisions. Because it did not do this, the MMC failed to comply with *Bearden* with respect to every class member, and the district court must presume that the court did not make an ability to pay determination in any case. Individualized testimony is unnecessary.[13]

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[13] The district court further erred in its apparent belief that the *Rooker-Feldman* doctrine bars this argument. Plaintiffs do not "question the form" of the Jail Transcripts recording the fact that commutations occurred. M374 at 31 n.13. Rather, Plaintiffs take them at face value. The MMC records fail to show that any *Bearden* determination ever took place, and *Rooker-Feldman* does not prevent a federal court from concluding that if the MMC failed to record an ability-to-pay determination, it did not make one.

Here, Plaintiffs do not seek to invalidate state court judgments; rather, they bring independent claims for damages against independent actors. *See Brucker v. City of Doraville*, 38 F.4th 876, 882 n.1 (11th Cir. 2022); *Behr v. Campbell*, 8 F.4th 1206, 1212 (11th Cir. 2021); *Nivia v. Nation Star Mortg, LLC*, 620 Fed. App'x 822, 824 (11th Cir. 2015). Furthermore, Plaintiffs could not have raised their *Bearden* claims before the state court for two additional reasons. First, Alabama does not provide for direct review of commutations, only direct appeal of the original judgment and conviction—and there is 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). Second, *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.

B. The jury can infer from common evidence—and the lack of a single example to the contrary—that no class member received a *Bearden* hearing.

Even if the lack of any records showing the MMC made *Bearden* determinations were not dispositive, the overwhelming evidence of systemic practices is more than sufficient to meet the predominance test here. This is especially true given that Defendants have failed to come forward with even a single example of a class member who received a *Bearden* determination.

The district court repeatedly acknowledged that "[t]he record contains enough evidence for a reasonable jury to find that the [MMC] systemically ignored *Bearden*." M374 at 30. Specifically, the court noted that the record shows the MMC "routinely jailed [probationers] for failing to pay fines without inquiring into their ability to pay" (*id.* at 1) and that the MMC's "conduct was so egregious" that its presiding judge was suspended for violating *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 found that the Jail Transcripts—the only MMC records of the commutations of probationers' fines to jail time—are "silent as to any underlying findings." *Id.* at 31.

Despite this, the court wrongly concluded that "the only way to resolve the question" whether *Bearden* violations occurred in individual cases "is by asking what happened at each [commutation proceeding]." *Id.* at 31. That was error.

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. In contrast, Defendants merely speculated that unidentified class members could have received *Bearden* hearings. They presented no evidence that even a single class member actually did receive one.

This Court has long held that where a 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; *see also Menocal v. GEO Grp., 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 v. Humana* 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, 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 individual questions of intentional discrimination were at issue.

Defendants have failed to rebut Plaintiffs' systemic evidence. After completing discovery and a two-day evidentiary hearing, Defendants have never identified a single putative class member who received a *Bearden* hearing. As the Supreme Court has made clear, courts considering predominance cannot assume the existence of any issue—common or individual—where the party pressing for its consideration has "provide[d] no convincing proof." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). Here, Defendants' failure to present even a single counter-example undermining Plaintiffs' showing of systemic violations should dispose of the predominance inquiry in this litigation. *See, e.g.*, *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 724 (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"); *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"); *cf. Busby*, 513 F.3d at 1326(defendant's hypothetical estoppel defense did not make class treatment inferior because the defendant "has not provided any evidence" that the defense would apply to any class member).[14]

Faced with similar facts and evidence, the Western District of Missouri recently certified two damages classes on behalf of misdemeanor defendants detained without an ability-to-pay determination. That court had no difficulty seeing that common issues predominated, in part *because* of the lack of any record of *Bearden* hearings:

> The City's liability for the alleged violations of plaintiffs' constitutional rights can be established through common proof, including municipal court records,

[14] 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, 456 (2016) (*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 and statutory obligations.

> jail records, revenue records, and testimony of municipal employees. While the City contends that no records exist to definitively show whether or not indigency inquiries were made, plaintiffs contend that that is precisely the point: at no time were indigency hearings *ever* held as to *any* individual. . . . Because the existence of the City's policies and processes are subject to common proof, the question of whether they pass constitutional muster can be determined on a class-wide basis.

Webb v. City of Maplewood, 340 F.R.D. 124, 140, 142 (E.D. Mo. 2021) (*petition denied*, 8th Cir. Case No. 21-8012 (Dec. 30, 2021).

Like Defendants here, the City in *Webb* argued that individual circumstances surrounding each person's jailing trumped common questions. But the court flatly rejected that argument:

> [I]t does not matter if [each class members'] detention was for an hour, a day, or a week. Nor does the amount of the bond matter. Nor does it matter if the bond was paid in full, was reduced, or not paid before release. *Any period of detention based solely on a failure to pay without an inquiry into indigency is a common question subject to common proof.* Municipal records can show the amount of bond, whether it was paid, and the length of detention.

Id. at 142 (emphasis added); *accord Fant v. City of Ferguson, Missouri*, 2022 WL 2072647, at *11 (E.D. Mo. June 9, 2022) (*Bearden* claim that class members were held without consideration of their ability to pay "as a matter of City policy or custom" is "subject to common proof").

The district court abused its discretion in refusing to certify these classes on predominance grounds.

II. The District Court Abused its Discretion By Incorporating Administrative Feasibility Concerns into its Commonality and Predominance Analyses.

