UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALDARESS CARTER, Individually and on behalf of a class of similarly situated persons,	)	
Plaintiff;	)	CIVIL ACTION NO.:
v.	)	2:15-cv-00555-RCL
THE CITY OF MONTGOMERY, et al.,	)	
Defendants.	)	

PLAINTIFFS' JOINT REPLY
IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

INTRODUCTION

Class actions "vindicat[e] . . . the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).[1] Class actions have long played an important role in remedying civil rights violations, as acknowledged in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (2011). This is precisely the type of case for which class certification was intended.

For years, the Montgomery Municipal Court had a systemic practice of jailing probationers for nonpayment of court debt without considering ability to pay, a violation of the United States Constitution. The Defendants in these related cases caused hundreds of low-income people to lose their liberty, and their money, to JCS's predatory scheme. JCS fed the system by routinely petitioning to revoke probation after bleeding probationers dry. Branch Kloess consistently failed to request *Bearden* inquiries or raise ability to pay as a defense. And the City of Montgomery turned a blind eye while pocketing money produced by rampant violations.

Certification of the proposed Classes is appropriate under Rule 23(b)(3) because the claims that arise from these uniform courses of conduct give rise to predominating common questions of liability and damages, and Plaintiffs will prove each claim on a class-wide basis using generalized evidence. This includes proving that each Defendant was the factual and proximate cause of the violations every member of the Classes experienced. The necessary evidence does not vary from one member to the next.

Defendants' responsive briefing introduces numerous arguments that masquerade as

[1] In citations to cases, citations, internal quotations, and alterations are omitted unless otherwise indicated.

individualized issues but quickly reveal themselves to be red herrings. Indigency, for example, is not an element of any claim, and lost-liberty damages compensate for a common injury that every member experienced and can be awarded in the aggregate. As for other types of injuries, Plaintiffs have proposed a three-phase trial plan that allows the Court to manageably resolve these—a plan that Defendants do not criticize.

For the following reasons, the Court should reject Defendants' arguments and certify the proposed Classes for trial.

ARGUMENT

I. PLAINTIFFS SATISFY THE PREDOMINANCE AND SUPERIORITY REQUIREMENTS OF RULE 23(B)(3).

A. Common Questions Predominate with Respect to Plaintiffs' *Bearden* Claim.

1. Whether, as Plaintiffs maintain, the Montgomery Municipal Court had a systemic practice of jailing probationers for nonpayment of court debt without a Bearden *hearing is a common question for the trier of fact.*

Plaintiffs' *Bearden* claim is rooted in common courses of conduct that Plaintiffs will establish at trial using generalized, class-wide proof. *See* C 307 at 47–49; M 282 at 43–45.[2] The first of these involves the Montgomery Municipal Court. Plaintiffs will prove at once for all members of the Classes that the Municipal Court "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 offenders of their due process and equal protection rights not to be incarcerated for their poverty." C 307 at 1 (quoting C 296 at 1); M 282 at 1 (quoting M 269 at 1).

Plaintiffs have documented this practice in extensive detail, and the Court has already recognized its existence. *See* C 307 at 10–15; C 296 at 8; M 282 at 10–15; M 269 at 5 ("At

[2] Documents in the *Carter* and *McCullough* records are designated "C" and "M," respectively. For example, *Carter* ECF No. 307 is cited as "C 307," and *McCullough* ECF No. 282 is cited as "M 282."

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."). Nevertheless, Defendants spend dozens of pages trying to convince the Court that "[h]earings on ability to pay were held as a matter of general practice," meaning there was no systemic practice of unconstitutional incarcerations. C 320 at 12; M 294 at 12. Indeed, Defendants go so far as to assert that "*Bearden* hearings were held in *all* cases" in which the Municipal Court commuted fines and fees to jail time. *Id*. at 16 (emphasis added). These arguments fail to undermine the appropriateness of class certification for two reasons.

First, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013). Accordingly, this Court is not tasked with determining which side will ultimately prevail. Rather, in ruling on Plaintiffs' motions, the Court is assessing whether the elements of Rule 23 are established such that Defendants' liability can be resolved through the class action mechanism.

Second, Defendants' arguments demonstrate that common questions predominate. At trial, the jury will decide whether the Montgomery Municipal Court had a systemic practice of jailing JCS probationers for nonpayment of court debt without considering ability to pay. Regardless of what the jury concludes, that decision will apply equally to all members of the Classes and is therefore "apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350.

Given the parties' positions regarding the Municipal Court's systemic compliance or noncompliance with *Bearden*, there are no individualized issues to resolve. It is unnecessary, for example, to ascertain which judge oversaw a commutation or whether the probationer had failed to attend any JCS meetings. Likewise, whether Municipal Court judges gave some people additional time to pay their fines and fees is of no consequence. *See* C 320 at 20–24; M 294 at

20–24; C 322 at 43–45; M 296 at 43–45. Probationers who avoided jail are not members of the Classes, and payment extensions are not proof of what transpired at hearings.[3] Regardless, Defendants rely on such evidence to make an argument that applies equally to all members of the Classes, thus underscoring the appropriateness of certification.

Defendants next maintain that a probationer's failure to make payments was, by itself, enough for the Municipal Court to conclude the probationer also failed to make bona fide efforts to pay. *See* C 320 at 20. Such a conclusory approach to the *Bearden* inquiry is insufficient because it would result in the automatic incarceration of every person who fails to make payments. *See Bearden v. Georgia*, 461 U.S. 660, 673–74 (1983) (holding trial court violated constitution by incarcerating probationer solely because "[he] has long known he had to pay the $550 and yet did not comply with the court's prior order to pay").[4] Nevertheless, the argument is common to all members of the Classes because they were all jailed after missing payments.

Defendants' attacks on Plaintiffs' positions are similarly common. It is undisputed, for example, that the Municipal Court judges never made written findings when jailing someone for nonpayment. *See* C 307 at 10–16, 27–28; M 282 at 10–16, 44–45. Defendants maintain such findings are unnecessary and allege "Plaintiff[s] cite[] no case or rule in the Rule 26.11 commutation/*Bearden* context that says that there must be a written record of the ability to pay determination." C 320 at 29; *see* M 294 at 37. This is untrue, as Plaintiffs cited (among several

[3] For example, the assertion that Judge Hayes chose not to commute the sentence of a probationer who had just undergone a kidney transplant says nothing about his standard practices at commutation hearings. *See* C 322 at 44.

[4] There are other significant problems with Defendants' merits-based argument. First, Defendants present no evidence showing Municipal Court judges reviewed Benchmark payment info during commutation hearings. And even if the judges could have done this, there are no records showing they took such information into consideration. When a court fails to find on the record that a probationer willfully refused to pay or make bona fide efforts to secure the resources to pay, the jailing of that probationer for nonpayment is unlawful. *See Bearden*, 461 U.S. at 665, 674 (holding sentencing court may not revoke probation for failure to pay "absent evidence and findings that the defendant was somehow responsible").

others) the case of *Taylor v. State*, 47 So. 3d 287, 289–90 (Ala. Crim. App. 2009), which holds that Rule 26.11 of the Alabama Rules of Criminal Procedure requires entry of "specific determinations and findings [on ability to pay] in accordance with *Bearden v. Georgia*" before a person may be jailed for failing to pay court debt. C 307 at 37; M 282 at 44. But the Court need not wade into this dispute for now. The key takeaway is that each side is making arguments that do not vary from one member of the Classes to the next.

Finally, common issues predominate with respect to the *Bearden* claim Carter alleges on behalf of the Kloess Subclass. As explained in his opening brief, classwide evidence will demonstrate that Kloess systemically failed to request *Bearden* hearings and that as a result, the Class members lost their liberty without due process. Kloess does not dispute that Carter has satisfied Rule 23's predominance requirement. *See generally* C 325. His only argument is that the evidence will show that he "always asked the Court to consider the client's ability to pay" (*id.* at 15); or, alternatively, that he "did not have a need to request *Bearden* hearings" (*id.* at 16; *see also id.* at 21). Kloess's *Bearden* arguments go to the merits of the claim. And if anything, they support class certification. As with the *Bearden* arguments made by the City and JCS, either Plaintiffs are correct or Defendants are correct.

2. Plaintiffs do not have to establish indigency in order to prove liability.

If the jury sides with Plaintiffs and finds the Montgomery Municipal Court systemically failed to engage in proper *Bearden* inquiries before jailing probationers for nonpayment, then Plaintiffs will have proven that the constitutional rights of the members of the Classes were violated. *See* C 307 at 47–49; M 282 at 43–45. Defendants respond by arguing that the procedural rights enunciated in *Bearden* apply only to people who are indigent. *See* C 322 at 50–57; M 296 at 50–57; C 320 at 40; M 294 at 41. This assertion is erroneous.

As Plaintiffs explained in their opening brief,[5] every person facing the possibility of incarceration for nonpayment of court debt is entitled to a hearing in which the court "inquire[s] into the reasons for the failure to pay"—specifically, by determining whether "the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay." *Bearden*, 461 U.S. at 672; *see also* C 296 at 38; M 269 at 14–15. The constitutional right to these procedures applies regardless of a person's financial circumstances, as several courts have made clear. *See, e.g.*, *Doe v. Angelina Cty.*, 733 F. Supp. 245, 254 (E.D. Tex. 1990) (holding the failure to engage in a *Bearden* inquiry "is unlawful whatever the economic status of the incarcerated person"); *West v. City of Santa Fe*, 2018 WL 4047115, at *9, *rep't and recomm. adopted*, 2018 WL 5276264 (S.D. Tex. Sept. 19, 2018) (same); *see also Taylor*, 47 So. 3d at 289–90 & 289 n.2 (holding Alabama Rule of Criminal Procedure codifying *Bearden* "applies to both indigents and nonindigents alike"). Indeed, the very purpose of the *Bearden* inquiry is to determine whether the probationer willfully refused to pay or acquire the resources to pay.[6]

The following passage summarizes the due process components of a *Bearden* claim and their application to every person facing incarceration for nonpayment of court debt:

> Clearly, an important liberty interest is implicated when the state determines to incarcerate a person for failure to pay a fine. This fact, coupled with the likelihood of unconstitutional conduct in the absence of process, clearly requires the institution of some form of pre-incarceration legal process for determining the reasons for a party's failure to pay a fine. *Absent such a procedure, a government entity that immediately converts a fine into a jail term when a party fails to pay that fine deprives the imprisoned party of liberty without due process of law. Government conduct of this sort is unlawful whatever the economic status of the incarcerated person.*

[5] *See* C 307 at 47–48.

[6] Particularly where, as here, the original sentences did not include jail time, and thus the sentencing court has already determined that "the State's penological interests do not require imprisonment," *Bearden*, 461 U.S. at 670, the court could jail only those who *intentionally* did not pay their fines.

Angelina Cty., 733 F. Supp. at 254 (emphasis added).

Furthermore, this Court has recognized that Plaintiffs do not have to show the "Municipal Court would have declared [them] indigent" had they received the process to which they were entitled. C 296 at 35; M 269 at 14–15. Their claim "stems from a deprivation of liberty *without due process*—the lack of a *Bearden* hearing injured [them]." *Id*. (emphasis added). By proving (a) that the Municipal Court systemically jailed people for nonpayment of court debt without considering their ability to pay and (b) that Defendants engaged in common courses of conduct that factually and proximately caused these constitutional violations, Plaintiffs will have established Defendants are liable to all members of the Classes regardless of any particular member's indigency status at the time the violation occurred.[7]

Defendants cite to *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), for the proposition that "indigency is an essential element of a *Bearden*-based claim." C 322 at 52 at 52; M 296. But their reliance on this case is misplaced for several reasons. First, the plaintiff in *Walker* sought only injunctive and declaratory relief, and the Court of Appeals had no occasion to address when and where indigency comes into play in a case like this one. *See Walker v. City of Calhoun*, 2016 WL 361580, at *10 (N.D. Ga. Jan. 28, 2016) (certifying class under Rule 23(b)(2) "for purposes of pursing declaratory and injunctive relief"). As Plaintiffs show below, indigency is relevant only as an affirmative defense to damages. *See* Section I.E. Second, while the Court of Appeals looked to *Bearden* in its analysis, the court was not applying the procedures the Supreme Court held must be followed *before* a probationer is incarcerated for failure to pay court debt. Instead, the court was determining the legal standards applicable to procedures for

[7] Even if indigency were a prerequisite to membership in the Classes, which it is not, the Court could draw the "reasonable inference that a significant number" of "indigent people were incarcerated" to make class certification appropriate. *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 2005 WL 2033696, at *11, 13 (S.D. Ohio Aug. 23, 2005).

setting bail *after* a person has been lawfully jailed. *See Walker*, 901 F.3d at 1266. Finally, *Walker* does not support the proposition that indigency showings are a prerequisite to class certification, as Defendants suggest. Indeed, the trial court in that case rejected "Defendant's speculation that an arrestee might choose to stay in jail" (despite being able to pay the bail amount) and held the commonality requirement of Rule 23(a)(2) was satisfied because "[t]he factual and legal questions surrounding Defendant's policies and practices . . . present questions that are common to the entire class." *Walker*, 2016 WL 361580, at *6. The same is true here.

Given that a showing of indigency is not required to establish Defendants' liability for due process violations under *Bearden*, the indigency-related arguments Defendants make in opposition to class certification fall to the wayside. It is unnecessary, for example, to determine whether a probationer was indigent or unable to pay, disabled or unemployed. Likewise, it is unnecessary to determine whether a probationer made bona fide efforts to obtain employment or willfully failed to pay. Finally, it is unnecessary to determine whether JCS knew or withheld information about any probationer's indigent status. Liability will be established through proof of the systemic practices and common courses of conduct of the Montgomery Municipal Court and Defendants. The predominance requirement is satisfied.

3. The Montgomery Municipal Court (not probationers) bore the burden of initiating Bearden hearings, and the City (not probationers) bore the burden of proving willful failure to pay.

Under *Bearden*, "a sentencing court must inquire into the reasons for the failure to pay" and may not jail a probationer for nonpayment unless the court finds the probationer willfully refused to pay or make bona fide efforts to pay. *Bearden*, 461 U.S. at 672, 673–74; *see also Teagan v. City of McDonough*, 949 F.3d 670, 680–83 (11th Cir. 2020) (Jordan, J., concurring) (judge's failure to determine whether probationer had the ability to pay before jailing her "directly contravened" *Bearden*); C 296 at 38; M 269 at 14–15.

In an effort to drum up individualized issues that will preclude class certification, Defendants repeatedly seek to place the burden of proof on Plaintiffs, insisting that (1) Plaintiffs were responsible for raising *Bearden* in the Municipal Court, and (2) Plaintiffs now bear the burden of proving that the nonpayment that prompted the court to jail them was not willful. *See* C 322 at 66–68; M 296 at 66–68; C 320 at 40–41; M 294 at 41–42. Defendants are wrong on both counts.[8]

First, "*Bearden* requires more" than placing the responsibility on a criminal defendant to raise the issue of indigency. *Cain v. City of New Orleans*, 327 F.R.D. 111, 124 (E.D. La. 2018). The court may not conduct "ad hoc ability-to-pay inquiries only if the issue is brought to a Judge's attention." *Id*. "[T]he absence of any inquiry into a defendant's indigency unless the defendant 'raises' it of his or her own accord does not provide the process due" and "risks that defendants who do not think to 'speak up' . . . . about their inability to pay fines may be jailed solely by reason of their indigency, which the Constitution clearly prohibits." *De Luna v. Hidalgo County*, 853 F. Supp. 2d 623, 648 (S.D. Tex. 2012); *see also Hernandez v. Lynch*, 2016 WL 7116611, at *23 (C.D. Cal. Nov. 10, 2016) (under *Bearden*, "the court must inquire into the reason for the nonpayment" and has a "duty to be mindful of indigency, alternatives to detention, and relevant state interests when considering whether to incarcerate an individual for failure to pay a monetary sum"). Accordingly, while the public defenders representing probationers before the Montgomery Municipal Court surely had a duty to raise *Bearden*, *see Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 612 (6th Cir. 2007), the court itself was also constitutionally obligated to conduct the inquiry—and to never jail a probationer unless it

[8] Under Defendants' proposed rule, actors in the criminal justice system would be free to sit back and ignore constitutionally-required protections such as *Bearden* hearings, then later argue that the lack of such procedures entitles them a do-over so they can conduct individualized inquiries at class certification and avoid classwide liability. This would turn *Bearden* on its head and create a dangerous incentive.

determined that the nonpayment was willful.

Defendants insist the onus was on each probationer to "disclos[e] or plead[]" indigency, relying on *Garcia v. Abilene*, 890 F.2d 773 (5th Cir. 1989). C 322 at 66; M 296 at 66. But *Garcia* simply held that if a probationer "*does not appear* and assert his indigency, the court cannot inquire into his reasons for not paying and offer alternatives." *Garcia*, 890 F.2d at 776 (emphasis added). This is uncontroversial. As a practical matter, unless an individual is before the court, the court cannot inquire into the person's ability to pay. But *Garcia* does not absolve courts of their duty to conduct *Bearden* hearings when the defendant does appear. *See De Luna*, 853 F. Supp. 2d at 646. ("[This court] does not read *Garcia* to mean that once a defendant *has* appeared before the court, the defendant must affirmatively raise his or her inability to pay before the court has any obligation to consider indigency in determining an appropriate sentence").