In its first (now vacated) opinion denying class certification in this case, the district court held that the *Bearden* Class was not ascertainable because "ambiguities" in Defendants' records meant class membership would need to be determined by a jury. M349 at 29–31. Specifically, the court held that questions about whether probationers met the *Bearden* Class definition "present factual disputes that a Jury must decide—they would necessitate a series of mini-trials just to determine class membership." *Id.* at 31. On remand, Plaintiffs explained that (1) under *Cherry*, the feasibility of identifying class members should have only "limited relevance" to the class certification analysis; (2) under *Cherry*, Rule 23 "does not permit district courts to make administrative feasibility a requirement"; and (3) Defendants' records objectively show whether each probationer meets the criteria in the class definitions. C392 at 19 (quoting *Cherry*, 986 F.3d at 1304). Nevertheless, in its second opinion, the district court repeated the same mistakes, merely shifting them from ascertainability to predominance and commonality.

First, the district court held that, in addition to proving the elements of their claims, Plaintiffs would need to prove that they met the class definitions. For example, for the *Bearden* Class, the district court held that Plaintiffs would need to show: "[t]hat the [MMC] sentenced them to probation with JCS; [t]hat they failed to make payments . . .; [t]hat JCS petitioned the court to revoke their probation;" and

"[t]hat the [MMC] commuted their fines to jail time." M374 at 28–29. The court made a similar ruling with respect to the Abuse of Process Class, *id.* at 49, and the False Imprisonment Class, *id.* at 41.

Second, in its analysis of the *Bearden* and Abuse of Process Classes, the district court classified the straightforward class definition criteria—questions that the court acknowledged ask merely "whether individuals are in fact members" of the classes—as "individual issues" for which a *jury* would need to determine "whether the evidence supports class membership." *Id.* at 30, 49–50. The court then concluded that individual issues predominated over common issues and that the classes should not be certified.

This Court should reverse those erroneous rulings.

A. Under Rule 23, class member identification is, at most, a manageability issue—not a commonality issue or a basis for holding common issues do not predominate.

To certify a class under Rule 23(b)(3), a district court must find that "questions of law or fact *common to class members* predominate over any questions affecting *only individual members*." Fed. R. Civ. P. 23(b)(3) (emphasis added). The plain language of the rule makes clear that the predominance analysis applies only to questions that affect "class members." The administrative feasibility of identifying class members is considered as part of manageability, not predominance. *Cherry*, 986 F.3d at 1303–04 ("A difficulty in identifying class members is a difficulty in

managing a class action."). The question whether a particular individual satisfies the criteria of the class definition "is entirely unrelated to" the predominance inquiry. *Id.* at 1304.

Here, the district court abused its discretion by incorporating into the predominance analysis numerous questions "that ask whether individuals are in fact members of" the *Bearden* and Abuse of Process Classes. M374 at 30, 49. The court made the same error when it held that "whether individuals are in fact members of the [False Imprisonment] class—determinations that had already been completed based on Defendants' records—would require "individualized review." *Id.* at 41. Then, in defiance of *Cherry*, the court treated these class member identification questions as individual questions weighing against predominance (and, for False Imprisonment, defeating commonality altogether). This egregious error irreparably compromised the court's balancing of the factors and must be reversed.

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 a deprivation occurred under color of state law." *Arrington v. Cobb Cnty.*, 139 F.3d 865, 872 (11th Cir. 1998). To state the obvious, the criteria for

membership in a class are distinct from the elements of the claims asserted on behalf of that class.

If the routine task of reviewing records to confirm class membership could create individual questions that defeat predominance, many class actions would never be certified. Moreover, courts in this Circuit consistently certify class actions requiring individualized review to confirm class membership with no suggestion that such a process weighs against predominance. *See, e.g.*, *Ocwen Loan Servicing v. Belcher*, 2018 WL 3198552 at *3–4 (11th Cir. 2018); *Ewing v. GEICO Indemnity Co.*, 2022 WL 1597824, at *6 (M.D. Ga. May 19, 2022); *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), *decertification of (b)(3) class denied*, 337 F.R.D. 426, 433 (S.D. Fla. 2020); *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).

B. The district court abused its discretion by holding that class membership must be determined by the jury at trial.

In addition to erroneously treating class membership as a predominance issue, the court opined that questions of membership in the *Bearden* and Abuse of Process Classes must be resolved by the jury at trial—and thus that class treatment was inappropriate. Specifically, the court held that a jury would need to review Defendants' records to determine whether each probationer met the criteria in the

class definition—such as whether a class member was sentenced by the MMC to JCS probation, whether JCS had sought to revoke probation, and whether the MMC commuted the probationer's fines to days in jail. *See, e.g.*, M374 at 21, 38, 45, 50. This unprecedented ruling cannot be squared with Rule 23 or existing precedent.

There is no requirement that the jury identify each class member at trial. Rather, Rule 23(c)(3)(B) states that the class judgment—which the court renders *after* trial—must "describe" those "whom *the court* finds to be class members." Fed. R. Civ. P. 23(c)(3)(B) (emphasis added). "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 (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 . . . [the defendant] is not entitled to discovery and trials on the identities of class members").

The district court's ruling that class membership questions create individual issues for the jury is particularly absurd in light of the ease with which Defendants' records can be used to identify class members. The district court's concern that class membership would be "an easy determination" for some individuals but "much harder" for others, M374 at 30, is therefore unwarranted and certainly should not "doom a motion for certification." *Cherry*, 986 F.3d at 1304.

But even if class membership were disputed for some individuals, the appropriate vehicle for handling such disputes is a post-trial claims process, as in *Allapattah Servs. Inc. v. Exxon Corp.*, 333 F.3d 1248 (11th Cir. 2003). There, this Court affirmed the district court's decision to resolve common questions of liability in a class trial and individual questions of class membership and damages in a post-trial, contested claims process. *Id.* at 1258, 1261.

The Supreme Court's decision in *Tyson Foods* confirms the correctness of the *Allapattah* approach. The Supreme Court affirmed certification of a class in which the jury had determined classwide liability and aggregate damages without specifically identifying which employees had suffered injury. 577 U.S. at 460. The Court specified simply that prior to distributing damages, the district court must ensure that only injured individuals could recover. *Id.* at 461. On remand, the district court accomplished this via post-trial briefing, relying on expert analysis submitted

by the plaintiffs to identify class members. *Bouaphakeo v. Tyson Foods, Inc.*, 214 F. Supp. 3d 748 (N.D. Iowa 2016).

Rather than employing the procedures approved in *Allapattah* and *Tyson Foods* or using any of the ordinary management tools at its disposal,[15] the district court first opted to treat class membership as a component of predominance rather than manageability, and then invented a new rule that the need for the jury to determine class membership at trial means individual issues predominate. This constituted an abuse of discretion, and this Court should reverse.

III. The District Court Abused its Discretion by Holding that the Abuse of Process Class Lacked Predominance Without Considering How Plaintiffs Intend to Prove Their Claims at Trial.

The district court's holding that the Abuse of Process Class lacks predominance violated this Court's direction to classify questions as common or individual "by predicting how the parties will prove them at trial." *Brown v. Electrolux Home Prod., Inc.*, 817 F.3d 1225, 1234 (11th Cir. 2016). To establish an abuse of process under Alabama state law, Plaintiffs must prove (1) an ulterior purpose; (2) a wrongful use of process; and (3) malice. *C.C. & J., Inc. v. Hagood*,

[15] These tools include, at minimum, ordering the parties to confer on class member identification and to bring only disputed matters to the court's attention. Fed. R. Civ. P. 23(d)(1)(A) (empowering court to issue orders as needed to "prevent undue repetition and complication").

711 So. 2d 947, 950 (Ala. 1998).[16] Plaintiffs clearly explained their trial plan to use JCS's standardized operating procedures, computerized systems, and forms to show that JCS systematically abused the probation orders to enhance its profit. M329-1 at 26–28. And the district court recognized that "[b]ecause the plaintiffs' theory of ulterior motive is that JCS acted in a systemic fashion to serve a single motive, that claim can be proven or disproven by common evidence." M374 at 47.

But the court wrongly held that the "wrongful use" element requires an examination of JCS's subjective intent as to each class member. *Id.* at 49. Nothing in Alabama law demands this. "Wrongful use" occurs when a lawful process is used "to obtain a result which the process was not intended by law to effect." *Dempsey v. Denman*, 442 So.2d 63, 65 (Ala. 1983). Plaintiffs intend to show at trial that whenever class members paid less than the amount specified in the probation orders, JCS—applying its policies and practices as set forth in its Training Manual, forms, and ProbationTracker—harassed them to bring in whatever small amount of money they could and then misappropriated large percentages of those small payments to itself. In this way, JCS perverted the probation orders for a result the orders were not intended to effect: profit for JCS instead of payment to the City.

[16] Malice is presumed if the first two elements are met. *Shoney's, Inc. v. Barnett*, 773 So. 2d 1015, 1025 (Ala. Civ. App. 1999) (citing *Clikos v. Long*, 165 So. 394, 397 (Ala. 1936)).

Just as with JCS's alleged ulterior motive, the evidence of JCS's common practice does not vary significantly from class member to class member. *See Walton v. Franklin Collection Agency, Inc.*, 190 F.R.D. 404, 412 (N.D. Miss. 2000) (finding predominance for abuse of process where "any individual factual or legal issues that may arise will be secondary to the common questions concerning the Defendant's alleged course of conduct and its unlawfulness"). The hypothetical question whether JCS thought that class members could "come back into compliance," M374 at 50 n.13, is irrelevant to whether JCS systemically misappropriated their payments and is not part of Plaintiffs' theory of the case.[17] The district court therefore abused its discretion in denying class certification in consideration of a theory Plaintiffs do not intend to present.

IV. The District Court Abused Its Discretion by Holding that for the *Bearden* and Abuse of Process Classes, Class Treatment is Inferior to Other Methods Based Solely on the Manageability Factor.

Rule 23(b)(3) permits certification where "a class action is superior to other available methods for fairly and efficiently adjudicating" the claims based on four factors, one of which is "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). Despite finding that the first three factors weighed in favor of class

[17] The district court further abused its discretion in considering JCS's asserted "good faith" defense as an individual issue preventing predominance. Affirmative defenses "ordinarily do not defeat predominance" because they "are often easy to resolve" and "district courts have several tools available to manage them." *Brown*, 817 F.3d at 1240.

certification, the district court held that "a class action is not superior to other methods" of resolving Plaintiffs' claims because "the administrative difficulties in trying the case as a class action would be immense." M374 at 36. Part of the district court's error flowed from its flawed predominance analysis,[18] but setting that aside, the district court's approach to manageability contravened clear Circuit precedent.

In *Cherry*, this Court instructed district courts to engage in a two-part comparative inquiry: "First, would a class action create more manageability problems than its alternatives? And second, how do the manageability concerns compare with the other advantages or disadvantages of a class action?" 986 F.3d at 1304–05. The relevant question is *not* "whether a class action . . . will create manageability problems in an absolute sense." *Id.* at 1304. Rather, "the district court must balance its manageability finding against *other* considerations." *Id*. (emphasis added). For these reasons, manageability will "rarely, if ever, be in itself sufficient to prevent certification.'" *Klay*, 382 F.3d at 1272.