Second, in a *Bearden* hearing, the government bears the burden of proving that nonpayment was willful. *See United States v. Mojica-Leguizamo*, 447 F. App'x 992, 996 (11th Cir. 2011) (reversing revocation of probationer's supervised release based in part on government's failure to prove willful failure to pay). "The government may establish willful failure to pay by producing evidence the defendant had funds available to pay restitution and did not do so. Willfulness requires the government to prove the law imposed a duty on the defendant, the defendant knew of this duty, and he voluntarily and intentionally violated that duty." *United States v. Davis*, 140 F. App'x 190, 191 (11th Cir. 2005). The Court should reject Defendants' attempts to shift the burden here. Finally, in *Bearden*, the Supreme Court held that in the absence of specific findings, it will be presumed a person jailed for nonpayment was jailed because of her inability to pay, not because of her willful fault. 461 U.S. at 674. Thus, a finding that the Montgomery Municipal Court systemically violated the rights of members of the Classes

commuted fines to jail supports a presumption that the Class members were indigent.

4. **Ray *is distinguishable.***

Defendants wrongly insist that Plaintiffs' *Bearden* claim is identical to the claim raised in *Ray* and that this Court must therefore follow Judge Proctor's reasoning. *See, e.g.*, C 322 at 40; M 296 at 40 (class certification "would be directly contrary to the rationale of *Ray*"); *id.* at 42 ("This Court is not writing on a clean slate. Judge Proctor in the Northern District . . . rejected certification of a *Bearden*-based § 1983 claim . . . ."); *id.* at 76 n.47 (arguing that the issue of indigency precludes class certification "under *Ray*").

Plaintiffs' *Bearden* claim is categorically different from the claim in *Ray* for an obvious reason: commutation. The Childersburg Municipal Court, unlike the Montgomery Municipal Court, did not commute fines to days in jail. Rather, the *Ray* plaintiffs challenged detentions that occurred immediately after arrest, before probationers appeared in court. Judge Proctor reasoned that class-wide evidence could not show whether probationers were jailed for failure to pay, failure to appear at a revocation proceeding, or for some other reason. *See Ray v. Judicial Corr. Servs., Inc.*, 333 F.R.D. 552, 577–78 (N.D. Ala. 2019). Complicating matters further, *Ray* concerned a "plethora" of different court proceedings. *Id.* at 578. In contrast, Plaintiffs' *Bearden* claim arises solely from the Montgomery court's systemic practice of commuting court debt to days in jail without *Bearden* hearings. C 296 at 1, 26; M 269 at 1, 14–15. Given that Plaintiffs' *Bearden* claim concerns only commutation, the facts that Judge Proctor believed required individualized inquiry in *Ray* simply do not pertain here.

Because Plaintiffs' claims center on commutation, this Court need not consider the red-herring issue of alleged "repeated non-attendance at JCS meetings." C 322 at 49–50; M 296. Here, unlike in *Ray*, jailing occurred *only* for nonpayment. Non-attendance has nothing to do with commutation, and the Court should ignore Defendants' transparent attempt to blur the

issues by pretending this case is a *Ray* redux.

B. Common Questions Predominate with Respect to Plaintiffs' False Imprisonment Claim.

1. Indigency is not an element of Plaintiffs' false imprisonment claim.

JCS offers a "few additional comments" that span seven pages, digging into every minute detail of Johnson and Mooney's financial histories in what amounts to a useless, irrelevant, and plainly offensive attempt to prove that at the time of their commutations, Johnson and Mooney were not in fact indigent. C 322 at 77–83; M 296 at 77–83. Putting aside the fact that both Johnson and Mooney have testified repeatedly that they did not have the money to pay their fines and fees (M 250-3 ¶¶ 3–8; M 246-7 at 122:4–17, 126:5–8; M 250-5 ¶ 3-8; M 246-11 at 128:1–15, 131:6–13, 159:18–23), the economic status of each individual is irrelevant as a matter of law. In Alabama, "[f]alse imprisonment consists in 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 (2020). At trial, Plaintiffs will present common proof that every class member was unlawfully jailed because none received the constitutionally-required *Bearden* hearing. Plaintiffs' financial status is irrelevant to JCS's liability on this claim.

2. Common proof will demonstrate JCS instigated the unlawful imprisonment of the Class Members.

JCS attempts to clothe itself as an innocent bystander who "simply reports a potential crime to the police," thus escaping instigator liability for false imprisonment. C 322 at 84; M 296 at 84. But as Plaintiffs will demonstrate through common evidence at trial—and as this Court already found on summary judgment—JCS "fed the system" that resulted in Plaintiffs' unlawful incarceration. C 296 at 26; M 269 at 14–15. For JCS "to walk out of the casino professing shock that gambling was occurring while pocketing millions in winnings beggars belief." *Id.* at 38.

A party "other than [one] who actually effect[s] an arrest or imprisonment" is liable for

false imprisonment under Ala. Code § 6-5-170 if that party is "involved with or related to the act or proceeding as instigators or participants." *See Crown Cent. Petroleum Corp. v. William*s, 679 So. 2d 651, 654 (Ala. 1996). A defendant may be an "instigator" simply by requesting or otherwise inducing a detention in bad faith. *See Grant v. Dolgen Corp*., 738 So. 2d 892, 896 (Ala. Civ. App. 1998); *J.J. Newberry Co. v. Smith*, 149 So. 669, 671 (Ala. 1933). A defendant need not even "expressly command[], request[], or direct[]" the imprisonment for liability to attach. *Standard Oil Co. v. Davis*, 208 Ala. 565, 567 (Ala. 1922). Furthermore, the instigating factor need not be the *only* cause of the unlawful detention. *Id*. Thus, a defendant that "played any part in the decision" to jail the plaintiff or who "was able to intercede to prevent" the jailing can be liable as an "instigator" even if the defendant played only a limited role. *Helm v. Rainbow City*, 2019 WL 1326160, at *13 (N.D. Ala. Mar. 25, 2019).

Contrary to JCS's assertions, instigation does *not* require Plaintiffs to demonstrate that JCS had actual knowledge of a given probationer's inability to pay, that JCS participated in the commutation proceeding, or any of the other allegedly individualized factors discussed in its brief. *See* C 322 at 85–86; M 296 at 85–86. JCS already had constructive knowledge that the probationers it supervised could not afford to pay fines and fees. Indeed, only people who could not pay all their fines within thirty days of sentencing were even assigned to JCS. *See* M 246-97. Additionally, ProbationTracker records show that more than ninety percent of payments JCS probationers made were for less than the required amount. M 283-1 at ¶ 31.

As this Court recognized in its summary judgment ruling, JCS operated a system in which it systemically funneled probationers who could no longer pay its fees back to the Montgomery Municipal Court, where, in keeping with the court's established practice, their fines were commuted to jail time. C 296 at 27; M 269 at 14–15. JCS knew of the court's notorious

commutation policy. *See* M 282 at 14; M 246-5 at 106:16-107:1, 121:7-23; M 257-89; M 283-17. JCS could easily foresee that its Petitions for Revocation would cause Plaintiffs to appear before a court that had a common practice of commuting the sentences of those who did not have the money to pay. JCS followed an identical set of practices and policies for all revocations, thus factually and proximately causing the imprisonment of each member of the class through the same common practices. That is enough for instigation under Alabama law.

Relying on *Heining v. Abernathy*, 295 So.3d 1032 (Ala. 2019), JCS argues that an "independent investigation" breaks the causal link between the instigating action and the resulting jailing, even if the defendant acted with malice in providing information that led to the false arrest or imprisonment. C 322 at 89; M 296 at 89. JCS contends that individualized inquiries are therefore necessary to establish what information JCS provided to the court and what the court did with that information. But such individualized proof is unnecessary and certainly does not require testimony from class members. Plaintiffs will show that the petitions for revocations were standard form documents that varied only in the amounts allegedly due and appointments allegedly missed. And as discussed at length above, the judges of the Montgomery Municipal Court did not conduct a *Bearden* hearing in any case. Therefore, any causation issues are common to all class members and subject to generalized proof.[9] *See Roy v. County of Los Angeles*, 2016 WL 5219468, at *18 (C.D. Cal. Sept. 9, 2016) ("one determination could be made" as to whether defendants knew or should have known immigration detainers were unlawful).

[9] JCS also cites *Jarrett v. Deerman*, 2016 WL 7011323, at *4 (N.D. Ala. Dec. 1, 2016), and *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982), in support of this proposition. C 322 at 89 n.55; M 296 at 89 n.55. But these cases concerned warrants issued upon a finding of probable cause, and Plaintiffs do not bring warrant-based claims. *See* Section I.B.4. While JCS emphasizes the mere furnishing of information in *Russell v. Crossland Sav. Bank*, 111 F.3d 251 (2d Cir. 1997), that court denied instigator liability because the defendant furnished information to a third party, not the police who effected the arrest.

3. Common evidence predominates as to bad faith.

Next, JCS conjures up a parade of individualized questions it claims predominate in the bad-faith analysis. C 322 at 90; M 296 at 90. But nothing in false imprisonment case law holds that Plaintiffs must establish a unique bad-faith motivation as to each individual class member. JCS is the Defendant here, not individual probation officers, and at issue is *JCS*'s treatment of probationers pursuant to its policies and practices. At trial, Plaintiffs intend to present common proof of bad faith, based on JCS's standard policies and practices, as reflected in the company's training manuals, form documents, and ProbationTracker entries.

Plaintiffs will demonstrate with common proof that JCS operated its entire system in bad faith. Far from treating Plaintiffs as individuals, JCS went to extraordinary lengths to treat probationers similarly—that is, in the way that reaped the most profit for JCS. JCS's training manuals and forms demonstrate the company's bad faith in spades. JCS knew that most probationers could not pay as ordered by the court and developed elaborate policies to squeeze as much money from them as possible, requiring probationers to attend frequent appointments and pay what they could upon threat of arrest if they failed to comply. JCS kept people on probation for as long as it could, adding monthly probation fees their balances and allocating as much money as possible to its own fees. Then, after extracting all it could, JCS funneled the probationers back to the Municipal Court to be jailed. In doing so, JCS made use of form Petitions for Revocation that systemically withheld exculpatory information about Plaintiffs' poor financial circumstances and good-faith efforts to pay. JCS further trained its employees to withhold this exculpatory information when presenting the petitions on an ex parte basis to the court. *See generally* C 274 ¶¶ 82–97; M 262 ¶¶ 13–34, 58–60, 63–64, 72–77; M 246-98 (describing evidence). Such conduct more than constitutes a common course of bad faith under Alabama law. *Williams*, 679 So. 2d at 655 (bad faith instigation arises when a person fails to

"state[] all material facts within his or her knowledge" or "by fraud, by suppressing facts, or by other misconduct") (quoting *Pannell v. Reynolds*, 655 So. 2d 935, 938 (Ala. 1994)); *Dismukes v. Trivers Clothing Co.*, 127 So. 188, 190 (Ala. 1930) (instigation includes "a misrepresentation of the facts in order to induce action" or "a suppression of known material facts").

JCS cites *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1557–58 (11th Cir. 1989), in support of its argument that reasonableness determinations are individualized and therefore unsuitable for class treatment. C 322 at 88; M 296 at 88. But *Kerr* was an excessive force case involving the "essentially unique factual circumstances" of an individual arrest. *Id.* at 1558. Plaintiffs here do not challenge the nature or degree of JCS probation officers' engagement in the probation revocation process. They challenge the reasonableness of JCS's systemic practice of initiating revocation proceedings in general given what it knew or should have known about the ability of probationers to pay and the Municipal Court's practices. Therefore, Plaintiffs' proof will consist of systemic evidence of JCS' policies and practices, not fact-specific evidence concerning individual interactions with JCS officers.

JCS mistakenly relies on *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000), to assert that the Eleventh Circuit has rejected class treatment for claims that "require intent-based findings." C 322 at 91; M 296 at 91. The plaintiffs in *Rutstein* argued that they had been denied their right to make and enforce contracts based on their ethnicity. 211 F.3d at 1230. The court found that individualized issues predominated in intentional discrimination claims, which turned on individualized facts. *Rutstein*, 211 F.3d at 1235–36. But Plaintiffs here do not bring intentional discrimination claims, and individualized intent is not an element of a false imprisonment claim. *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773 (8th Cir. 2013), is also inapposite because individualized inquiries were necessary there to determine whether class

members had suffered an injury. And *Simer v. Rios*, 661 F.2d 655, 673 (7th Cir. 1981), is simply irrelevant because none of Plaintiffs' claims turn on their "state of mind."

4. Plaintiffs' false imprisonment claims have nothing to do with arrest warrants or probable cause.

JCS's warrant- and probable-cause-related arguments are completely without merit. C 322 at 94–96; M 296 at 94–96. As Plaintiffs explained in their Opposition to JCS's Motion to Alter, this Court already held that Plaintiffs were arrested and held "pursuant to facially valid warrants." C 344; M 317. The Court dismissed any warrant-based claims, but specifically held that Plaintiffs' false imprisonment claims directed solely at post-commutation jailing may go forward. C 296 at 40; M 269 at 14–15. A false imprisonment claim "does not require a false arrest." *Helm*, 2019 WL 1326160, at *14. And Plaintiffs' false imprisonment claims have nothing to do with arrest warrants, so the issue of probable cause is irrelevant to their false imprisonment claims.

C. Common Questions Predominate with Respect to Plaintiff Carter's Sixth Amendment Claim.

Plaintiff Carter maintains the City's public defenders, including Branch Kloess, engaged in a systemic practice of failing to raise indigency or ability to pay at commutation proceedings. *See* C 296 at 28–29. Carter further maintains this failure stems from the extensive caseloads the City's public defenders carried, which prevented them from having sufficient time to provide meaningful assistance of counsel—specifically, to argue that the government had failed to meet its burden of proving willful failure to pay and to gather the information necessary to present indigency as a defense to commutation. *See id.* at 29; C 307 at 52–53.

In his opening brief in support of class certification, Carter explained that Plaintiffs will present evidence at trial that will prove the City was on notice of but deliberately indifferent to the systemic failure of its public defenders, including Kloess, to raise *Bearden* as a defense to

incarceration. C 307 at 30–31, 42, 52–53. This common evidence will allow the trier of fact to conclude that the City is liable to the City Class members and that Kloess is liable to the Kloess Subclass members on the *Bearden* and Sixth Amendment claims. *Id.*

As explained below, while the City and Kloess throw assorted legal and factual arguments in opposition at the wall, none of them sticks.

1. **Plaintiff *Carter properly pleaded Sixth Amendment class claims based on the systemic failure to request* Bearden *hearings.***

a) Carter properly pleaded a Sixth Amendment claim against the City on behalf of the City Class.

First, the City declares the only Sixth Amendment claim that "survived summary judgment" is the "[t]otal denial of counsel" to Carter based on Branch Kloess's absence from the courtroom when the Municipal Court commuted Carter's sentence and jailed him. C 320 at 50–51.[10] The City's strategy here, apparently, is to set up this straw-man premise and then knock it down by arguing there is no widespread evidence that public defenders typically failed to appear in court with their clients. *See id.* at 58–59; *id.* at 72 (arguing that court records will not show "whether counsel appeared at the bench with any particular individual").

The problem with this argument, of course, is that—as the Court has recognized—Carter's complaint clearly alleges that the City failed to provide adequate counsel for Municipal Court *defendants* (plural) and that "the public defenders engaged in a systemic practice of not requesting indigency hearings." C 296 at 28–29; C 145 at 35. As the City concedes, Carter "*does not assert* . . . that public defenders failed to appear at the bench with putative class members"

[10] This is not the first time the City has attempted to artificially limit Carter's Sixth Amendment claim. At summary judgment, the City argued that Carter's operative complaint "fails to allege that Mr. Carter was denied counsel." C 269 at 28. Now, in an effort to defeat class certification, the City argues that Carter alleges that *only he* was denied counsel, under factual circumstances unique to his experience, and that he thus fails to make a classwide claim. *See, e.g.*, C 320 at 51. The Court rejected the first argument, and the second argument is equally specious.

whose sentences were commuted. C 320 at 58 (emphasis added). The City thus cannot square its conveniently narrow characterization of Carter's Sixth Amendment claim with Carter's complaint. Furthermore, this Court denied the City's motion for summary judgment on Carter's Sixth Amendment claim "in *all* . . . respects." C 296 at 45. The only limitation the Court placed on this claim was the July 16, 2012 notice date. *See id.*

Next, the City argues for the first time that Carter's unlawful jailing was caused not by constitutionally inadequate public defense but by Carter's own actions. Under the City's new theory, because Carter responded that he would rather "pay" toward his fine than "stay" in jail when Kloess gave him that choice, Kloess was not "constitutionally mandated" to represent him in court. C 320 at 76. According to the City's circular reasoning, Carter's apparent hope of avoiding jail by paying magically eliminated any risk that he would be jailed, and "[n]o Sixth Amendment right attaches if there is no risk of incarceration." *Id.* To state the obvious, the Sixth Amendment right to counsel does not apply only to defendants who tell their public defenders they want to "stay" in jail.

Alternatively, the City posits that the violation of Carter's Sixth Amendment rights was caused by Judge Hendley's decision to "rush the docket" and commute Carter's fines without Kloess present. *See id.* at 70–71. But as the Court has recognized, a reasonable jury could conclude that the City's deliberate indifference to its public defenders' systemic failure to provide adequate *Bearden* defenses caused Carter's injury. C 296 at 29. The City did not seek summary judgment based on its theory that Hendley's rocket docket caused Carter's injury, and it fails to give any reason why the Court should reconsider its ruling now.

The City next protests that Carter's Sixth Amendment claim must be (and is not) "tied to *JCS*'s alleged wrongs or whether the City controlled *JCS*'s actions." C 320 at 49–50 & n.36

(emphasis added). But the Court never held that Carter's only path to liability against the City is through JCS. *See* C 296 at 28–29.[11] Rather, as the Court's summary judgment ruling recognizes, Montgomery has a statutory and constitutional obligation to provide adequate public defense services in its Municipal Court. *See id.* at 10. While JCS certainly contributed to the problem by "funnel[ing]" probationers "into jail regardless of their ability to pay," the City's duty to provide counsel was independent of JCS. *See id.* at 27. Carter has, the Court ruled, presented sufficient evidence for a jury to "find that the City knew its public defenders systemically failed to provide adequate defenses in violation of the Sixth Amendment." C 296 at 29.[12]

In sum, the City's latest efforts to mischaracterize Carter's Sixth Amendment claim and shift the blame to everyone but itself do not change the fact that common issues predominate.

b) Carter properly pleaded a Sixth Amendment claim on behalf of the Kloess Subclass.

Carter alleges that Kloess's actions deprived him and the members of the Kloess subclass of their right to counsel under the Sixth Amendment. Specifically, Carter alleges that Kloess's failure to request *Bearden* determinations for Carter and the other Municipal Court defendants he

[11] The City's argument appears to be based on a mischaracterization of this Court's March 2019 Order. *See* C 320 at 49–50. That ruling—which denied the City's motion for judgment on the pleadings—did not address Carter's Sixth Amendment claims at all. *See* C 206. It simply held that the Eleventh Circuit's decision in *McCullough v. Finley*, 907 F.3d 1324 (11th Cir. 2018) (which likewise did not involve Sixth Amendment claims) did not entitle the City to dismissal of all Carter's claims against it because Carter's complaint pleaded "more . . . than judicial acts." C 206 at 1, 5.

[12] July 16, 2012 is the date by which, the Court reasoned, a reasonable jury could conclude the City knew or should have known of "*JCS*'s allegedly unlawful conduct." *See* C 296 at 9; *id.* at 28 (emphasis added). But as the City acknowledges, Carter's Sixth Amendment claim is not tied to JCS's alleged wrongs. C 320 at 50. The City was on notice of possible Sixth Amendment violations *not* because it was made aware of JCS's alleged conduct but "[b]ased on the sheer volume of cases in the Municipal Court." C 296 at 29. It thus stands to reason that the City's Sixth Amendment liability should not be restricted to events after July 16, 2012. As a practical matter, this means that the City Class should include people whose sentences were commuted by the Montgomery Municipal Court on a JCS case and who served jail time on or after August 3, 2013 regardless of when JCS petitioned for revocation of their probation. *See also* Section III.B.1 (refuting the City's argument that anyone whose Petition was filed prior to the notice date should be excluded from the Class).

was assigned to represent constructively denied those defendants their right to counsel. This is a *class* claim. *See* C 275 at 11–17 (citing *United States v. Cronic*, 466 U.S. 648, 654–56 (1984) In addition, Carter alleges that Kloess's failure to appear before the Montgomery Municipal Court with Carter constituted a complete denial of Carter's right to counsel. *See* C 275 at 10–11. This is an *individual* claim.

Kloess dedicates the bulk of his opposition to arguing the Court should not certify a class based on Carter's individual claim. *See* C 325 at 17–24. For example, Kloess argues that there is "no common class-wide evidence that public defenders (specifically Kloess) failed to appear at the bench during commutation hearings" (*id.* at 23); there is no way to ascertain from court records whether Kloess failed to appear in court with other defendants (*id.* at 24); and that the members of this failed-to-appear group are not sufficiently numerous (*id.* at 26). But Carter is not seeking to certify such a class. Rather, Carter alleges that Kloess customarily failed to gather the information from clients needed for a legitimate *Bearden* determination and systemically failed to ask the Municipal Court to assess his clients' ability to pay at hearings where the court commuted his clients' fines to days in jail. C 307 at 29–31. These questions are common to the members of the Kloess Subclass regardless of whether he appeared before the bench with any given class member. Also common is the evidence Plaintiffs will use to prove the claims, including documentation of high caseloads, testimony from Kloess himself, and evidence establishing that the Municipal Court did not inquire into ability to pay when commuting fines to jail time.

Other than trying to narrow Carter's Sixth Amendment claim, Kloess does not dispute that common questions predominate with respect to the Kloess Subclass. His only other arguments are directed at Carter's complaint, which he says is insufficient. These arguments fail.

First, Kloess argues that "there is no Sixth Amendment claim" against him. C 325 at 1–2. The Court rejected this argument when it denied Kloess's motion for summary judgment. *See* C 296 at 4, 45. The Court determined that based on the evidence in the record, a reasonable jury could find that (1) Kloess's "absence from the court and failure to present evidence of indigency . . . deprive[d] Mr. Carter of his right[] to counsel," *id.* at 34–35; and that (2) Kloess "routinely" failed to "ask[] the Municipal Court to consider [his clients'] inability to pay fees" despite the fact that "many of Mr. Kloess's clients were poor." *Id.* at 11.

Kloess also argues that Carter "has not pleaded class allegations against Kloess" because the Kloess subclass is not specifically defined in Carter's complaint. C 325 at 3–4. But the definition of a certified class does not need to match the definition proposed in the complaint. *Sandoval v. Cnty. of Sonoma*, 2015 WL 1926269, at *2 (N.D. Cal. Apr. 27, 2015). As the Eleventh Circuit has recognized, "the scope and contour of a class may change radically as discovery progresses and more information is gathered about the nature of the putative class members' claims." *Prado-Steiman v. Bush*, 221 F.3d 1266, 1273 (11th Cir. 2000); *see also Powers*, 501 F.3d at 619 (rejecting public defenders' criticism of "repeated modification of the class definition"); *Schorsch v. Hewlett–Packard Co.*, 417 F.3d 748, 750 (7th Cir. 2005) ("[l]itigants and judges regularly modify class definitions"). What matters is whether the allegations underlying Carter's class claim against Kloess were properly pleaded, and the Court held they were. *See* C 296 at 11, 34–35. There is no basis for revisiting the Court's prior rulings on this.

2. The merits arguments made by the City and Kloess confirm that common questions predominate.

The City and Kloess make a number of arguments about what they claim the evidence will show at trial. These arguments all have two things in common: (1) they go to the merits of

the claim; and (2) they are common to all Class members.

For example, Kloess and the City both argue *Bearden* hearings were regularly held. The City concedes that its public defenders customarily failed to raise indigency as a defense to commutation but maintains this was unnecessary because judges routinely assessed indigency on their own. *See* C 320 at 52 ("the public defenders . . . did not have to ask the Court to conduct [*Bearden* inquiries], as such inquiries were the general practice"). Kloess likewise argues that he "did not have a need to request *Bearden* hearings," C 325 at 16, although he also claims he "*always* asked the Court to consider the client's ability to pay." *Id.* at 15 (emphasis added).

In support of this argument, Defendants belatedly offer parallel statements from two previously-undisclosed witnesses: the two other Municipal Court public defenders.[13] *See* C 321-1 at 1 (Schoettker Decl.) (stating that "the Municipal Court Judges *always* made an inquiry into the ability of each such defendant to pay the fine or fines before a commutation" and that he "would *regularly* raise the question with the judges") (emphasis added); C 321-2 at 2 (Barfoot Decl.) (stating that "it was *never* the case that a defendant's fines and costs were simply commuted to jail time without any inquiry as to why that defendant had not paid").

As with Defendants' *Bearden* arguments, either one side or the other is correct. *See* Section I.A, *supra*. Thus, the question of whether Kloess and the other public defenders routinely requested *Bearden* determinations or routinely failed to request *Bearden* determinations is a

[13] For the same reasons stated in the Court's Jan. 21, 2020 Order granting Defendants' Motion to Strike (C 254), the declarations of Barfoot and Schoettker should be stricken from the record here. Defendants never disclosed these declarants during years-long discovery in this case. Thus, based on the Court's prior rulings, Barfoot and Schoettker should "not be allowed to testify, and their statements [should not] be used in this litigation. [Plaintiffs have] been prejudiced by their inability to depose these newly disclosed individuals or cross examine their statements . . . . Rule 26(a) requires timely notice to allow orderly discovery to proceed and prohibits parties from holding back information and discovery until it is too late to be used." *Id.* At minimum, given Defendants' failure to properly and timely disclose these witnesses, the Court should give no weight to their declarations.

common question that can be resolved on a class-wide basis.

The same is true of the remaining Sixth Amendment arguments offered by the City and Kloess. The City argues, for example, that it was unaware of the high caseloads carried by its public defenders (*id*. at 53–54); the City was not "apprised of any failure by public defenders to raise ability to pay at commutation hearings" (*id.* at 60); the public defenders "could have" billed more hours than they did (*id.* at 54–56, 60–62); *Bearden* hearings were "provided by the judges as a matter of course" (*id.* at 57); and the public defenders' caseloads did not systemically preclude them from providing adequate assistance of counsel (*id.* at 62–66). Kloess, for his part, argues that he "always asked the Court to consider the client's ability to pay" (C 325 at 15) and that his representation of Carter did not fall below constitutional standards (*id.* at 16–17).

The merits of the claims are not before the Court at this stage of proceedings. Factual questions such as "[w]hether Mr. Kloess actually sought [*Bearden*] hearings . . . must go to a jury." C 296 at 36. At trial, the City and Kloess will be free to put their best evidence before the jury and argue that it proves they did not violate Plaintiffs' Sixth Amendment rights. But the issue here is whether Carter has satisfied Rule 23's requirements such that the Court should certify the Classes. Because Defendants' factual arguments raise questions that are common to all members of the City Class and Kloess Subclass, respectively, these arguments confirm that class treatment is appropriate.

The City's legal argument likewise goes not to any Rule 23(b)(3) requirement but to the merits. The City asserts that the Sixth Amendment right to counsel does not apply when a criminal defendant is jailed at a "probation revocation hearing" and that only probationers who were jailed at "commutation hearings" can be part of the Class. C 320 at 74. This is wrong as a matter of constitutional law: "[t]he Sixth Amendment requires the state to provide adequate

counsel to an indigent defendant in a proceeding that may result in his immediate imprisonment"— regardless of the type of proceeding. C 296 at 39 (citing *Alabama v. Shelton*, 535 U.S. 654, 662 (2002)). And even if this were open to debate, the question of whether the Sixth Amendment right to counsel applies is common to all class members because all were jailed for nonpayment of court debt.

3. The City's unsupported hypotheticals are insufficient to defeat class certification.

Finally, the City speculates, without evidence, that despite "systemic deprivation," C 320 at 73, some class members may have somehow received adequate representation. This conclusory argument cannot, without more, defeat class certification.

"[S]peculation and surmise [do not] tip the decisional scales in a class certification ruling[.]" *Licari Family Chiropractic Inc. v. eClinical Works, LLC*, 2019 WL 7423551, at *7 (M.D. Fla. Sept. 16, 2019) (quoting *Bridging Cmtys. Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1126 (6th Cir. 2016)); *see also Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 298 (1st Cir. 2000)). It is only where a "defendant proffers individualized and varying evidence to defend against claims of individual class members" that a finding of predominance may come under threat. *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1178 (11th Cir. 2010). Courts thus routinely certify classes where a defendant provides no evidence in support of a defense that would theoretically require individualized inquiries. *See, e.g.*, *Barfield v. Sho-Me Power Elec. Coop.*, 852 F.3d 795, 806 (8th Cir. 2017) (finding predominance where defendant "point[ed] to no evidence that even one class member" was susceptible to its hypothetical defense); *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1042 (9th Cir. 2012) (same); *Mohamed v. Off Lease Only, Inc.*, 320 F.R.D. 301, 316 (S.D. Fla. 2017) (same).

The City has offered only "bare assertions" without "identifying a single instance" in which a class member was in fact adequately represented. *Cabrera v. Gov't Emps. Ins. Co.*, 2014 WL 11894430, at *5 n.4 (S.D. Fla. 2014). Accordingly, its suggestion that individualized inquiries are required to resolve the Sixth Amendment claim fails.

D. Common Questions Predominate with Respect to Plaintiffs' Abuse of Process Claim.

JCS attempts to twist Plaintiffs' abuse of process claim—which contests the systemic practices JCS inflicted on thousands of low-income probationers—into a series of referenda on class members' individualized financial circumstances. JCS's efforts fail because the minutia of class members' lives have no relevance to the legal elements Plaintiffs must prove at trial—"(1) the existence of an ulterior purpose, (2) a wrongful use of process, and (3) malice"—all of which focus on JCS. *C. C. & J., Inc. v. Hagood*, 711 So. 2d 947, 950 (Ala. 1998)). The key to the tort is the "perversion of a regularly issued process to accomplish a purpose whereby a result not lawfully or properly obtainable under it is secured." *Duncan v. Kent*, 370 So. 2d 288, 290 (Ala. 1979).[14] Here, common evidence will show that JCS engaged in a systemic practice of abusing probation orders "for an end not germane" to the purpose of probation, namely, enhancing JCS's profits. *Willis v. Parker*, 814 So. 2d 857, 866 (Ala. 2001) (quoting *Shoney's, Inc. v. Barnett*, 773 So. 2d 1015, 1025 (Ala. Civ. App. 1999)).

JCS argues that Plaintiffs must prove the company had a unique ulterior motive as to each specific class member, but nothing in Alabama law requires such a granular showing.

[14] While not relevant to any Rule 23 factor, JCS falsely cites *Ramsey v. Leath*, 706 F.2d 1166, 1170 (11th Cir. 1983), for the proposition that the abuse of process tort requires an additional element: "the issuance of special process from the court." M 296 at 101. Alabama law says nothing of the kind and, properly read, neither does *Ramsey*. *Id.* (explaining that abuse of process lies when "a suit had been legally filed for a proper purpose, but that, once filed, the process of the court, such as a writ of attachment *or the like*, had been improperly used") (quoting *Ancora Corp. v. Stein*, 445 F.2d 431, 422 (5th Cir. 1971)) (emphasis added).

Rather, in Alabama, an ulterior motive arises from the exploitation of an otherwise legal process for a collateral purpose—such as profiting off a person's debt. *Shoney's*, 773 So. 2d at 1025 (citing *Dickerson v. Schwabacher*, 177 Ala. 371, 376 (Ala. 1912)). Alabama courts have found an ulterior motive in circumstances very similar to those at issue here: using the criminal process to compel payment of a debt, *Shoney's*, 773 So. 2d at 1025, seizing exempt income, or taking other legal action to compel payment of more than is actually due. *See, e.g.*, *Duncan*, 370 So. 2d at 290; *Dickerson*, 177 Ala. at 376.

As for the "wrongful use of process" element, Plaintiffs agree they must prove that JCS "acted outside the boundaries of legitimate procedure," but such a showing does not depend on individualized evidence from class members. C 322 at 101; M 296 at 101. Rather, this Court must examine JCS's policies and procedures, as set forth in the company's training manual and recorded in ProbationTracker, to determine whether JCS's uniform practices constituted an abuse of process.

And finally, JCS's supposed "good faith" defense to the malice element will not involve a need for individualized evidence. "[T]he element of malice requires the plaintiff to show willful conduct on the *defendant*'s part." *Drill Parts & Serv. Co. v. Joy Mfg. Co.*, 619 So. 2d 1280, 1289 (Ala. 1993) (emphasis added). Here, the question to be presented to the jury is whether JCS—not its individual employees—willfully engaged in the practices that constitute abuse of process. JCS's intent is evidenced by its formal policies and its efforts to implement and enforce those policies. The motivation and intent of individual employees, whether stemming from animus against probationers or simply a desire to maintain employment, is irrelevant.

Plaintiffs will use common proof to establish that JCS abused the probation process for the collateral purpose of harvesting revenue from probation fees and allocating to itself money

that should have gone towards satisfying Plaintiffs' and class members' debts to the City. The evidence in support of Plaintiffs' claim derives mainly from JCS's own records: its handbook, the ProbationTracker database and form documents and records contained within it, and the fact that over the relevant time period JCS allocated more to itself in fees than it remitted to the City of Montgomery. M 282 at 18–21 (describing how JCS manipulated the probation system to maximize its own profit). JCS attempts to convince the Court that it treated probationers as individuals, but that is for the jury to decide. For purposes of class certification, JCS's argument applies equally to all class members.[15] Plaintiffs will counter with generalized evidence showing, among other things, that JCS's contract allowed each probation officer to supervise up to 300 people, and JCS used computerized systems and form documents to ensure that each probationer received similar treatment. C 145-1 at ECF p. 3; *see* C 73-3 at ECF pp. 104–194; ECF No. 73-4 at ECF pp. 1–106. JCS designed its system to extract as much fee income as possible, and probationers were simply a source of revenue. JCS bled them dry, and when the money ran out, kicked them back to the court for jailing. The particular details of a probationer's case are irrelevant to the functioning of such a system.[16]

E. Lost-Liberty Damages Can Be Proven on a Class-Wide Basis, and Plaintiffs Have Proposed Appropriate Methods for Resolving Individualized Damages.