In its single-paragraph explanation, the court failed to consider the manageability problems that would be posed by the prospect of individual trials. M374 at 36. And it skipped altogether *Cherry*'s second step of comparing any

[18] The district court's assessment that "individual trials on liability would be necessary following the classwide trial," M374 at 36, is flat out wrong for the reasons stated in section I.

manageability concerns to the many other benefits of class certification—which in this case are extensive. *Id*. In doing so, the district court abused its discretion.

A. Management difficulties of individual lawsuits would dwarf those of a class action.

Under *Cherry*, the first question is whether "a class action [would] create more manageability problems than its alternatives." *Cherry*, 986 F.3d at 1304. The court must assess the "relative advantage of a class action suit over whatever forms of litigation might be realistically available to the plaintiffs." *Klay*, 382 F.3d at 1259–60.

Whatever the perceived challenges with the proposed classes, they are nothing compared to the manageability problems that would arise if members brought their own suits. Plaintiffs have identified more than 500 *Bearden* Class members and more than 800 False Imprisonment Class members. C358-27. And as *amici* noted in support of Appellants' Rule 23(f) petition, were just the Abuse of Process Class members to proceed individually, "plaintiffs would need to file almost three times the total number of new civil cases last year in the Middle District of Alabama." Amicus Br. for 23(f), Case No. 21-90015, at 8–9. Given the complex issues at stake and the voluminous record, individual lawsuits would raise significant manageability issues, including the repeated adjudication of identical questions, duplicative discovery, potentially conflicting legal resolutions, and excessive costs to putative class members, Defendants, and the courts. *See, e.g.*, *Cox v. Am. Cast Iron Pipe Co.*,

784 F.2d 1546, 1554 (11th Cir. 1986) (reversing decertification that "would invite the repeated litigation of [a legal] issue, with lamentable consequences for judicial economy and the finality and consistency of judgments."). In contrast, class certification would provide a single judicial proceeding to resolve the central factual and legal issues, including but not limited to: whether the MMC had a systemic practice of jailing people for nonpayment of court debt without considering their ability to pay, whether JCS factually and proximately caused the commutations, and whether the City knew about the commutations and had the power to stop them.

Ignoring the obvious problems that would result from a multitude of individual trials, the district court suggested, without explanation, that this case could serve as a "quasi-bellwether" for other similar claims. *See* M374 at 36. But there is no such thing as a "quasi-bellwether." Neither the Supreme Court nor any federal appellate court has ever used the term.

Bellwether trials are sometimes appropriate in multi-district litigation where the court system is "swamped with potential trials" in "hundreds or thousands" of individually filed cases. 4 Herbert B. Newberg et al., *Newberg and Rubenstein on Class Actions* § 11:11 (6th ed. 2022). The goal of the procedure is to run a few trials to conclusion in order to promote settlement of the remaining cases. *Id.* But each verdict only binds the parties to that particular case. *Id.* A bellwether concept makes

no sense here, where only the *Carter* and *McCullough* plaintiffs have actually filed claims against JCS and the City of Montgomery.

The district court speculated that later plaintiffs *might* invoke the doctrine of non-mutual offensive collateral estoppel to prove some elements of their claims. *See* M374 at 36. But the decision to employ collateral estoppel could arise only after each case had been filed and undergone discovery and motion practice—this alone is a significant burden. Moreover, "the trial court has broad discretion in deciding whether offensive collateral estoppel is appropriate." *Cotton States Mut. Ins. Co. v. Anderson*, 749 F.2d 663, 666 (11th Cir. 1984) (citing *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331 (1979)). And this Court has cautioned that collateral estoppel "may be inappropriate" when "issues of law arise in successive actions," when the precluded party "did not have the initiative in the prior action," or when "conflicting rulings involve the same defendant." *Id.* Given the discretionary nature of the doctrine and the scorched-earth character of the defense in *Carter* and *McCullough*, the idea that collateral estoppel could alleviate the administrative burden of litigating and adjudicating hundreds of individual cases is pure fantasy.

The only way that individual actions could create fewer manageability problems than a class action is if few individual actions are filed, leaving hundreds of harmed people without redress. Indeed, even if 200 of the proposed class members file individual lawsuits, that would both impose a great burden on the judicial system

and still result in most class members having no legal redress at all. Such a result is clearly inferior to resolving all claims in a single judicial action.

B. The other benefits of class certification significantly outweigh any manageability challenges.

The second question is "how [class] manageability concerns compare with the *other* advantages or disadvantages of a class action." *Cherry*, 986 F.3d at 1304–05 (emphasis added). The district court never considered this factor. *See* M374 at 35–36. Had it done so, it would have recognized that a class action is the only shot most of the victims of Defendants' debtors' prison scheme have at possibly obtaining justice. *See, e.g.*, *Klay*, 382 F.3d at 1270–71 (describing importance of class action device for absent class members who could not realistically pursue individual lawsuits).

These class actions are necessary to secure justice and relief for absent class members. As the district court observed elsewhere in its superiority analysis, *no* members have brought individual suits against Defendants for the practices at issue here. M375 at 35. And there is no reason to think that will change if class certification is denied. Litigants with smaller potential recoveries would be unable to retain attorneys willing to bring individual actions given the complexity of the factual and legal issues and the voluminous evidentiary record. *See Dickens v. GC Servs. Ltd. P'ship*, 706 Fed. App'x 529, 538 (11th Cir. 2017) ("[A]bsent class adjudication, defendants in cases where individual damages are low would be able to break the law with impunity, as most victims would be without effective strength to bring their

opponents into court at all."); *Klay*, 382 F.3d at 1271 (noting importance of certification where "the amounts in controversy would make it unlikely that most of the plaintiffs, or attorneys working on a continency fee basis, would be willing to pursue the claims individually). And the *possibility* of an attorneys' fees award under § 1983 does little to counterbalance the risk for attorneys that a significant investment in time, staff, and monetary resources will go unrecouped. Indeed, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *see also* C348 at 54–55 (noting courts in this Circuit routinely certify Rule 23(b)(3) classes where the underlying statutes provide for attorney's fees).

Assuming individual plaintiffs could overcome these obstacles, they would then each have to prevail on several difficult legal questions—including complex jurisdictional issues and federal court doctrines such as *Monell*, judicial immunity defenses, and *Rooker-Feldman*—and grapple with a complicated factual record. The difficulty of bringing such claims against "corporate behemoths with a demonstrated willingness and proclivity for drawing out legal proceedings for as long as humanly possible and burying their opponents in paperwork and filings" would deter many if not all individual plaintiffs. *Klay*, 382 F.3d at 1271.

In addition, class certification is particularly important when, as here, all or nearly all the putative class members lack financial resources and face structural barriers to pursuing legal actions, including "limited education and literacy, limited mental and emotional bandwidth, complex administrative processes . . . and background conditions such as homelessness." Lauren Sudeall & Ruth Richardson, *Unfamiliar Justice: Indigent Criminal Defendants' Experiences with Civil Legal Needs*, 52 U.C. Davis L. Rev. 2105, 2110 (2019). For these reasons, the district court in *Webb* certified a nearly identical class:

> I find certification of this Class to be superior to other methods of adjudication. The Class includes hundreds of plaintiffs, and class certification will allow for the resolution of their claims in a single forum. The Class consists of indigent persons subject to detention for failure to appear or for failure to pay on minor ordinance violations. It is unlikely that many if not most of these individuals would ever commence litigation on their own behalf to vindicate their rights. "It is appropriate for the court to consider the inability of the poor or uninformed to enforce their rights and the improbability that large numbers of class members would possess the initiative to litigate individually."

Webb, 340 F.R.D. at 140 (quoting *Betances v. Fischer*, 304 F.R.D. 416, 432 (S.D.N.Y. 2015) (internal quotation marks and citations omitted in original).

Furthermore, many putative class members would have little time to secure representation and file a lawsuit within Alabama's two-year statute of limitations for § 1983 claims, which would begin running again if this Court affirmed the denial of class certification. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 330 n.3 (1980). This is particularly true given the substantial time required to build these

fact-intensive claims. Without class notice, many victims of Defendants' unconstitutional scheme are unlikely even to discover they have claims until the relevant statutes of limitation have already expired.

Lastly, without class actions like these, there is no effective way to deter future misconduct by municipalities and their contractors. "[T]he class action enables a deterrent effect" that individual litigation often cannot. 2 *Newberg and Rubenstein on Class Actions* § 4:64 (6th ed.); *see also* Brandon Garrett, *Aggregation and Constitutional Rights*, 88 Notre Dame L. Rev. 593, 641–43 (2012) (explaining deterrence value and other advantages of class action for remedying and preventing abuses of public concern).

The district court, of course, ignored all these benefits of class certification when it skipped *Cherry*'s second step entirely. That is an abuse of discretion and reversable error.

V. The District Court Abused its Discretion by Holding that the False Imprisonment Class Lacks Commonality Despite the Presence of Common Questions of Law and Fact and Despite Holding that the Class Satisfies Typicality.

The district court held that the False Imprisonment Class—alone among all the proposed classes—lacks commonality. This ruling represents an 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).

Here, Plaintiffs identified numerous common legal questions that would "resolve an issue that is central to the validity of . . . the claims in one stroke," *Dukes*, 564 U.S. at 350, including whether jailing class members without an ability to pay determination is "unlawful" and whether JCS "instigated" the detentions by filing petitions for revocation.[19] Each of these legal questions would "generate common *answers* apt to drive the resolution of the litigation," *id.*, because a negative answer would end the False Imprisonment claims of every class member and a positive answer would allow every class member to prevail, provided they establish the other elements of the claim. The district court's opinion ignored these basic common questions.

Indeed, immediately after holding that "there are *no common issues of fact or law* for the false-imprisonment class's claims against JCS," the court went on to hold that the "class representatives' claims are . . . typical" because they and the Class they represent have alleged "*a common practice and a common legal theory*." M374 at 41–42 (emphasis added). The court also recognized that the factual claims asserted—*e.g.*, that the JCS acted in bad faith when it asked the MMC to revoke probation, and that the MMC jailed the class members without a *Bearden*

[19] 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).

determination—"are the same across the class," and that the class members "assert that systemic practices—on the part of the [MMC] and JCS—caused their injuries." *Id.* at 41–42.

The court's finding that the named plaintiffs met the typicality 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 v. Bush*, 221 F.3d 1266, 1278 (11th Cir. 2000). "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, the class necessarily shares common questions of law and fact.

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 Plaintiffs' 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 this defense is itself a common question that would drive resolution of the litigation, because a decision that the defense is inapplicable would remove it from the case for all class members in one fell swoop. 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 abused its discretion by ruling that the proposed False Imprisonment Class involved "no common issues of fact or law."

VI. The District Court Abused its Discretion by Holding that the Kloess Subclass Lacked Typicality.

In denying contract attorney Branch Kloess's motion for summary judgment, the district court held that a reasonable jury "could conclude that Mr. Kloess systemically deprived defendants of indigency hearings" by failing to request them. C296 at 37. This is the essence of Carter's class claim against Mr. Kloess: Kloess categorically failed to gather any evidence or make any argument to the MMC that his clients lacked the ability to pay their fines and thus could not lawfully be jailed, and that this failure violated the Kloess Subclass members' rights under the Sixth Amendment and *Bearden*. C307 at 39–41.