1. Lost-liberty damages compensate for actual injury and are common to the members of the Classes.

Plaintiffs have proposed a three-phase trial plan. C 307 at 59–63; M 282 at 57–61. In Phase I, the jury will determine Defendants' liability and award aggregate general damages for

[15] The same applies to JCS's lengthy footnotes throughout this section, which primarily concern merits questions common to all class members.

[16] JCS's disgraceful attempts to prejudice the Court with irrelevant information allegedly obtained from Caldwell's Facebook page in 2019, and other extraneous evidence, do nothing to support the company's arguments against class certification. The *only* time periods relevant to Caldwell's abuse of process claim are April-July 2013, when Caldwell was on JCS, and December 2013, when he went before the court on a JCS-procured warrant and ultimately paid off the fine.

lost liberty on a class-wide basis. *See id*. at 59–60. In Phase II, the jury will award damages to named Plaintiffs for their individualized injuries. *Id*. at 60. And in Phase III, any additional damages to which members of the Classes are entitled will be determined in an appropriate manner. *Id*. at 60, 63.

Defendants fail to address Plaintiffs' proposal and offer no criticism of the three-phase approach. Instead, Defendants attack the recoverability of general damages for lost liberty. Defendants argue such damages are individualized, but those arguments fail.

Defendants' first argument turns on the erroneous assertion that "general damages" compensate for the "abstract value" of the constitutional rights violated, citing *Slicker v. Jackson*, 215 F.3d 1225 (11th Cir. 2000). *See* C 322 at 73–74; M 296 at 73–74; C-320; at 42 M 294 at 51. But the court there did not address *Bearden* claims, lost-liberty damages, or even "general" damages. The injuries at issue stemmed from the use of "excessive force" by police officers during an arrest. *Slicker*, 215 F.3d at 1227. The district court ruled that the officers were entitled to judgment as a matter of law because the plaintiff "did not present any evidence that he suffered *a monetary loss* . . . ." *Id*. at 1229 (emphasis added). The Court of Appeals reversed, holding the district court "misapprehended the 'actual injury' requirement" announced in *Carey v. Piphus*, 435 U.S. 247 (1978). *Slicker*, 215 F.3d at 1229, 1233. In *Stachura*, "the Supreme Court expressly recognized that compensatory damages may be awarded once actual injury is shown despite the fact that the monetary value of the injury is difficult to calculate." *Slicker*, 215 F.3d at 1231 (citing *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986)).

As numerous courts have held, the loss of liberty is an actual injury that flows from constitutional violations resulting in unlawful detentions. *See, e.g.*, *Kerman v. City of New York*, 374 F.3d 93, 125, 130 (2d Cir. 2004) (physical detention is "anything but abstract," and

"damages [are] recoverable for loss of liberty for the period spent in wrongful confinement") (punctuation altered); *Daniel v. Hodges*, 125 So.3d 726, 728 (Ala. Ct. App. 1960) (unlawful detention results in "damages sustained by the loss of time and liberty"). Indeed, the "loss of time, in the sense of loss of freedom, is inherent in any unlawful detention and is compensable as 'general damages' for unlawful imprisonment without the need for pleading or proof." *Kerman*, 374 F.3d at 130; *see id.* ("loss of liberty is not just 'virtually certain' to occur; it is inseparable from the detention itself"); *see also H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1088 (11th Cir. 1986) ("real injury" for unlawful detention "can be inferred from the facts"). Contrary to Defendants' protestations, Plaintiffs are not seeking to recover for an "abstract" injury.[17]

Defendants next argue that lost-liberty damages are individualized because they encompass "mental-anguish damages." C 322 at 75–76; M 296 at 75–76; C 320 at 43–44; M 294 at 44–45. This too is erroneous. Lost-liberty damages "are *separable* from [other] damages" that may arise from an unlawful detention, including damages related to "physical harm, embarrassment, or *emotional suffering*." *Kerman*, 374 F.3d at 125 (emphasis added). For this reason, courts have allowed lost-liberty damages to proceed on a class-wide basis while reserving emotional distress and other damages for individual proceedings. *See, e.g.*, *Barnes v. Dist. of Columbia*, 278 F.R.D. 14, 20-22 (D.D.C. 2011) ("general" damages for unlawful detention could be proven on class-wide basis while "special" damages "for emotional distress, lost wages, or other types of compensatory damages" would be resolved individually); *Betances*

[17] Plaintiffs do not seek lost-liberty damages for "unauthorized extended probations," as JCS asserts. C 322 at 74; M 296 at 74 It appears this argument made its way into JCS's brief because JCS copied and pasted several sentences directly from the brief it filed in opposition to certification in *Ray*, where the plaintiffs had alleged that JCS extended their probations past the 24-month statutory maximum. *Compare* C 322 at 74, *with Ray*, N.D. Ala. No. 2:12-cv-02819, ECF No. 714 at 28. JCS admits, as it must, that the injury of being unlawfully detained—the only kind of lost-liberty injury for which Plaintiffs seek damages here—is compensable. *See* C 322 at 74.

v. Fischer, 403 F. Supp. 3d 212, 236 (S.D.N.Y. 2019) ("class-wide damages may be calculated as to certain damages common to class members, including the loss of liberty," whereas "individualized damages can be dealt with after class-wide damages issues are determined"); *see also Roy v. Cty. of Los Angeles*, 2018 WL 3436887, at *3 (C.D. Cal. July 11, 2018) ("general damages may be available on a class-wide basis in § 1983 cases based upon unlawful detention"); *Covington v. Wallace*, 2014 WL 5306720, at *2 (E.D. Ark. Oct. 15, 2014) ("*per diem* standard, which measures damages by the number of days each class member was unlawfully detained, appears both fair and legally adequate"). Because the jury can determine Defendants' liability and award aggregate lost-liberty damages to members of the Classes in Phase I, certification is appropriate.

Defendants wrongly argue that Plaintiffs cannot recover lost-liberty damages for any member of the Classes unless Plaintiffs prove that member was indigent at the time of his or her commutation. *See* C 320 at 40–41; M 294 at 41–42. To begin with, "once it is determined that a claimant's due process rights were violated, the burden of proof shifts to the defendants to demonstrate that the procedural violation did not cause the plaintiff's injury." *Franklin v. Aycock*, 795 F.2d 1253, 1263 (6th Cir. 1986); *see also Carey*, 435 U.S. at 260 ("[I]f [defendants] can prove on remand that [plaintiffs] would have been suspended even if a proper hearing had been held, then [plaintiffs] will not be entitled to recover damages to compensate them for the injuries caused by the suspensions."); *Thompson v. Dist. of Columbia*, 832 F.3d 339, 346 (D.C. Cir. 2016) (citing *Carey* and holding that defendant bears burden of establishing action giving rise to injury would have occurred regardless of due process violation); *Alston v. King*, 231 F.3d 383, 386 (7th Cir. 2000) (same); *Brewer v. Chauvin*, 938 F.2d 860, 864–65 (8th Cir. 1991) (same).

In Phase I, Plaintiffs will prove on a class-wide basis that probationers were jailed in violation of their *Bearden* rights, that Defendants factually and proximately caused those violations, and that members of the Classes lost their liberty as a result. None of these showings turns on indigency. To the extent Defendants maintain any given member would have lost his liberty even if the Montgomery Municipal Court had engaged in a proper *Bearden* inquiry, this is an affirmative defense to damages on which Defendants bear the burden of proof. This shifting of the burden makes particularly good sense because members of the Classes had no obligation to raise indigency at their commutation hearings, the City of Montgomery bore the burden of proving willful failure to pay, and the Municipal Court failed to make written records of the evidence and findings necessary to justify incarceration. *See* Section I.A.3, *supra*.

The availability of this affirmative defense to damages does not undermine the appropriateness of class certification. Even if Defendants could prove that a member of the Classes had willfully failed to pay and thus would have been jailed regardless of the constitutional violation, Defendants would nevertheless remain liable for that violation, and the member would be entitled to nominal damages, as Defendants readily admit. *See Carey*, 435 U.S. at 266–67 ("We therefore hold that if, upon remand, the District Court determines that respondents' suspensions were justified, respondents nevertheless will be entitled to recover nominal damages not to exceed one dollar from petitioners."); C 320 at 40 n.28. But Defendants must come forward with specific, admissible evidence on this point; they cannot meet their burden with hypothetical speculations about unnamed members of the Classes choosing jail despite an ability to pay. *See Franklin*, 795 F.2d at 1264 (defendant bears "the burden of *proving* that the due process violation did not cause [plaintiff's] injury") (emphasis added).

With respect to class certification, Defendants have not demonstrated they have the

evidence necessary to make such showings on a large scale. Instead, Defendants offer only speculative and conclusory assertions as to a handful of people based on bits and pieces of information that often relate to time periods well before or after the person was jailed. "While the existence of individual defenses may be important in a court's decision to certify a class, the relevance of such defenses must be subjected to the same rigorous inquiry as plaintiffs' claims." *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 619 (8th Cir. 2011); *see also Bridging Cmtys.. Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1126 (6th Cir. 2017) ("the mere mention of a defense is not enough to defeat the predominance requirement"); *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1241 (11th Cir. 2016) (affirmative defenses can defeat predominance only if they "apply to the vast majority of cases"); *Mowbray*, 208 F.3d at 298 ("arguments woven entirely out of gossamer strands of speculation and surmise [cannot] tip the scales in a class certification ruling"). Defendants' assertions do not withstand such scrutiny.

Finally, while indigency is not an element of Plaintiffs' claims, both the Court and the jury can infer from generalized, class-wide proof that all members of the Classes were unable to pay at the time they were jailed. *See CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1089 (10th Cir. 2014); *see also Klay v. Humana, Inc.*, 382 F.3d 1241, 1258–59 (11th Cir. 2004) (holding common "circumstantial evidence" can be "used to show reliance" as to the "whole class"); *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 920–21 (10th Cir. 2018) (holding factfinder could find causation as to each class member based on circumstantial evidence despite "hypothetical alternative explanations" to the contrary); *Powers*, 2005 WL 2033696, at *11, 13 (certifying class based on "reasonable inference that a significant number" of "indigent people were incarcerated"). Indeed, indigency is a commonsense inference under the circumstances. Members of the Classes were placed on probation with JCS because they were unable to pay

fines and court fees at the time of imposition. JCS petitioned for revocation only after determining it could no longer extract payments from the members. And once a Petition for Revocation[18] was filed, a member could have avoided jail by paying the fines owed.

It is unreasonable to think that a person who had the resources to pay would surrender his liberty and sit in a jail cell in exchange for a credit of $25 to $50 per day. In other words, the fact of incarceration itself is powerful circumstantial evidence of one's inability to pay at the time of incarceration, and every member of the Classes spent time in jail. So too is the complete dearth of written records regarding ability to pay. *See Bearden*, 461 U.S. at 674.

2. Jail Transcripts provide the information needed to allocate days in jail between JCS related commutations and other offenses.

Plaintiffs have repeatedly described how comparing information on JCS's Petition for Revocation, the Municipal Court's Jail Transcript, and the Municipal Court's Order of Release shows exactly which commutations JCS proximately caused through its initiation of revocation proceedings. Defendants do their best to muddy the waters by presenting a slew of cases where, they claim, a simple review of these documents and counting the days of confinement from commutation through release cannot tell the whole story. C 322 at 68–72; M 296 at 68–72; C-320 at 34–36; M 294 at 36–38. But none of these hypothetical objections presents any real challenge to the method. With the documents, it is easy to (1) ensure that only commuted time between the date of commutation and the release date is counted for damages, even where the probationer received credit for time served before the commutation hearing; (2) ensure mandatory (that is, non-commuted) days are not counted as part of the JCS-caused injury; (3)

[18] As Plaintiffs explained in their opening briefs, JCS initiated revocation proceedings using either a Petition for Revocation or Notice to Show Cause as tools to bring the person back before the court, and both JCS and the Municipal Court treated Notices to Show Cause and Petitions for Revocation as interchangeable. *See* C 307 at 11 n.6. Thus, references herein to Petitions for Revocation are intended to encompass both kinds of form.

allocate commuted days served in jail between JCS-related offenses and commutations on unrelated matters; and (4) flag cases where the commutation did not occur at the first court date after JCS initiated revocation proceedings. Here, Plaintiffs will demonstrate the efficacy of their method by considering Defendants' specific examples in sequence and, unlike Defendants, actually citing and thoroughly discussing the underlying documents associated with each one.

Aldaress Carter[19]

JCS attempts to sow confusion about the date of Carter's commutation, but there can be no doubt Carter was commuted on Monday, January 27, 2014, not the following day as JCS suggests. January 27, 2014 is the date on his Jail Transcript, C 308-3 at 2, a document generated following commutation. C 93-3 at 5–6.[20]

JCS's argument that Carter could not have been commuted on his second JCS probation is equally vacuous. Carter was sentenced to probation on two separate dates, first in May 2011, C 159-13, and then again (in two separate orders) in June 2012. C 159-15 & C 159-17. The June 2012 orders placing Carter on his second JCS probation show that it was for three cases: 2012TRT033859, 2012TRT033860, and 2012TRT040632. *Id.* But JCS's assertion that it "did not file a revocation petition regarding that probation" (C 322 at 38) is dead wrong: those three case numbers for Carter's second probation are included on the Petition for Revocation JCS filed with the court. C 308-3 at 1. And they are included on the list of commuted cases on Carter's Jail

[19] JCS discusses Carter's documents at length in its section on ascertainability, C 322 at 30–33, but indicates that discussion also applies to the question of whether JCS was the moving force behind commutation, *id.* at 68–72.

[20] One seeking further proof to confirm this obvious point could also look to the January 27, 2014 date on Kloess's signature on Carter's booking card—Kloess signed that document shortly before the court appearances of the people he purported to represent. *See* C 307 at 49 (citing documents). One could also review the Benchmark E-Court docket of any of Carter's JCS cases and note that the date the transcript appears is January 27, 2014, not January 28, 2014. C 171-14. These documents confirm that one need look only to the Jail Transcript to learn the date of commutation.

Transcript. C 308-3 at 2. If JCS listed a case number on the Petition for Revocation, JCS sought to revoke probation on that case. And if those case numbers appear on the Jail Transcript next to a "commuted" entry, they were commuted. Carter was plainly commuted on all three of those cases in addition to the others from his first probation.

Because the Jail Transcript confirms that *all* of the cases for which Carter was jailed after the commutation hearing were those for which JCS had petitioned to revoke probation, it is simple to determine damages: JCS and the City are liable for all the jail time between the commutation and Carter's release. (As this Court directed in its summary judgment order, C-296 at 3–4, Plaintiffs are not counting days he was confined before his commutation hearing towards his damages.)

JCS next argues that perhaps the date on Carter's Order of Release from jail doesn't really signify the date of his release at all. That's absurd. Prisoners were released on the day they were ordered to be released. To confirm this, one could look to the entry for Carter on the City Jail spreadsheet the City produced, which shows he was booked on January 25, 2014 and released on January 28, 2014. C 268-5 at 6–8. This is exactly what his Jail Transcript and Order of Release plainly indicate.

So after a needless trip through a few corroborating documents, we arrive right back where we started: the JCS Petition for Revocation lists all the cases for which JCS sought revocation of probation for a probationer; the Jail Transcript date is the date of the commutation and lists all cases for which a person was commuted; cross-referencing those cases with the Petition for Revocation case numbers either corroborates or rules out JCS's involvement; and the Order of Release does in fact show the date of release.

Angela McCullough (C 322 at 70; M 296 at 70)

JCS selectively quotes McCullough's Order of Release to suggest that she only served

four days in jail following her commutation and that none of those days are related to the JCS-related cases for which she was commuted. But employing Rubens's method quickly corrects this willful obtuseness on JCS's part.

McCullough's Jail Transcript shows that following the issuance of a JCS Petition for Revocation, she was commuted on 10 JCS-related cases.[21] M 252-16. In addition to the JCS-related cases, the Jail Transcript shows seven cases where McCullough was sentenced to a mandatory day of confinement, with three of those cases marked with "CC," *id.*, which JCS correctly indicates stand for "concurrent." *See* C 322 at 70 n.44; M 296 at 70 n.44. Since three of the mandatory days run concurrently with other mandatory days, McCullough served four days of mandatory time in total. And that is precisely what her Order of Release indicates: "DEFENDANT SERVED 4 DAYS MANDATORY." C 324-12; M 252-18. But it is patently obvious this is not all the time she served. The Order of Release goes on to state, "DEFENDANT GIVEN CREDIT FOR 17 DAYS; BALANCE OF $1350.00 PAID IN FULL." *Id.* This indicates that she zeroed out her commuted time, as was often the case, through a combination of payment and earning credit for days in jail. McCullough's Jail Transcript shows she was booked on July 2, 2013, one day before the July 3 hearing. M 252-16. Her four days of mandatory time would run from July 2 through July 5, meaning that she first started earning commuted time on July 6. And her Order of Release is dated July 22, 2013. C 324-12; M 252-18. The number of days from

[21] Nine cases directly match between McCullough's Petition for Revocation and Jail Transcript. The tenth case is off by a single digit, 2002TRT036423 on the Petition for Revocation and 2002TRT036427 on the Jail Transcript, suggesting a typo. From time to time, when review of the Petition for Revocation, Jail Transcript, or Order of Release suggests a simple clerical error occurred, looking to additional JCS and Montgomery E-Court Records can help resolve the issue. Here, E-Court confirms that that 2002TRT036423 is a failure to display insurance case for a person other than McCullough. And the E-Court file for 2002TRT036427 shows that is McCullough's case, for which she was placed on JCS probation and JCS sought to revoke that probation. The probation order saved on E-Court for the case shows the case number being entered as 2002TRT036423 rather than -427. So the error is unambiguous and the case should be attributed to JCS.

July 6 through July 22 is 17—that's how many commuted days she served. McCullough's Order of Release independently reached that same 17-day number. *Id.* But it is unnecessary to rely on this. To figure out the number of commuted days on a sentence with mixed mandatory time and commuted time, one need only count the mandatory days starting with the booking date, then attribute the remainder of the time to commuted days, using the release date on the Order of Release. JCS claims that "Receipt of Transaction" documents show McCullough paid money to be released rather than serve commuted time on JCS-related offenses. C 322 at 70; M 296 at 70. But JCS neglects to mention that the receipt of those payments is dated July 22, 2013, the date of her Order of Release, further corroborating the sequence of events the Jail Transcript and Order of Release already show to be true. *See* C 324-7; M 297-82.

McCullough's Jail Transcript shows a mix of commuted and mandatory time: she served her mandatory time and 17 days of her commuted time, and then she (or someone acting on her behalf) paid enough money to release her before she finished serving all her commuted time. Because all commuted time on her case is directly linked to JCS's Petition for Revocation, JCS is liable for the full 17 days.[22]

Marquita Johnson (C 322 at 93; M 296 at 93)

JCS rehashes two issues: (1) that there is no way to allocate days in jail between Johnson's mandatory days, JCS-related commutations, and other commutations, and (2) that if one of her probations was "inactive," it should not be counted. C 322 at 73; M 296 at 73. As

[22] If, as was occasionally the case, a probationer was commuted on a mix of JCS-caused cases and other cases, there is a simple way to allocate the injury between the two. Say, for example, McCullough's case 2007TRT036427 had not been shown to be a JCS-related case. M 252-16. To allocate, one should total the fines commuted on the jail transcript—here, $2,550 (the sum of the commuted dollar amounts from lines 8 through 17). Assume (for argument's sake) the non-JCS case was commuted on $66. Subtracting that from the total gives the total JCS-related amount, $2,484. Calculating 2484/2550 gives the proportion of the commuted dollar amount attributable to JCS: 0.97. Multiplying 17 days by 0.97 gives one the corresponding number of commuted days served for which JCS is responsible: 16.49 days out of the 17.

discussed with respect to McCullough above, allocating jail days between JCS-related commutations and others is straightforward. Johnson shows one day of mandatory time, and a second day of mandatory time to run concurrently with the first one. C 3244; M-252-28. That is one day of mandatory time in total. Johnson was booked and had her commutation hearing on the same day, April 25, 2012. *Id.* She served her one day of mandatory time on that date. All later time—from April 26, 2012 through her release on January 28, 2013—is commuted time and must be allocated between her JCS-related offenses and any others. *See* M-252-30.[23]

Kenny Jones

JCS next sets its sights Kenny Jones, a probationer whose sentence was commuted to days in jail in 2011, before the Municipal Court's implementation of its Benchmark system in February 2012. C 322 at 93; M 296 at 93. Using the method described in the Rubens declaration, Plaintiffs identified Jones as a class member based on his JCS Case File Report, which noted that a Petition for Revocation was generated on September 17, 2010, and indicated that his fines had been "commuted to days by judge hayes" on February 11, 2011. Ex. 1 at 2. Plaintiffs concluded that Jones had been released from jail on June, 2, 2011 based on an entry imported into Benchmark from the system that predated it, which indicated that "Penalties to this date have been paid in full" M 282 at 25; Ex. 1 at 5.

JCS argues that Plaintiffs are speculating about the release date. But in the past month, Plaintiffs have located Jail Transcripts and other records for multiple pre-Benchmark class members, including Jones, and Jones's records bear out Plaintiffs' conclusions concerning the

[23] As with Carter, JCS's records show that Johnson had two probations with JCS. And as with Carter, JCS initiated revocation proceedings in both probations, regardless of whether one of them was supposedly "inactive." *See* M 241-39 (two Petition for Revocation forms for Johnson submitted on the same date, showing different sets of case numbers in the top right corner).

dates of his jail term following his commutation. Jones's Jail Transcript from February 10, 2011 shows Jones was commuted for one of the two cases appearing on his JCS Petition for Revocation on that date.[24] Ex. 1 at 6. The Jail Transcript also notes the balance for Jones's commuted time, "$3339.00 or 129 days." Jones's file contains a form titled "Montgomery Municipal Court Payout Calculator," used to calculate the payment required to be released at any point during a commutation. Ex. 1 at 7. The Montgomery Municipal Court form stating "NEED JAIL RELEASE," is also in Jones's file and shows that $539 had been paid. Ex. 1 at 8. It is clear, then, that Jones was released on June 2, 2011, as Plaintiffs had concluded before locating his Jail Transcript and release paperwork. Jones's Jail Transcript contains mandatory time, JCS commuted time, and other commuted time, all of which can be allocated between JCS-related commutations and other offenses as it was for the other plaintiffs discussed in this section. Furthermore, Jones's recently uncovered Jail Transcript confirms the information Plaintiffs had earlier gleaned from his ProbationTracker file using the method for pre-Benchmark class members without a Jail Transcript on hand. This demonstrates that at trial, Plaintiffs can present a summary of Defendants' data to the jury with the aggregate number of days members of the Classes were jailed as a result of Defendants' conduct. The jury can then award lost-liberty damages to the Classes by, for example, determining an appropriate amount to compensate for each day in jail and then multiplying that amount by the aggregate number of days.

3. The Court has tools and procedures for manageably resolving individualized damages issues.

Defendants' final damages-related argument focuses on Plaintiffs' claims of emotional

[24] The Jail Transcript contains citation numbers rather than Municipal Court Case numbers, but that is no problem. Each citation corresponds to a single Municipal Court case and both the citation number and the case number are listed in Benchmark, even in cases imported from the earlier system. Here case number 2009TRT056174 corresponds to citation number N2848656, Ex. 1 at 4, which appears on the Jail Transcript. Ex. 1 at 6.

distress. *See* C 322 at 76; M 296 at 76. Defendants maintain these damages cannot be determined on a class-wide basis, but Plaintiffs do not propose to resolve these damages in Phase I. *See* C 307 at 60–63; M 282 at 57–61. Defendants also ignore the extensive authority, including in the Eleventh Circuit, allowing emotional distress and other individualized damages to be proven in subsequent phases after liability and general damages are decided on a class-wide basis. *See id.* (citing cases).[25]

"District courts have many tools to decide individual damages." *Brown*, 817 F.3d at 1239; *see also Klay*, 382 F.3d at 1273 ("There are a number of management tools available to a district court to address any individualized damages issues that may arise in a class action."). And "courts, both state and federal, frequently manage class actions by splitting them into separate phases." *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1184 (11th Cir. 2017); *see also Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248, 1257 (11th Cir. 2003) (holding defendant's liability "was decided properly on a class-wide basis" even though damages would be determined "on an individual basis"). Defendants do not dispute any of this and make no effort to argue against the Court's utilization of tools or splitting of the case into separate phases to manage individual damages issues, as Plaintiffs have proposed. Thus, certification is appropriate despite the presence of individualized damages issues.[26]

[25] The Court of Appeals recently issued yet another decision demonstrating that common issues can be resolved in one phase while individualized issues can be resolved in separate phases, including (if necessary) a person's status as a class member. *See Harris v. R.J. Reynolds Tobacco Co.*, ___ F.3d ___, 2020 WL 6816965, at *1, 2, 8 (11th Cir. Nov. 20, 2020) (Because the Phase III jury determined the deceased "wasn't an *Engle* class member, Mrs. Harris wasn't entitled to the preclusive effect of the Phase I jury's findings.").

[26] The Court's ability to manageably resolve individualized damages issues further undercuts Defendants' argument that indigency must be assessed on an individual basis for purposes of lost-liberty damages. Even if Defendants are able to offer evidence sufficient to raise an affirmative defense as to several members of the Classes, those members can be segregated such that their lost-liberty damages are resolved individually while the lost-liberty damages of the remaining members are resolved in the aggregate.

F. The Availability of Attorneys' Fees Does Not Defeat Certification.

Defendants rely on the Eleventh Circuit's decision in *Truesdell v. Thomas*, 889 F.3d 719, 723 (11th Cir. 2018), to argue that individual claims are encouraged where attorney's fees are provided within a statute. C 320 at 8; M 294 at 8. *Truesdell*, however, found class certification inappropriate for many reasons. 889 F.3d at 725. The Court particularly emphasized the plaintiff's failure to overcome "the fatal fact" that the defendant's liability varied widely for each class member, "resulting in numerous mini-trials and a lack of typicality and commonality." *Id*. at 725–26. The availability of attorney's fees through individual litigation was "only a factor the district court was entitled to consider" and "not dispositive." *Id*. at 726. Unlike in *Truesdell*, Plaintiffs here readily meet the Rule 23 requirements for certification.

Moreover, contrary to Defendants' argument, courts in the Eleventh Circuit routinely certify Rule 23(b)(3) classes in which the underlying statutes provide for recovery of attorney's fees. In *Klay v. Humana*, for example, the Eleventh Circuit affirmed class certification in an action brought in part under the Racketeer Influenced and Corrupt Organizations (RICO) Act, which provides for the recovery of treble damages and attorneys' fees. 382 F.3d at 1269–70. Specifically, the Eleventh Circuit emphasized that the proposed class members had no particular interest in controlling their own litigation and that there were no class members separately pursuing other cases involving the same parties and claims. *Id*. at 1269. Moreover, the Eleventh Circuit found that it was desirable to concentrate the litigation into a single forum to preserve judicial resources, to vindicate the rights of those who were unlikely to file suit individually, and to concentrate claims in a forum that has already handled several preliminary matters related to the case. *Id*. at 1270–71; *see also Upshaw v. Ga. Catalog Sales, Inc.*, 206 F.R.D. 694, 701–02 (M.D. Ga. 2002) (in RICO action, holding that a class action was superior to any other available method of adjudication); *Agan v. Katzman & Korr, P.A.*, 222 F.R.D. 692, 701–02 (S.D. Fla.

2004) (granting Rule 23(b)(3) class certification in a case brought under the Fair Debt Collection Practices Act, which allows plaintiffs to recover damages, costs, and reasonable attorneys' fees.); *see also Augustin v. Jablonsky*, 461 F.3d 219, 230 (2d Cir. 2006) (district court erred in concluding that the class action device was not a superior mechanism to challenge a correctional facility's blanket strip search policy under 42 U.S.C. § 1983); *Tardiff v. Knox Cnty*., 365 F.3d 1, 6–7 (1st Cir. 2004) (class action was superior means of litigating plaintiffs' 42 U.S.C. § 1983 actions alleging Fourth Amendment violations).

II. PLAINTIFFS HAVE STANDING AND SATISFY RULE 23(A)'S REQUIREMENTS.

A. Plaintiffs Satisfy the Typicality and Adequacy of Representation Elements.

1. Plaintiffs' Bearden and false imprisonment claims are typical of the claims of the Classes.

Defendants contend that the claims of Carter, Agee, and McCullough are not typical of those of the *Bearden* and False Imprisonment Classes.[27] C 320 at 47; M 294 at 49–50. Defendants misunderstand Rule 23(a)'s typicality requirement. Plaintiffs' claims *are* typical of the claims of Classes because all claims arise out of the same legal theory and are based on the same material facts.

Rule 23 requires only that "the *claims or defenses* of the representative parties are typical of the *claims or defenses* of the class." Fed. R. Civ. P. 23(a)(3) (emphasis added). This "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). Rule 23 does not demand that the class

[27] Defendants also frame this argument as challenging standing and adequacy, but both of those assertions are "perfunctory and underdeveloped" and thus should be considered waived. *U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 n.13 (11th Cir. 2007). In any event, Carter clearly has standing, and he remains an adequate class representative. *See* C 307 at 32–33, 44–45.

representatives *themselves* be typical; it is, after all, always possible to point to factual differences between the class representative and other class members. Instead, whether a particular factual difference is relevant for purposes of typicality depends on whether that fact affects the legal claim asserted.[28] For that reason, "[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." *Id.* Indeed, "[t]he typicality requirement may be satisfied despite substantial factual differences." *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001).

The differences cited by the City are precisely the type of factual variation that has no bearing on typicality. Carter's subjective reasons for why he failed to make JCS-mandated payments are irrelevant to his legal claims because they have no bearing on his jailing without an ability-to-pay determination. Similarly, Carter's belief that he no longer needed to pay is unrelated to his false imprisonment claim, which turns on *JCS*'s bad faith. The fact that Agee and McCullough found themselves in the position of having to drive without valid licenses, or that they lacked the money to pay their tickets over a period of years, similarly does not render them atypical of other class members. To the contrary, many class members likely faced similar challenges.

Carter's offhanded suggestion during his deposition that "he believed JCS did not pay over to the Court all the funds it should have," C 320 at 48, does not affect typicality.[29] To be

[28] JCS's pre-2012 issuance of the Petitions for Revocation of Plaintiffs McCullough and Agee does not affect their entitlement to relief and thus has no bearing on typicality. *See* Section III.B.1.

[29] Defendants claim Agee is not a typical class member, alleging that his fines were not commuted at the hearing following his Petition for Revocation but that he was instead put on a court payment plan at that time. M 294 at 51. Defendants are wrong. No municipal court docket files were cited for this assertion, and Plaintiffs' review has not shown any hearing at all on any of Agee's JCS-related cases between JCS's issuance of a Petition for Revocation and the commutation of his JCS-related cases in 2013. Defendants

sure, JCS's failure to remit Carter's payments to the Municipal Court would bolster his *Bearden* and false imprisonment claims against JCS because JCS would have even more reason to know that his jailing was unjustified. But Plaintiffs have not relied on this assertion to prove JCS's knowledge, and a single comment during a deposition does not constitute a statement of Plaintiffs' overarching claims. Rather, Plaintiffs will, as discussed above, rely on common evidence to establish their *Bearden* and false imprisonment claims against Defendants. *See* Sections I.A.3 and I.B, *supra*.

Defendants argue that McCullough's claims are not typical of other class members' claims because she never attended any JCS appointments. This directly contradicts the Court's summary judgment ruling, which held that "Ms. McCullough need not have attended a JCS meeting to be entitled to her *Bearden* rights." M 269 at 22. Defendants also argue about what JCS knew of Carter and McCullough's employment status and ability to pay but as noted previously, Plaintiffs are *not* required to demonstrate that JCS had actual knowledge of a given probationer's inability to pay or any other allegedly individualized factor Defendants raise. *See* M 296/C 322 at 85–86. *See* Section I.B.2, *supra*.

The City's reliance on *Truesdell v. Thomas* is therefore misplaced. That case involved a class action brought under the federal Driver's Privacy Protection Act, which prohibits the unauthorized use of motor vehicle records. *Truesdell*, 889 F.3d at 721–22. The Eleventh Circuit affirmed a district court's finding that the class representative lacked typicality because of his "assert[ion] that he had legitimate reasons for some of his searches." *Id.* at 725–26. Because access of some class members' information was in fact authorized, the court reasoned, the factual

cite only Agee's testimony about being put on a court payment plan in October 2014, well after the relevant fines were commuted. M 294 at 51 n.38 (citing M 241-29 at 388:21–23; 389:1–3); M 241-29 (C 321-7) at 387:16–21 (showing Agee was discussing an October 1, 2014 hearing).

differences went to the heart of the claim's merits. *See id.* Here, by contrast, the factual differences on which Defendants rely have no effect on the merits of Plaintiffs' claims. Plaintiffs' claims, as well as those of other class members, continue to "arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg*, 741 F.2d at 1337. Their claims are therefore typical of those of the classes.

2. Mr. Carter has standing to represent the City Class and Kloess Subclass, and his Sixth Amendment claims are typical of the claims of those Classes.

Carter alleges that despite the fact the City nominally provided public defenders in its Municipal Court, a reasonable jury could conclude those public defenders systemically failed to request *Bearden* hearings for probationers whose fines were commuted to jail. C 276 at 42. At trial, Carter intends to prove this amounted to the constructive denial of counsel under *Cronic*, 466 U.S. 648. *See* C 276 at 42.

The City now argues that because Kloess was absent from the courtroom when Judge Hendley commuted his sentence, Carter's claim is "atypical" and he lacks standing to represent a class of probationers whose public defenders "appeared with them at the bench when their cases were called." C 320 at 66–68. The City also erroneously characterizes Carter's class claim as a "*Gideon* claim" for "complete absence of counsel." *Id.* at 67–68 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). These arguments cannot withstand scrutiny.

First, Carter's Sixth Amendment claim has never been (as the City suggests) "simply that there was no lawyer." C 320 at 68. It is undisputed that Branch Kloess was assigned to represent Carter. *Id.* at 72; C 296 at 12 ("Mr. Kloess nominally represented Mr. Carter."). Carter alleges that Kloess failed to do his job—not just by not being present at the time the judge commuted his sentence, but by, among other things, failing to gather the detailed information he would have needed to present an effective *Bearden* defense and instead just asking Carter only whether he

would "pay or stay." *See* C 274 at ¶¶ 143, 147 (compiling evidence). Carter alleges that Kloess and the City's other public defenders systemically failed to raise indigency as a defense to commutation and that this violated the Class members' Sixth Amendment (and *Bearden*) rights, regardless of whether the public defenders appeared at the bench in any given case.