The district court's dismissal of the Kloess Subclass on typicality grounds defies reason. According to the district court, Mr. Carter "does not present claims typical of the members of the" Kloess Subclass—individuals represented by Branch Kloess when their court debt was unlawfully commuted to jail time—because "Mr. Carter and the class members argue that Mr. Kloess violated their Sixth Amendment right to counsel in different ways." C397 at 19. This ruling is especially puzzling given that the court held that Mr. Carter *is* a typical class representative for purposes

of the City Class, which—like the Kloess Subclass—raises Sixth Amendment and *Bearden* claims arising out of public defenders' failure to request *Bearden* hearings. *Id.* at 14 ("The [City] class members and Mr. Carter all allege the same type of harm, which is all that Rule 23 requires to show typicality.").[20]

Typicality under Rule 23(a) "is established if the claims or defenses of the class and the class representative arise from the *same event or pattern or practice* and are based on the *same legal theory*." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (emphases added). In other words, typicality requires both *factual* typicality ("the same event or pattern or practice") and *legal* typicality ("the same legal theory"). *Id.*

Start with the factual typicality. Here, the same pattern or practice clearly underlies both Mr. Carter and the class's claim: the failure of Mr. Kloess to raise

[20] The district court failed to rule altogether on whether Mr. Carter is a typical representative for purposes of the Subclass's *Bearden* claim against Mr. Kloess. *See* C296 at 37 (holding on summary judgment that Mr. Carter "may proceed against . . . Mr. Kloess for depriving him of his *Bearden* rights"); C307 at 52–53 (explaining that the members of the Kloess Subclass seek to hold Mr. Kloess liable for violating *Bearden*). The district court's failure to address this, on its own, warrants reversal because it "wholly fail[s] to provide this Court with an opportunity to conduct meaningful appellate review." *Danley v. Allen*, 480 F.3d 1090, 1092 (11th Cir. 2007).

In any event, Mr. Carter's *Bearden* claim is typical of those of the Kloess Subclass because he has alleged the "same policy or practice" underlies the Subclass's *Bearden* claims—that "Mr. Kloess caused the due process violations that members of the [Subclass] experienced." C307 at 52.

Bearden as a defense to incarceration for inability to pay. Both Mr. Carter and the Kloess Subclass allege that "Mr. Kloess[] customarily violated probationers' rights under *Bearden* by failing to ask the Municipal Court to assess indigency or ability to pay when representing probationers at the proceedings where the court commuted their fines to jail." C307 at 41.

True enough, as the district court correctly recognized, evidence in the record shows that "Mr. Kloess was absent from the courtroom during Mr. Carter's commutation hearing." C397 at 19. But that absence is not the only reason Mr. Kloess failed to request a *Bearden* determination for Mr. Carter: Indeed, the district court itself recognized that Kloess's "failure to present evidence of indigency" and to even gather such evidence—not simply his failure to appear at Mr. Carter's commutation proceeding—"deprive[d] Mr. Carter of his rights to counsel and due process." C296 at 35. Mr. Kloess did "not provide evidence that he routinely asked the Municipal Court to consider their inability to pay fees," "was unable to name a single client for whom he had requested" an indigency hearing, and did not "remember ever filing a written motion for an indigency hearing." *Id.* at 11. Consistent with this evidence, and as the district court found, MMC Judges Westry and Hayes and Court Administrator Nixon all admitted that neither Alabama's form Affidavit of Substantial Hardship nor any similar form was used in the MMC. M374 at 6.

Factual "[t]ypicality . . . does not require identical claims," so "[a] factual variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class." *Kornberg*, 741 F.2d at 1337. Here, at bottom, Mr. Carter and the other members of the Kloess Subclass have all alleged the same unconstitutional practice with the same resulting harm—that Mr. Kloess completely failed to raise *Bearden* as a defense to incarceration and that, as a result, they were unlawfully jailed.

Next, legal typicality. Mr. Carter and the class have asserted a claim based on the "same legal theory," *id.*—an unconstitutional denial of the rights to counsel and due process. The district court, however, wrongly believed that two different kinds of Sixth Amendment claims were asserted: "[T]he class asserts ineffective assistance of counsel, while Mr. Carter asserts total deprivation of counsel." M397 at 19. Not so. The crux of both Mr. Carter and the Kloess Subclass's Sixth Amendment claim is that Mr. Kloess violated their right to counsel through "policies, practices, and customs that cause systemic deficiencies in the funding, staffing, and assignment of cases to public defenders, where the result is that defendants are actually or constructively deprived of court-appointed counsel." C307 at 40. This is a class-based claim based on the *denial* of counsel, not the *ineffective assistance* of counsel, as the district court wrongly assumed. *See United States v. Cronic*, 466 U.S. 648, 659 (1984); *cf. Strickland v. Washington*, 466 U.S. 668, 692 (1984). Kloess's complete

failure to ask the court to consider *any* of his clients' ability to pay or to defend them against unconstitutional jailing for nonpayment constituted a denial of counsel, regardless of whether Kloess was physically standing with the client at the time of the commutation or not.