At trial, in addition to evidence of Kloess's failure to adequately represent Carter, Plaintiffs will present evidence showing that the City's public defenders—including Kloess—had such a high volume of cases that it was impossible for them to adequately advocate for their clients—and that the City was on notice of this problem. *See* C 296 at 29–30. Plaintiffs alleges that the evidence will show that the City's public defense program was "a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel" under *Cronic*, 466 U.S. at 654; *see also Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013). *Gideon*, in contrast, applies where *no lawyer has been appointed at all*—not where counsel is appointed but fails to effectively represent his client. *See Custis v. United States*, 511 U.S. 485, 496 (1994) (distinguishing between *Gideon* claims alleging the "unique constitutional defect" of "failure to *appoint* counsel for an indigent defendant" and typical claims based on the "denial of the *effective* assistance of counsel" (emphases added)). Accordingly, Carter has standing to assert a Sixth Amendment claim against the City and Kloess based on the public defenders' systemic failure to request *Bearden* hearings.

Nor does the fact that Kloess was not present in the courtroom with Carter make his claim atypical for purposes of class certification: as explained above, even "substantial factual differences" do not defeat typicality under Rule 23. *Murray*, 244 F.3d at 811. Rather, what matters is whether the class representative's claims "arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg*, 741 F.2d at 1337; *see also In re*

HealthSouth Corp. Sec. Litig., 261 F.R.D. 616, 627 (N.D. Ala. 2009) ("Typicality does not mean 'identical'; it refers to the nature of the claims of the class representatives, rather than to the specific facts from which the claims arose."). Carter's claim and the claims of all the members of the Classes arise from "the same . . . pattern or practice": the failure of the City's public defenders to request *Bearden* hearings for probationers who were jailed for failure to pay. The specific facts of *how* Kloess failed to adequately represent Carter do not change the legal theory underlying Carter's Sixth Amendment claim.

Lastly, the City argues that Sixth Amendment claims cannot be certified under Rule 23(b)(3) "as a matter of pure logic" because each class member would (according to the City) be required to separately prove that had their public defender adequately represented them, "the result of the proceeding would have been different." C 320 at 69. The Court has already rejected this argument. *See* C 296 at 34 (Carter does not have to "show that the Municipal Court would have declared him indigent had Mr. Kloess requested an indigency hearing"). At any rate, because the public defenders' systemic failure to request *Bearden* hearings for clients who were then jailed for failure to pay constituted a constructive denial of counsel under *Cronic*, prejudice is presumed and thus need not be proven. *See Cronic*, 466 U.S. at 659 ("[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable" and "[n]o specific showing of prejudice [is] required"). And even if Plaintiffs were required to prove prejudice, they could do so through common evidence: all were jailed after being denied a *Bearden* hearing.

B. Plaintiffs Have Standing to Pursue the State-Law claims on Behalf of the Classes.

Only one named Plaintiff needs to have standing for a class to be certified. *See Prado-*

Steiman v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000) (certification appropriate if "*at least one* named class representative has Article III standing to raise each class subclaim") (emphasis added). At least one Plaintiff has standing to represent each of the Classes.

1. Mr. Caldwell has standing to represent the Abuse-of-Process Class.

Defendants fail in their efforts to contest Caldwell's standing to represent the abuse of process class, confusing Article III standing requirements (which apply to the named plaintiff) with the requirements for class certification (governed by Rule 23). Standing requires only an "injury in fact" that is (1) "concrete and particularized" and "actual or imminent"; (2) "fairly traceable to the challenged action of the Defendant"; and (3) "redressed by a favorable decision." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1268 (11th Cir. 2019) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

JCS improperly allocated Caldwell's payments to its fees instead of his fines, causing Caldwell to pay more to satisfy his debt to the City than he otherwise would have done. This is a concrete harm; it actually occurred; JCS caused the harm; and it can be redressed with money damages. Caldwell has standing.[30]

The case of *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917 (11th Cir. 2020), is entirely inapposite. There, the named plaintiff sued for a violation of the Fair and Accurate Credit Transactions Act—namely, that the defendant printed more credit card digits on customer receipts than the statute allowed. Applying *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the Eleventh Circuit held the named plaintiff lacked standing to sue because he could not articulate

[30] JCS blatantly attempts to mislead the Court with its citation Caldwell's deposition testimony that he "did not have anything bad to say about JCS." M 296 at 22 n.12. Caldwell was obviously speaking about a temporary employment service also called JCS. M 246-2 (Caldwell Dep.) 276:12–278:9. Later in the deposition, Caldwell stated clearly that he believed the *Defendant* JCS had misapplied his payments. *Id.* 350:11–351:4; 354:20–355:11.

any concrete injury, or even risk of injury, resulting from the printing error. 979 F.3d at 932–33. *Muransky* simply has no bearing on the instant case, in which plaintiffs and class members have experienced real, measurable economic harm as a result of JCS's wrongful actions.

That Caldwell's mother gave him money to pay JCS, and later the City, does not alter his standing or JCS's liability to him and the members of the Class. Under the collateral source rule, which both the Eleventh Circuit and Alabama follow, "a plaintiff is entitled to recover the full value of the damages caused by a tortfeasor, without offset for any amounts received in compensation for the injury from a third party (like an insurance company or a family member)." *Higgs v. Costa Crociere S.P.A. Co*., 969 F.3d 1295, 1310 (11th Cir. 2020); Restatement (Second) of Torts § 920A(2) (Am. Law. Inst. 1981) ("Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable."); *Ex parte Barnett*, 978 So. 2d 729, 731 (Ala. 2007) ("Under the collateral-source rule, an amount of damages is not decreased by benefits received by a plaintiff from a source wholly collateral to and independent of the wrongdoer."). The collateral source rule applies in § 1983 litigation. *Carswell v. Bay County*, 854 F.2d 454, 458 (11th Cir. 1988). The doctrine is "an exception to the basic tort principle that damages are designed to make the plaintiff whole." *Higgs*, 969 F.3d at 1310. It "allows a plaintiff to recover damages for a harm for which she has already been compensated"—"a windfall . . . better awarded to the plaintiff than the tortfeasor." *Id.* at 1310–11. Under the collateral source rule, Caldwell and class members are entitled to recover the full measure of their overpayments to JCS, regardless of the source of those payments.[31]

[31] For this reason, the Abuse of Process class definition needs no adjustment to account for the source of probationers' payments, contra M 296 at 27.

Furthermore, in the Eleventh Circuit, claims regarding "collateral source payments" are affirmative defenses that Defendants must plead pursuant to Rule 8(c). *Hassan v. U.S. Postal Serv.*, 842 F.2d 260, 263 (11th Cir. 1988); Fed. R. Civ. P. 8(c). Neither the City nor JCS asserted such an affirmative defense. M 136; M 138. Accordingly, JCS has waived its right to assert a collateral source defense now. *Am. Nat'l Bank of Jacksonville v. FDIC*, 710 F.2d 1528, 1537 (11th Cir. 1983).

JCS articulates no reason why Caldwell cannot serve as a class representative other than its meritless attempt to wipe away his economic injuries in violation of the collateral source rule. As Caldwell indisputably has standing to bring abuse of process claims against JCS, this Court should hold that he is an appropriate representative for the abuse of process class.

2. Mr. Edwards has standing to represent the False Imprisonment Class[32]

JCS also fails in its argument that Edwards does not have standing to represent the false imprisonment class. Court records clearly show that Edwards served post-arrest commutation jail time. Edwards was arrested on September 18, 2012. M 246-66 at 2; M 257-117 at 3–6.[33] On September 19, Edwards appeared in front of Judge Westry, and his tickets were commuted, with a notation that he could be released upon payment of $1,900. M 257-117 at 3 and 5. On September 20, Edwards and his wife made the payment that resulted in his release. M 246-66 at 7, 9–11. These records establish that Edwards served post-arrest commutation jail time.

Under the collateral source rule, the fact that Edwards's wife paid the $1,900 to secure his release does not prohibit him from serving as a class representative. *See* Section II.B.2, *supra*. Further, Edwards's wife raised the $1,900 by taking out a title loan on a car she owned jointly

[32] In addition to Edwards, Agee, Carter, McCullough, Johnson, Jones, and Moody each have standing to represent the False Imprisonment Class.

[33] In their opening brief, Plaintiffs mistakenly cited the date of Edwards' arrest as September 19. This was a typographical error; the court records clearly show an arrest day of September 18.

with Edwards. M 259-3 at ¶ 10.

III. THE PROPOSED CLASSES ARE PROPERLY DEFINED AND ASCERTAINABLE.

A. The Proposed Definitions Are Based On Objective Criteria.

Rule 23's implicit ascertainability requirement requires that a class be defined by objective, rather than subjective, criteria. *See* C 307 at 33–39; M 282 at 29–34. Under this standard, the Classes are plainly ascertainable. C 307 at 2 (listing criteria); *id.* at 34; *see also* Addendum (class definition chart). The Court can thus dispose of the ascertainability issue without further inquiry.

B. The Proposed Class Definitions Are Not Over-Inclusive.

Defendants quibble with Plaintiffs' proposed class definitions in an effort to create individualized issues where none exist and slash class membership to evade liability. None of their arguments holds merit.

1. The proposed Bearden Classes properly include individuals whose sentences were commuted after the City was put on notice of the unlawful jailing of JCS probationers, no matter when their petitions for revocation were filed.

In denying summary judgment to the City, the Court found that the record supports the conclusion that the City was deliberately indifferent to the unlawful jailing of JCS probationers. Specifically, the Court reasoned that a reasonable jury could find that, once it was on notice of the alleged constitutional violations, the City's "failure to stop those practices constituted acquiescence or ratification of them." C 296 at 27. The Court further held that a reasonable jury could find that the City was on notice on or after July 16, 2012. *Id.* at 28.

The City now objects to Plaintiffs' class definitions on grounds that they do not include any "reference to when the probation revocation petitions were filed."[34] C 320/M 294 at 44.

[34] Carter's proposed City Class and McCullough's proposed *Bearden* Class are identical except for the first date of the class period. *See* C 307 at 2; M 282 at 2. See Addendum (class definitions chart).

According to the City, as "a matter of logic," the proposed Classes must be limited to probationers for whom JCS sought revocation *after* the City was on notice of the unlawful jailing of JCS probationers. C 320 at 44 Under the City's reasoning, even if a probationer's fines were commuted to jail on July 17, 2013—a full *year* after the City was on notice of the constitutional problems in its Municipal Court—the City should bear *no responsibility* so long as JCS had sought revocation on July 15, 2012 (the day before the City was on notice). The City cites no authority for this proposition, and there is none.

The City of Montgomery was not a bystander powerless to stop the unconstitutional chain of events once JCS set it in motion—it could have taken any number of steps in addition to cancelling the JCS contract that would have prevented or mitigated many people's *Bearden* injuries.[35] It could have threatened cancellation of the contract if JCS did not take remedial measures or ordered JCS to cancel outstanding petitions for revocation. It could have told its police not to arrest based on a JCS-initiated petition. It could have told its prosecutors not to prosecute or trained its public defenders to request *Bearden* hearings for probationers facing commutation. It could have authorized prosecutors or public defenders to take action to secure the release of unlawfully jailed individuals.

But the City issued no such directives and took no such steps. And even the one step it admits it could have taken, canceling the contract, it delayed for two more years.[36] *Id.* at 27–28.

As long as the City took no steps to prevent further harm, the City's policy or custom was

[35] Plaintiffs do not understand the Court's passing reference to the City's "contractual right to terminate the agreement" to constitute a finding that the City was somehow barred from taking other actions that would have mitigated or prevented constitutional harms. C 296 at 28.

[36] In its summary judgment opinion, the Court stated that "in addition to any duty it may have had to rescind the contract upon learning of JCS's practices, the City had a contractual right to terminate the agreement each year." C 296 at 27. However, as the City acknowledges, the contract expressly provided that the City could terminate the contract "with 30 days written notice." C 253-11 at 1; M 301 at 2.

a moving force behind the jailing of JCS probationers. As the Supreme Court has explained, City officials' "*continued* adherence to an approach that they know or should know has failed to prevent tortious conduct by employees . . . establish[es] the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability." *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 407 (1997) (emphasis added). Thus, a municipality is liable under *Monell* if it "fail[s] to take the first remedial measure or preventative step" toward preventing further constitutional injury. *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1311 (11th Cir. 2001). In *Griffin*, the court held that *Monell* liability attached because the city "never investigated the allegations of sexual harassment, no records were kept of complaints, and no one in charge ever questioned, disciplined, or even discussed sexual harassment with" the harassing employee. *Id.* at 1311. Here, as in *Griffin*, the City's failure to take *any* remedial measures or preventative steps establishes that the City was a moving force behind Plaintiffs' injuries.

In sum, there is no basis for excluding individuals for whom revocation petitions were filed before the City was put on notice of the unlawful jailing of JCS probationers from the Classes.[37] The Court should reject the City's efforts to arbitrarily limit its liability in this way.[38]

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[37] JCS also argues that the class definition is underinclusive because in some cases the probationer had a Notice to Show Cause rather than a Petition for Revocation. C 322 at 29 n.21. But the class definitions do not include Petition for Revocation as a criterion—they are defined in terms of whether JCS "petitioned for revocation" of probation. And, as explained previously, both JCS and the Municipal Court treated Notices to Show Cause and Petitions for Revocation as interchangeable. *See* C 307 at 11 n.6.

[38] In denying the City's motion for summary judgment in *McCullough*, the Court necessarily rejected the City's argument that it cannot be held liable for jailings flowing from JCS petitions for revocation filed prior to July 2012. M 269. The City now seeks reconsideration of that ruling. *See* M 301; M 316.
In addition, on November 20, 2020, the plaintiffs in *Carter* and *McCullough* filed identical motions for reconsideration arguing that because the City delegated authority to JCS in 2009, the City's liability should not be limited to events after the 2012 notice date. C 337, M 311. The Court denied Carter's motion on procedural grounds, C 345, but McCullough hereby incorporates by reference the arguments made in that motion. If the Court agrees with Plaintiffs, the City's argument that the notice date should

2. Intervening causes are identified in the Municipal Court data.

There are some instances in which a probationer appeared in court for JCS's initiation of revocation hearing proceedings and a judge removed the person from JCS and gave them more time to pay. Some of these folks later had their fines commuted to jail time. The City argues that Plaintiff's class certification argument and class definition fail because they don't take into account this intervening contact between the Municipal Court and probationers, which would break the chain of causation. C 320 at 32–34. The City's argument fails, as the vast majority of probationers who were commuted following a JCS Petition for Revocation *did* have their fines commuted to days in jail the *first time* they appeared before the Municipal Court following the initiation of revocation proceedings. The relatively few exceptions to this rule are identified in the court's Benchmark records, which show that the judge removed the person from JCS and gave them more time to pay. The Eleventh Circuit has held that class definitions may encompass some individuals who have not experienced injury so long as those individuals can be identified and removed prior to awarding damages. *Cordoba*, 942 F.3d at 1274.[39] Such is the case here, so Defendants' objections lack merit.

3. The City's arguments that probationers identified as class members might not have served any commuted time are meritless.

Defendants present a smorgasbord of scenarios where a probationer supposedly would be identified as a class member without having served any commuted time. C 320 at 34–36. But the

limit the class is irrelevant: the proposed class should include *all* JCS probationers who were unlawfully jailed, regardless of when their revocation petitions were filed.

[39] This principle applies with equal force to the Abuse of Process class definition, which JCS asserts may include some individuals who did not overpay fees to JCS. M 296 at 27. The ProbationTracker database contains detailed, easily searchable records of each probationer's payment history. M 283-1 ¶¶ 29–31. If, as JCS theorizes, some people who meet the class definition did not in fact suffer monetary harm, they can easily be identified at the damages phase. Such individuals will be few and far between, as 90% of payments in ProbationTracker were for less than the required amount. M 283-1 ¶ 31.

assertions prove meritless as soon as one looks to the underlying documents rather than the say-so of counsel and the City's witness.

Makesha Sneed is a class member even though she paid all outstanding amounts on the date of her hearing and was released. [40] Sneed was booked on January 11 and had her commutation hearing on January 14, the date of her Jail Transcript. Ex. 2. Her Jail Transcript shows she was sentenced to one day of mandatory time, one day of mandatory time to serve concurrently with that first day, and commuted time on five cases totaling well over $1000, meaning that she served all her mandatory time before the date of her Jail Transcript and had begun serving her commuted time by that date. Her Jail Transcript is time stamped 3:13 P.M., and her payment receipt is dated 4:32 P.M., showing that she was detained for over an hour. *Id.* at 1–2 That time is attributable to her commutation. *Id*. Her damages are less than someone jailed on a JCS commutation for days or weeks, but she lost liberty and is entitled to at least nominal damages.

Sheneka Hampton has a Jail Transcript showing commutations generated at 3:02 p.m. and an Order of Release indicating it was generated at 7:10 p.m., shortly after a receipt for payment on her commuted cases generated at 7:01 p.m. Ex. 4 at 1–3. As with Sneed, this four-hour span shows an injury.

Christopher Shorts and **Felicia Maull** are not Class members under Plaintiffs' methodology. Shorts's Jail Transcript and Order of Release show he had four days of mandatory time, he was booked on January 12, and he was released on January 15, having served only those

[40] This analysis assumes all other criteria for class membership are met. For efficiency's sake, in refuting these specific objections raised by Defendants, Plaintiffs focus only on the content of the objection rather than presenting to the Court the complete information needed to determine whether the person is or is not a class member.

four days. Ex. 3 at 1–3. And Maull's Jail Transcript shows she was booked on January 26 and commuted on $89 on January 28, with no other jail time on any case. Ex. 5. At $50 credit per day, her commuted time would have been served by the time of her hearing. Rubens's method shows they served no commuted time at all, so there is no risk of their being improperly included in the class.

The City also cites records for three non-JCS defendants as hypothetical examples of fact patterns it claims would lead to an incorrect result under the method set out in Rubens's declaration. C 320 at 35–36. But these examples would not undermine his approach, even if they arose in a JCS-related case. In each, the Jail Transcript baldy shows the person did not serve commuted time: **Brian Jones**, Ex. 6 (Jail Transcript showing he was released on his own recognizance); **Christopher Terrell** (Tolbert ¶ 46), Ex. 7 (Jail Transcript showing commuted time running concurrently with other time); **Ricardo Hill** (Tolbert ¶ 33), Ex. 8 (Jail Transcript the entries reading "CASE CLOSED (CREDIT GIVEN FOR TIME SERVED …"). There is no danger whatsoever of anyone with such a Jail Transcript being misidentified as a class member.

C. Plaintiffs Have Demonstrated a Feasible Method for Identifying Members of the Classes.

Only a minority of appellate courts have required that plaintiffs also propose an "administratively feasible" method to identify class members in the future. C 307 at 34–35 & n.17. That heightened ascertainability standard would be incompatible with controlling circuit precedent, and the Eleventh Circuit has not yet adopted it. *Id.* at 34–35; *see also Ocwen Loan Serv., LLC v. Belcher*, 2018 WL 3198552, at *3 (11th Cir. June 29, 2018). Neither JCS nor the City offers any reasons why this Court should nonetheless, in the face of binding circuit law to the contrary, apply the administrative feasibility requirement.

Regardless, the Classes are clearly ascertainable even under the administrative feasibility

standard. As Plaintiffs have repeatedly described in detail, identifying *Bearden* and False Imprisonment members simply requires matching ProbationTracker records with Benchmark records, and briefly reviewing the Petition for Revocation, Jail Transcript, and Order of Release to confirm that the probationer was commuted on a JCS-related case and to determine the duration of jailing and allocation of time between JCS cases and any other cases. C 312 at 11–12, 14–15; C 307 at 35–37; C 308-1 ¶¶ 12–15, 17–21. In cases where the commutation predates the 2012 implementation of the City's Benchmark system, the notation "commuted to days" in the probationer's ProbationTracker Case File Reports indicates class membership when following a Petition for Revocation on that same case. C 312 at 14–15; C 307 at 37. Kloess Subclass members are identified by Kloess's signature on the probationer's Booking Card or a notation in the probationer's Benchmark file. C 307 at 38–39. And Abuse of Process members are identified through a straightforward search of payment records in ProbationTracker. M 283-1 ¶¶ 29–32.

JCS and the City take issue with any individualized inquiry. But even courts that apply a heightened ascertainability standard are clear that "there will always be some level of inquiry required to verify a person is a member of a class." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 170 (3d Cir. 2015); *see also Ocwen Loan Serv. LLC*, 2018 WL 3198552, at *3–4 (class met either ascertainability standard even though it required a "file-by-file review" to identify members); *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 317 F.R.D. 675, 680 (N.D. Ga., July 12, 2016) ("Of course, that identification of class members should not involve a great extent of individual inquiry does not suggest that *no* level of inquiry as to the identity of class members can ever be undertaken."). That individualized review may be file-by-file, and it may be time-consuming, but it is a far cry from impermissible "mini-trials" that are not administratively feasible. *See, e.g.*, *Ocwen Loan Serv.*, 2018 WL 3198552 at *4 ("'[F]ile-by-file review' does not necessarily

amount to 'file-by-file trial'."); *Joffe v. Geico Indemnity Ins. Co.*, 2019 WL 5078228, at *4 n.1 (S.D. Fla., July 31, 2019) ("Some file-by-file manual review does not preclude class treatment."); *Jones v. Advanced Bureau of Collections LLP*, 317 F.R.D. 284, 291 n.3 (M.D. Ga. 2016) (class ascertainable because member identification will not require a "series of mini-trials" but instead cursory review to ascertain whether a letter had been returned).

Defendants do their best to mischaracterize Plaintiffs' straightforward matching process, insisting that determining whether any given probationer is a class member is such a complicated exercise that it would be a trial unto itself. But as Plaintiffs have repeatedly shown, Rubens's method easily and definitively resolves the class membership issues Defendants have raised. *See, e.g.*, §§ I.E.2, III.B.3. Class member identification in this case does not require a trial—it just requires matching case numbers, noting dates on court and jail records, and checking dated entries in JCS's ProbationTracker and city data.

Courts in this circuit have repeatedly certified classes requiring review of documents that is at least as extensive as in this case. *See, e.g.*, *Owens v. Metro. Life Ins. Co.*, 323 F.R.D. 411, 416–17 (N.D. Ga. 2017) (finding ascertainability satisfied even though class membership determination would require examination of thousands of individual files); *Cox v. Porsche Fin. Servs., Inc.*, 330 F.R.D. 322, 331 (S.D. Fla. 2019) (certifying class where members could be ascertained through individual review of vehicle lease documents and holding the fact that "individual dealerships maintained different forms or types of databases to memorialize this information does not render the process of identifying class membership administratively infeasible").

Defendants also work to make the process of matching documents between ProbationTracker and Benchmark sound complicated, but courts routinely permit plaintiffs to identify class members using a "combination of methods," including analysis of defendants' own

records, third parties' data, and documentation or affidavits from potential class members. *Collins v. Quincy Bioscience, LLC*, 2020 WL 3268340, at *21 (S.D. Fla., Mar. 19, 2020) (holding class is ascertainable where proposed identification methodology uses a "combination of methods" including analysis of defendant's own records, third-party retailer data, and potential class members' affidavits); *see also, e.g.*, *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 440–43 (3d Cir. 2017) (explaining plaintiffs may ascertain class membership by cross-checking affidavits against a database); *Grubb v. Green Tree Servicing, LLC*, 2017 WL 3191521, at *16–18 (D.N.J. July 27, 2017) (rejecting defendant's arguments that its task was prohibitively difficult because the loan information is not in an electronic searchable database and may require "file-by-file review"); *In re Delta*, 317 F.R.D. at 691–92 (holding class is ascertainable where plaintiffs proposed identifying members based on defendants' records, which could be cross-referenced to third parties' data and class members' financial records and affidavits).

And where a class is relatively small, as here, objections that member identification will require some individualized review are particularly unpersuasive. *Reed v. Big Water Resort, LLC*, 2015 WL 5554332, at *4 (D.S.C. Sept. 21, 2015) (holding class was ascertainable because "identifying this class will not require the court to 'make *thousands* of fact-intensive inquires'—plaintiffs proposed class consists of between 257 and 750 members").

The process of identifying class members would, of course, be easier if the Defendants had kept better records. But their failure to do so does not defeat class certification, and plaintiffs should not be penalized for Defendants' errors. *See, e.g.*, *Hargrove v. Sleepy's LLC*, 974 F.3d 467, 470 (3d Cir. 2020) ("[W]here an employer's lack of records makes it more difficult to ascertain members of an otherwise objectively verifiable class, the employees who make up that

class should not bear the cost of the employer's faulty record keeping."); *Cope v. Let's Eat Out, Inc.*, 319 F.R.D. 544, 543–54 (W.D. Mo. 2017) ("Where an employer's records are inaccurate or inadequate, the solution is not to penalize the employee by denying him any recovery . . . [which] would place a premium on an employer's failure to keep proper records in conformity with his statutory duty"); *Smith v. Family Video Movie Club*, 311 F.R.D. 469, 474 (N.D. Ill. 2015) ("Defendant should not benefit any more than is necessary from its own allegedly poor record keeping"); *Galoski v. Applica Consumer Prods.*, 309 F.R.D. 419 (N.D. Ohio 2015) ("A company's failure to keep purchase records cannot provide an automatically defense to class certification."); *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 249–50, 254 (N.D. Ill. 2014) (certifying class despite defendants' incomplete records because the alternative "would create an incentive for a person to violate the [law] on a mass scale and keep no records of its activity, knowing that it could avoid legal responsibility for the full scope of its illegal conduct"); *Marcarz v. Transworld Sys.*, 193 F.R.D. 46, 57–58 (D. Conn. 2000) ("Should a debt collection company . . . be able to avoid class action liability by mere fact of inadequate record-keeping, the Congressional purpose behind the statute would indeed be thwarted."); *see also* C 312 at 18–19 (collecting cases).

If the Defendants' objection is, at its core, that Plaintiffs' method for identifying class members sounds like a lot of work—that's the nature of a class action. But it pales in comparison to the labor of conducting hundreds of individual trials. *See, e.g.*, *Klay*, 382 F.3d at 1270 ("Holding separate trials for claims that could be tried together would be costly, inefficient, and would burden the court system . . . ."). "If class actions could be defeated because membership was difficult to ascertain at the class certification stage, there would be no such thing as a . . . class action." *Astiana v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D. Cal. 2013). Plaintiffs' method is

well within the bounds of what courts in this circuit have allowed in other class cases, and enormous resources would be saved by proceeding as a class action rather than as many hundreds of individual trials.

D. Plaintiffs' Search for "Commuted To Days" in ProbationTracker Is an Effective Method of Identifying Pre-Benchmark Class Members

Plaintiffs have previously described how pre-Benchmark-era class members can be identified by searching for notations of "commuted to days" in their ProbationTracker Case File Reports following a JCS Petition for Revocation on those probations. See C 307 at 37; C 312 at 14–15.

JCS argues that this method leads to over-inclusive results, but misunderstands several key points. *See* C 322 at 28–29. First, JCS fails to acknowledge that in *every* case where *Plaintiffs* identified a class member through a ProbationTracker Case File Report entry of "commuted to days," the Case File Report shows the entry was preceded by a JCS-generated Petition for Revocation for that probation: there is clear evidence that JCS had already taken the necessary steps to initiate the revocation. C 308-1 ¶ 24.

Second, JCS incorrectly claims that the first several entries in Plaintiffs' exhibit showing "commuted to days" in ProbationTracker Case File Reports either show the entries were not for a JCS-related offense or that the entry is "ambiguous as to whether fines for JCS-supervised offenses or fines for new non-JCS charges were the subject of the commutations." *See* C 322 at 29. But JCS is wrong—commutation was a process where *overdue* fines were converted to jail time, not a process where fines were converted to jail in a new sentence. *See, e.g.*, C 73-2 at 12:11–14:7; C 308-3 at 2. That fact, coupled with the fact that the commuted-to-days entry appears in the JCS ProbationTracker file, shows the commutation is connected to the JCS fine—not the new charge for which a fine had just been imposed.

There is nothing ambiguous about the ProbationTracker entries JCS flags in its opposition brief. *See* C 322 at 29. "ARRESTED ON NEW CHARGES AND TIME COMMUTED TO DAYS" documents the standard practice of the Montgomery Municipal Court. If a probationer was arrested and brought before the court for sentencing on a new charge while there was an open warrant on older cases with a JCS Petition for Revocation, the court would give the probationer a chance to pay the balance *on the older cases* and commute the unpaid balance *on that older cases* to jail if the probationer could not make a sufficient payment. This happened all the time, as amply shown in the Benchmark era: A single Jail Transcript often shows both the disposition of new charges and commutations of past-due fines, as with Carter, meaning both cases were addressed at the same hearing. *See, e.g.*, C 308-3 at 2.[41]

Third, for reasons unclear, JCS includes in its argument in a lengthy footnote a list of nine JCS probationers who were on a list of possible class members Carter produced in 2017 based on ProbationTracker codes not relevant to the current method of ascertaining class members. C 322 at 28 n.20. This list was generated long before Plaintiffs had the benefit of additional discovery in 2019 and nearly three years before Rubens began implementing the current method in July 2020. Because the list of potential class members in JCS's footnote is

[41] The remaining two entries JCS cites on page 29 are even clearer. JCS's second example of a supposedly ambiguous entry is, incredibly, "DEFENDANT APPEARED IN COURT FROM JAIL ON NEW CHARGES. DEF'S CASE WITH JCS HAS BEEN COMMUTED TO DAYS." There is no serious debate that the JCS case was commuted. It says so outright. And Plaintiffs' review confirmed that the commutation followed a JCS-issued Petition for Revocation, as in the Benchmark era. JCS's third example is based on a misreading of the entry—JCS quoted only the first half. The full entry is "DEF APPEARED IN COURT AND IS CURRENTLY INCARCARCERATED IN THE CITY JAIL. JUDGE KNIGHT ADDRESSED HIS FINES WHICH IS IN WARRANT STATUS AND WAS COMMUTED TO DAYS." C 308-8 at 1. After the defendant was brought in on new charges, the municipal court judge commuted past-due fines (for which a warrant had been issued) into commuted days in jail, just as they are clearly shown to have done many hundreds of times through the complete Benchmark records. There is no other plausible scenario, and JCS has offered no more than empty speculation that something else—rather than a pattern visible hundreds of times over—just might have happened.

irrelevant to Plaintiffs' current method, Plaintiffs will spare the Court a point-by-point, document-supported discussion of the errors in the "summary" JCS provides for each probationer in the table, but Plaintiffs will be prepared to discuss the specifics in more detail at the hearing if the Court has any concerns.

In reviewing JCS probationers' ProbationTracker Case File Reports that include the "commuted to days" notation, Plaintiffs have encountered one particular scenario where the notation might appear without indicating class membership: in a handful of cases, the Montgomery Municipal Court commuted a JCS-supervised case to days in jail and then let that sentence run concurrently with a sentence of confinement in a more serious crime for which the probationer was serving a lengthy term in jail. Fortunately, it will be simple to remove these few probationers from the Classes, because, as JCS acknowledges in the entries for Neco Bailey and Anthony Means in footnote 20 of its brief, the ProbationTracker Case File Reports contain multiple indications that the sentences ran concurrently with another term of confinement. *See* C 324-8 at 2–3.

E. JCS's Argument That It is Impossible to Distinguish Between JCS-Related Commutations and Others Fails.

JCS argues in three separate sections in its brief that it Plaintiffs cannot figure out which commutations relate to JCS and which do not. JCS was wrong with respect to the examples it raised when discussing *Bearden* and False Imprisonment. Those are addressed in § I.E.2 above. JCS's argument fares no better with respect to ascertainability. *See* C 322 at 30–36. JCS's first two examples in its ascertainability section, Carter and Jones, are also addressed above in § I.E.2. JCS points to a third example, Christopher Mooney, and argues that it appears his fines were not commuted because his Jail Transcript "only has 'commuted on' next to various dollar amounts and offenses," with no notation of "days" next to the word "commuted." C 322 at 35. But as JCS

knows perfectly well, having now litigated this case for five years, the notation on Mooney's Jail Transcript is what appears appears—time and again—when fines are commuted to days in jail. *See, e.g.*, C 308-3 at 2. JCS also rehashes an argument it made earlier concerning an obvious clerical error concerning Mooney's Order of Release. Plaintiffs have fully responded to that issue in an earlier brief and incorporate that response here. C ECF 312 at 15–17.

F. Plaintiffs Are Not Required to Identify Each Member as a Prerequisite to Certification

It is black letter law that plaintiffs need not identify each class member at the certification stage. 1 *Newberg on Class Actions* § 3.3 (5th ed. 2014); Manual for Complex Litigation § 21.222 (4th ed. 2004); *see also* C 307 at 33; C 312 at 10–11. After all, Rule 23 requires that classes be "ascertain*able*," *see DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (emphasis added), not that they have already been ascertained.

JCS attempts to recharacterize the controversial administrative feasibility requirement as an "'identification' component of ascertainability" that obliges plaintiffs to identify all class members *prior to certification*. C 322 at 22, 25. That is unambiguously wrong, regardless of whether a court uses the heightened ascertainability standard. Even the cases JCS cites undermine its position. In *Carrera v. Bayer Corp.*, for example, the Third Circuit explicitly noted that "[a]lthough some evidence used to satisfy ascertainability, such as corporate records, will actually identify class members at the certification stage, ascertainability only requires the plaintiff to show that class members *can be* identified." 727 F.3d 300, 308 n.2 (3d Cir. 2013) (emphasis added); *see also Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 950 (11th Cir. 2015) (unpublished) ("[A] plaintiff establishes Rule 23's implicit ascertainability requirement by proposing an administratively feasible method by which class members *can be* identified.") (emphasis added). Since *Carrera*, the Third Circuit has explicitly reaffirmed that "a plaintiff

need not be able to identify all class members at class certification." *Hargrove*, 974 F.3d at 470.

In sum, while Plaintiffs are not required to identify every member of their Classes prior to certification, the methods used by Rubens to match Defendants' records are robust and would satisfy even the most demanding feasibility standard.

G. Plaintiffs Will Provide Direct Notice to Members of the Classes.

Defendants assert that Rule 23 requires "individual" notice to members of the Classes (C 322 at 25), but that is incorrect. The rule provides: "[T]he court must direct to class members the best notice *that is practicable under the circumstances*, including individual notice to all members *who can be identified through reasonable effort*." Fed. R. Civ. P. 23(c)(2)(B) (emphasis added). It then goes on to state that "notice may be by *one or more* of the following: United States mail, electronic means, *or other appropriate means*." *Id*. (emphasis added).