The district court's error flowed from its assumption that because "the record does not contain evidence that Mr. Kloess was out of the courtroom for the hearings of all the other class members," the class's Sixth Amendment claim necessarily "stems from Mr. Kloess's failure to provide constitutionally adequate representation *while he was in the courtroom with his clients*." M397 at 19 (emphasis added). In other words, the district court believed that the potential presence of a lawyer in the courtroom for some absent class members turned their claim into one alleging only "ineffective assistance of counsel." *Id.*

But the mere possibility that a lawyer was in the room is not determinative, because the denial of counsel can be either "[a]ctual or *constructive*." *Strickland*, 466 U.S. at 692 (emphasis added). Here, Plaintiffs have alleged that even if Mr. Kloess were present in court for some class members, *all* the individuals represented by Kloess in municipal court were constructively denied their right to counsel under *Cronic* because "the public defense caseload that Mr. Kloess carried made it impossible for him to provide meaningful assistance of counsel to members of the Kloess Subclass." C307 at 41. As the district court found, "[o]ver the course of 2012,

Mr. Kloess handled 16,436 cases over 127 days in court." C296 at 12. This caseload not only prevented him from appearing in court at all, as with clients like Mr. Carter, but also from reviewing the case file for each one of his assigned clients or discussing their case with them individually. *See id.* Indeed, the district court noted, "[a]lthough many of Mr. Kloess's clients were poor, he [did] not provide evidence that he routinely asked the Municipal Court to consider their inability to pay fees" and in fact "was unable to name a single client for whom he had requested such a hearing." *Id.*

As this Court and others have concluded, the legal standard for ineffective assistance does not apply to Sixth Amendment claims involving facts like these, because they allege *systemic* deprivations of the right to counsel. *See Luckey v. Harris*, 860 F.2d 1012, 1018 (11th Cir. 1988) (holding that a claim alleging "systemic delays in the appointment of counsel" are not analyzed under *Strickland*); *see also, e.g.*, *Tucker v. State*, 394 P.3d 54, 62 (Idaho 2017) ("*Strickland* is inapplicable when systemic deficiencies in the provision of public defense are at issue."); *Kuren v. Luzerne County*, 146 A.3d 715, 746 (Pa. 2016) (same); *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1127 (W.D. Wash. 2013) (same).

Instead, such claims are properly analyzed as denials of the right to counsel, as Carter has asserted here on behalf of the Kloess Subclass.[21]

Given the factual and legal typicality present here, *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566 (11th Cir. 1992), which the district court cited, *see* C397 at 19, is simply inapt. There, five individual plaintiffs sued an employer, "alleg[ing] racial discrimination in recruiting, hiring, job assignments, training, evaluations, promotions, transfers, discipline, retaliation—basically every employment decision the company made." *Washington*, 959 F.2d at 1568. This Court held that their claims were not typical of the class, because "[t]he five named plaintiffs ha[d] five different disparate treatment claims." *Id.* at 1570. Indeed, "the only thing they ha[d] in common with the class they seek to represent—or each

[21] This is true even if, as the district court noted, Mr. Kloess's absence from the courtroom "totally denied Mr. Carter counsel at a critical stage of a criminal proceeding." C397 at 19. At most, this fact makes the denial of counsel more severe for Mr. Carter than for others. But "[c]lass members' claims need not be identical to satisfy the typicality requirement; rather, there need only exist 'a sufficient nexus . . . between the legal claims of the named class representatives and those of individual class members to warrant class certification.'" *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012) (alteration in original) (quoting *Prado-Steiman*, 221 F.3d at 1278–79). That "each class member may have a stronger or weaker claim" based on the extent of Mr. Kloess's absence "does not make class representatives' claims atypical of the class as a whole." *Id.* Here, because "the same legal theor[ies]," *Kornberg*, 741 F.2d at 1337—denial of the Sixth Amendment right to counsel and denial of the right to an ability-to-pay determination under *Bearden* before being jailed for nonpayment—underly both Mr. Carter and absent class members' claims, Mr. Carter's claim is typical.

other—[was] race." *Id.* Here, by contrast, Mr. Carter and the class have both alleged the same unconstitutional deprivation of counsel stemming from the same course of conduct by Mr. Kloess—his failure to raise indigency at their commutation proceedings. As a result, they all suffered the same ensuing harm of incarceration in violation of *Bearden*.

In sum, Mr. Carter's claims "arise[s] from the same event or pattern or practice" and are "based on the same legal theory" as the Kloess Subclass. *Kornberg*, 741 F.2d at 1337. This Court should reverse the district court's incorrect conclusion and hold that the typicality requirement is met for the Kloess Subclass.

VII. The District Court Abused its Discretion by Ruling that Kenny Jones is Not an Adequate Representative for the False Imprisonment Class.

The district court abused its discretion by refusing to allow Kenny Jones to serve as a class representative based solely on factors related to his intellectual disability. In so doing, the court imposed a heightened adequacy standard that has no basis in law and would preclude most individuals with intellectual disabilities from serving as class representatives.

For the past seven years, Kenny Jones has been an active participant in this case. His contributions have included participating in a multi-hour deposition, providing information to his counsel, responding to interrogatory and document requests from Defendants, and discussing what he thinks a fair settlement would be with his counsel. M283-10 at ¶ 7. Despite his years of active involvement in this case

and no objection from JCS regarding his adequacy to serve as a class representative, the district court ruled that Mr. Jones cannot serve as a class representative because of "issues with his memory" and his "understanding" of class litigation. M374 at 42.

This was a clear abuse of discretion. As this Court has made clear, a proposed class representative need only show that no "substantial conflicts of interest exists between [them] and the class" and that they will "adequately prosecute the action." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003). Mr. Jones meets this standard.

Rule 23 does not require a class representative to have "robust" knowledge of the case. *See* 1 *Newberg and Rubenstein on Class Actions* § 3:67 (6th ed.). To the contrary, both the Supreme Court and this Court have held that a trial court should *not* impose knowledge standards on class representatives. In *Surowitz v. Hilton Hotels Corp.*, a securities action, the Seventh Circuit dismissed a verified complaint on account of the plaintiff's lack of "understand[ing]" and "knowledge" of the complex financial transactions at issue in the lawsuit. 383 U.S. 363, 366 (1966). The Supreme Court reversed and remanded, explaining that imposing such standards on the class representative would "defeat the ends of justice." *Id*. at 372. This Court, likewise, has explicitly stated that "adequate class representation generally does not require that the named plaintiffs demonstrate to any particular degree that individually they will pursue with vigor the legal claims of the class." *Kirkpatrick*,

827 F.2d at 727. More recently, an Alabama district court allowed class representatives to proceed despite not having "independent knowledge of his or her cause of action" because the "Eleventh Circuit has never held that a class representative must have independent knowledge." *Weekes-Walker v. Macon Cty. Greyhound Park, Inc.*, 281 F.R.D. 520, 527 (M.D. Ala. 2012).

The heightened standard imposed by the court below also conflicts with precedent from other circuits. *See, e.g.*, *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 n.6 (3d Cir. 2007) ("class representative need only possess a minimal degree of knowledge necessary to meet the adequacy standard"); *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 430 (4th Cir. 2003) ("representative need not have extensive knowledge of the facts of the case"); *Baffa v. Donaldson,* 222 F.3d 52, 61 (2d Cir. 2000) (referencing the Supreme Court's "express[] disapprov[al] of attacks on the adequacy of a class representative based on the representative's ignorance").

The district court's decision initially set forth the correct knowledge standard for determining adequacy: "a representative is qualified if he has at least a little knowledge about the case." M374 at 17 (citing *Surowitz,* 383 U.S. at 366). But instead of following this standard, the district court went on to disqualify Mr. Jones using an unspecified heightened standard that evaluated both his memory and his understanding of legal concepts.

The district court conducted a narrow assessment focused only on Mr. Jones's purported lack of "understanding of these proceedings." M374 at 42. The court also improperly failed to consider the "competent and zealous" representation Mr. Jones would continue to receive from class counsel as a mitigating factor for any perceived deficiencies. *Kirkpatrick*, 827 F.2d at 728. *See also Juris v. Inamed Corp.*, 685 F.3d 1294, 1324 n.27 (11th Cir. 2012) ("[C]ounsel's behavior is directly intertwined with that of the named plaintiffs."); *Hines v. Widnall*, 334 F.3d 1253, 1255 (11th Cir. 2003) (describing Rule 23(a) adequacy requirement as "adequacy of counsel").

Additionally, while cherry-picking testimony to support Mr. Jones' alleged deficiencies, the district court erroneously failed to consider the entirety of Mr. Jones's deposition. *See Veal v. Crown Auto Dealerships, Inc.*, 236 F.R.D. 572, 578–79 (M.D. Fla. 2006) (reviewing a deposition "in its entirety" to determine the adequacy of the representative). Mr. Jones may have had difficulty explaining the role of a class representative, but he clearly articulated his own experience, including being jailed for not having enough money to pay his tickets, M267-2 at 189:15–189:17, and his frustration with the system being challenged, *Id*. at 85:5–85:12; 191:7–197:15. That is all that is required.

Finally, the district court's ruling constitutes an abuse of discretion because it imposes harm that is "unnecessarily broad [and] does not result in any offsetting gain to anyone else or society at large." *Vega*, 564 F.3d at 1264–65. Having concluded

that other class representatives met the adequacy requirement, the district court had no need to attack Kenny Jones. *See Local Jt. Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 n.2 (9th Cir. 2001) ("adequacy-of-representation requirement is satisfied as long as one of the class representatives is an adequate class representative"); *Grasty v. Amalgamated Clothing & Textile Workers Union, AFL-CIO, CLC*, 828 F.2d 123, 128 (3d Cir. 1987), *abrogated on other grounds*, *Reed v. United Transp. Union*, 488 U.S. 319 (1989) ("It is not necessary that all of the named representatives meet the Rule 23(a)(4) requirement").

The district court abused its discretion by ruling that Mr. Jones would not be an adequate class representative.

VIII. This Court Should Correct the District Court's Erroneous Rule 23 Rulings, Not Merely Reverse and Remand.

The court below has now misapplied Rule 23 and defied this Court's precedent—twice. In light of the district court's clear abuse of discretion, this Court need not merely remand for the district court to reconsider its rulings and take a third swing at these issues. Instead, the Court should reverse the lower court's erroneous rulings, as it did in *Busby*, 513 F.3d at 1327. Specifically, this Court should hold that: (1) the *Bearden* Class meet the requirements of Rule 23(b)(3); (2) the Abuse of Process Class meets the requirements of Rule 23(b)(3); (3) the False Imprisonment Class satisfies the requirements of Rule 23(a) and Rule 23(b)(3); (4) the Kloess Subclass meets the requirements of Rule 23(a); and (5) Kenny Jones is an adequate

class representative for the False Imprisonment Class. On remand, the only question for the district court to resolve should be whether the Kloess Subclass satisfies Rule 23(b)(3).

CONCLUSION

This Court should reverse the district court's decision denying class certification and remand for consideration of the remaining issues.

Dated: August 26, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 16,781 words,[22] excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: August 26, 2022

s/ Leslie A. Bailey

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[22] Appellants have simultaneously filed an Unopposed Motion to File a Consolidated Opening Brief Exceeding the Type-Volume Limitations Set Forth in FRAP 32(A)(7).

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on August 26, 2022.

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Dated: August 26, 2022

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