Plaintiffs have proposed sending notice directly via First Class mail to all members of the Classes who are identified by the time notice issues. C 307 at 64. If some members remain unidentified at that time, Plaintiffs have also proposed issuing notice by publication "in a local paper, through targeted internet postings, or on a website" that includes key case documents. *Id*. Plaintiffs have cited authorities in support of this plan, but Defendants ignore both the authorities and Plaintiffs' proposals. *See* C 322 at 25. Instead, Defendants assert that "[n]otices can't be sent to an overinclusive class," but the authorities on which Defendants rely do not stand for that proposition. *Id*. Indeed, if it were true, publication notice would never be allowed, for a notice posted in the back of USA Today or some other publication will inevitably be seen by people who are not members of the class. The concern raised in those cases is whether there is a way to verify a person's self-identification as a class member. And here there is: Defendants' records.

IV. DEFENDANTS' REMAINING ARGUMENTS ARE MERITLESS.

A. *Rooker-Feldman* Does Not Bar Plaintiffs' Claims.

Defendants again invoke the *Rooker-Feldman* doctrine to question this Court's subject matter jurisdiction. But for the reasons discussed in this Court's previous orders (C 206 at 1 n.1; C 296 at 17–18; M 131 at 7) and those discussed below, the doctrine presents no impediment to certifying the classes.[42]

As a threshold matter, JCS takes out of context a statement this Court made about *Rooker-Feldman* in its summary judgment decision, where it noted that Carter's § 1983 claims "rest on" the Municipal Court's judgment in the sense that but for that conviction and sentence, Carter would never have crossed paths with JCS in the first place. C 296 at 17. JCS tries to recast this statement as one of causation, C 322 at 13–14, but it was a statement of chronology. Plaintiffs do not allege their convictions were unlawful or that those convictions caused their injuries—they allege Defendants' actions did. Beyond this fundamental misinterpretation, Defendants' *Rooker-Feldman* arguments fail for three reasons: (1) the abuse-of-process claims presume the validity of the probation orders. And as for the *Bearden* and false imprisonment claims, (2) neither the § 1983 nor the false imprisonment claims is "inextricably intertwined" with the Municipal Court's commutation decisions but arise from the independent actions of the defendants; and (3) Plaintiffs lacked a reasonable opportunity to raise those claims in the state court proceedings.

1. The abuse of process claims presume the validity of the probation orders.

As JCS concedes in its brief, Plaintiffs' abuse-of-process claim is "logically incompatible with the *Rooker-Feldman* doctrine." C 322 at 18. First, Plaintiffs' abuse-of-process claim does not challenge the issuance or validity of the probation orders, nor does it seek to overturn them.

[42] Plaintiffs incorporate their arguments on *Rooker-Feldman* made earlier in this case.

The very premise of Plaintiffs' abuse-of-process claim is that JCS abused *validly issued* probation orders to achieve a collateral purpose. Because the claim "assume[s] that the Municipal Court's orders are valid," C 296 at 17, it does not implicate *Rooker-Feldman*.

Second, Plaintiffs' abuse-of-process claim, by definition, arose *after* issuance of the probation orders. "[I]t's difficult to imagine a case where a federal court could be barred by *Rooker-Feldman* from hearing a claim that arose only after the relevant state court decision had been issued." *Target Media Partners v. Specialty Mktg. Corp.*, 881 F.3d 1279, 1286 (11th Cir. 2018). The question whether JCS abused the probation orders "did not figure, and could not reasonably have figured, in the state court's decision" to issue the orders. *Id.* at 1287 (quoting *Wood v. Orange Cty*., 715 F.2d 1543, 1547 (11th Cir. 1983)). Therefore, *Rooker-Feldman* does not bar a claim that JCS abused the probation orders for its profit.

Thurman v. Judicial Correction Services, 760 F. App'x 733 (11th Cir. 2017), is not controlling. There the plaintiffs directly attacked the probation orders by asking the federal court to deem them invalid and rule that the fees they allowed constituted unjust enrichment to JCS. *Id.* at 737. In this case, however, Plaintiffs do not challenge the probation orders, nor does the Abuse of Process Class definition include those who paid in accordance with their terms. Rather, Plaintiffs contend that when they could not afford to pay the full amount specified in the probation orders, JCS abused those orders to misdirect Plaintiffs' limited funds towards its own profit.

At trial, the jury will have to determine based on the common evidence presented whether JCS's actions aligned with the probation orders or constituted an abuse of process. But regardless of the outcome, *Rooker-Feldman* does not bar a merits determination of the claim.

2. The Bearden and false imprisonment claims seek damages from independent actors, not review or rejection of Municipal Court commutations.

Rooker-Feldman only deprives federal courts of jurisdiction over claims that "invit[e] district court review and rejection" of earlier state court judgments. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). Such invitations for review can be direct, as when the plaintiff asks a federal court to reverse the state court, or they can involve a claim "inextricably intertwined" with a state court judgment. *Casale v. Tillman*, 558 F.3d 1258, 1260 (11th Cir. 2009). This "inextricable intertwining" can occur in one of two ways: when the claim would "effectively nullify" the state court judgment, or when it "succeeds only to the extent that the state court wrongly decided the issues." *Id.* Neither form of intertwining is present here.

First, the commutations were not even "judgments" as a matter of Alabama criminal procedure, see part C *infra*. And second, success on the *Bearden* and false imprisonment claims would not effectively nullify them. This is not a case like *Alvarez v. Attorney Gen. for Fla.*, 679 F.3d 1257, 1263–64 (11th Cir. 2012), where the plaintiff alleged that his injuries flowed from a state court decision and sought in federal court access to the evidence the state court had denied him. Here, Plaintiffs' theories of liability turn on wrongful acts of others besides the Municipal Court judges, and Plaintiffs seek damages from those independent wrongdoers.

This case is more like *Nivia v. Nation Star Mortg., LLC*, 620 Fed. Appx. 822, 824 (11th Cir. 2015), where the Eleventh Circuit found that *Rooker-Feldman* did not bar federal claims against mortgage lenders because the plaintiffs sought damages from the lenders rather than an invalidation of the state-court foreclosure. *See also Hageman v. Barton*, 817 F.3d 611, 616 (8th Cir. 2016) (*Rooker-Feldman* not implicated where federal complaint sought "statutory penalties" for alleged unlawful conduct of defendant "in the process of obtaining the judgment"); *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 94–95 (2d Cir. 2015) (*Rooker-Feldman* not

applicable where plaintiffs sought damages for fraud and did not challenge the "propriety of the state court judgments"). As in *Nivia*, *Hageman* and *Sykes*, parties besides the Municipal Court judges—namely, the City and JCS—caused the injuries for which Plaintiffs and the Class members here are seeking relief. That relief will not disturb the commutations in any way.

Nor does success on these claims depend on the Municipal Court having reached the wrong conclusion on any particular commutation. *See Target Media*, 881 F.3d at 1287 (inextricable intertwining only occurs when a "determination made by the state court would have to be relitigated in federal court"). The crux of the § 1983 and false imprisonment claims is that Defendants' actions caused class members to be jailed without a proper *Bearden* hearing. Whether the Municipal Court made the right or wrong commutation decision in any particular case is irrelevant to the allegations of systemic misconduct by Defendants.

3. Plaintiffs had no reasonable opportunity to pursue these claims in state court.

The Eleventh Circuit has repeatedly held that *Rooker-Feldman* does not divest the federal courts of jurisdiction over claims that the plaintiff had no reasonable opportunity to raise in the state court proceedings. *Target Media*, 881 F.3d at 1285 (citing *Casale*, 558 F.3d at 1260); *Wood*, 715 F.2d at 1547 ("[A]n issue that a plaintiff had no reasonable opportunity to raise cannot properly be regarded as part of the state case.").

Here, the only municipal court action the Plaintiffs and Class members could challenge in the state court proceedings was the underlying judgment of conviction and the resulting sentence. Judgments are appealable within 14 days after entry or denial of a timely post-judgment motion. Ala. Code § 12-14-70(c); Ala. R. Crim. P. 30.1(a). A defendant can seek modification of a sentence within 30 days of its imposition. *Dixon v. State*, 920 So. 2d 1122, 1127–28 (Ala. Crim. App. 2005). A commutation decision is not a "judgment." Ala. R. Crim. P. 26.1(a)(1)

("'Judgment' means the adjudication of the court . . . that the defendant is guilty or not guilty.")

When Municipal Court judges commuted fines to jail time, they did not enter a new "judgment" within the meaning of Rules 26.1 and 30.1, nor did they impose a new sentence subject to a new 30-day review period. Rather, as Judge Hayes explained in a deposition, they simply applied a formula to convert dollars owed into days in jail. M 246-6 at 18:15–20. The Jail Transcripts reflect the ministerial nature of this act, for the clerk's entries show the math by which they derived the number of days of incarceration from the amount of money owed. *See, e.g.*, C 324-4; M 252-28.

In Alabama "[t]he right of appeal is wholly statutory and is authorized in criminal cases [only] for a judgment of conviction." *Dixon v. City of Mobile*, 859 So. 2d 462, 463 (Ala. Crim. App. 2003). An appeal can only be taken from an order subsequent to the judgment of conviction if a statute specifically authorizes it, and all statutes authorizing appeals are "strictly construed." *Id.* (quoting *Wood v. City of Birmingham*, 380 So. 2d 394, 396 (Ala. Crim. App. 1980) (strictly construing the 14-day appeal period of Ala. Code § 12-14-70)). Defendants point to no statutory basis for Plaintiffs to challenge their commutations in state court besides Ala. Code § 12-14-70. C 320 at 27; M 294 at 27; C 322 at 13 n.7; M 296 at 13 n.7. And given the relatively short durations of incarceration often resulting from these commutations, by the time set for the circuit court to hear any appeal, if allowed, it could be moot. *Morrison v. Mullins*, 154 So. 2d 16, 18 (Ala. 1963) (appeal dismissed as moot if intervening event, like release from jail, makes it "impossible for the appellate court to grant effectual relief").

By the time Plaintiffs' fines were commuted to jail time, months or years after conviction, the ability to appeal their original convictions and sentences had long since expired. Plaintiffs therefore had no opportunity to seek direct review of the commutation decisions.

Wood, 715 F.2d at 1548 (plaintiffs had no reasonable opportunity to raise claim on appeal when they did not even learn of judgment until months after appeal deadline had passed).[43] And as for collateral attacks such as mandamus or a petition under Ala. R. Crim. Proc. 32, the Eleventh Circuit has held that "*Rooker* is not a requirement that the plaintiff exhaust all conceivable state remedies." *Wood*, 715 F.3d at 1548; *Biddulph v. Mortham*, 89 F.3d 1491, 1495 n.1 (11th Cir. 1996) (*Rooker-Feldman* does not apply to mandamus decisions because of high bar to relief) (applying Florida law); *Ex parte Horton*, 711 So. 2d 979, 983 (Ala. 1998) (similar high standard for mandamus in Alabama).

Plaintiffs and members of the Classes could not raise § 1983 and false imprisonment claims on direct appeals of their convictions and sentences based on *Bearden* violations that had yet to occur. *Target Media*, 881 F.3d at 1287 ("An allegedly tortious act occurring long after the state court rendered its judgment cannot be barred by *Rooker-Feldman*."). Nor did they have a reasonable opportunity to challenge the lack of adequate *Bearden* hearings in state court after the fact, either on direct appeal or otherwise. Accordingly, *Rooker-Feldman* does not bar this Court's consideration of the class claims.

[43] Nor does the form that a defendant must use to file a notice of appeal under Ala. Code § 12-14-70 suggest that it may be used to challenge a commutation. Ex. 9 (A Notice of Appeal from the Montgomery Municipal Court, referring to an appeal for "trial de novo" from "final judgment of conviction adjudging the defendant to be guilty of the offense"). And that form presents another roadblock to inhibit a probationer incarcerated because of an inability to pay fines, even if that person otherwise believed the commutation decision to be appealable: reference to an appeal bond in the amount of up to $1,000 or twice the fines and costs that they had been jailed for not paying, due to remain in place "until the undersigned are duly exonerated." *Id.* While the very bottom of this fee waiver form includes a line designating "waived," the form provides no information about how to request waiver of the bond based on indigency. A lawyer might know that indigency-based waivers can be requested from the municipal court under Ala. Code § 12-14-70(c), but class members were unlikely to receive such key information from counsel. C-265-1 at 163:1–11, 176:6–11.

B. There Are No Issues Regarding Statutes of Limitations.

Defendants offer assorted grounds for the assertion that each of Plaintiffs' claims involves "individualized statute of limitations issues" that preclude class certification. C 322 at 102–05; M 296 at 102–05. None has merit.

First, as to Plaintiffs' *Bearden* and false imprisonment claims, Defendants argue that Plaintiffs' claims accrued "[w]hen the probationer knew or should have known that JCS had commenced a revocation proceeding" and that this is "an individual question." *Id.* at 103. Defendants misunderstand the nature of Plaintiffs' alleged injury. A claim accrues "when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Wallace v. Kato*, 549 U.S. 384, 388 (2007). Plaintiffs were injured *not* when JCS sought revocation of their probation, but when they were jailed. And Plaintiffs could not have filed suit to obtain relief from that injury until after they had been jailed. *See id.* at 389–90 (§ 1983 claims analogized to false imprisonment do not begin to accrue until after the "false imprisonment came to an end"); *Locker v. City of St. Florian*, 989 So. 2d 546, 550 (Ala. Civ. App. 2008) (plaintiff could maintain false imprisonment claim "on the date of his . . . imprisonment"); *cf. Lawson v. Shelby County*, 211 F.3d 331 (6th Cir. 2000) (in voting rights suit, claim did not accrue when plaintiffs' voter registrations were denied but when "presented themselves at their polling station and were refused the right to vote").

There is no issue with the six-year statute of limitations in the false imprisonment claims because that stretches back to earliest JCS-related jailings in Montgomery. And it is simple to determine when *Bearden* class members were each jailed and released using Rubens's method, as shown in detail in Section I.E.2 above. Accordingly, no statute of limitations defense requires individual inquiry. And "even if some of the class members were threatened with a potential statute of limitations defense, that problem would not necessarily defeat the availability of a class

action suit." *Kennedy v. Tallant*, 710 F.2d 711, 718 (11th Cir. 1983). Rather, "[c]ourts consistently hold . . . that the statute of limitations does not bar class certification, even when individual issues are certain to exist." *In re Checking Account Overdraft Litig.*, 307 F.R.D. 630, 651 (S.D. Fla. 2015). Thus, there are no individualized statute of limitations issues with respect to Plaintiffs' *Bearden* or false imprisonment claims that could defeat class certification.[44]

As for Plaintiffs' abuse of process claim, that too fails to raise the kind of individualized statute of limitations issues that would defeat predominance. This Court already held on summary judgment that the continuing violations doctrine applies to Plaintiffs' claims, and it held that class claims are available to those whom JCS harmed after July 1, 2013. M 269 at 21. Plaintiffs' proposed definition for the abuse of process class incorporates this holding, limiting the class to those "from whom JCS continued to collect or attempt to collect after July 1, 2013." Under this definition, probationers cannot be class members if they are merely suffering the present effects of a harm inflicted before the statute of limitations period. Moreover, because class membership is based on information contained in ProbationTracker, class members are easily ascertainable. M 283-1 ¶¶ 29–32.

C. Plaintiffs Have Properly Responded to Discovery, and JCS's Arguments to the Contrary Do Not Defeat Certification.

As described more fully in Plaintiffs' Response to Defendants' Motion to Exclude Portions of Plaintiffs' Declarations, M 312, and the filings referenced therein, Plaintiffs have each responded in detail to extensive discovery requests, have provided all documents within

[44] JCS's confusion over the correct accrual date also infects its argument that "[t]he continuing violation doctrine only reinforces the problem." C 322 at 104. Again, Plaintiffs' claims began to accrue only after they were unlawfully jailed. That JCS's contact with Plaintiffs ended before this date is precisely how the continuing violations doctrine works. As the Court explained, the doctrine allows "[t]he statute of limitations . . . [to] be extended if the defendant engages in a pattern of unlawful conduct." C 296 at 41. To the extent that JCS disputes that it—along with the City and Kloess—was engaged in such a pattern of unlawful conduct, that is an argument for reconsideration of the Court's prior order and is not relevant to class certification.

their possession, custody and control, have sat for many hours of depositions, and have not objected to the more than 100 third party subpoenas JCS issued in an invasive attempt to uncover every detail of Plaintiffs' personal lives. Plaintiffs have complied fully with their discovery obligations, and they are more than adequate class representatives.

CONCLUSION

Respectfully submitted this December 4, 2020,

s/ Leslie A. Bailey

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December 2020, I electronically filed the foregoing PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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Addendum – *Carter* and *McCullough* class definitions

Carter	**Definition**	***McCullough***
City Class (*Bearden* & 6A)	All individuals the Montgomery Municipal Court 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 August 3, 2013 (*Carter*)/July 1, 2013 (*McCullough*).	***Bearden* Class –** (JCS & City)
JCS *Bearden* Subclass	All individuals in the City Class who served any of their post-commutation jail time on or after September 11, 2013 (*Carter*)/July 1, 2013 (*McCullough*).	
Kloess Subclass (*Bearden* & 6A)	All individuals in the City 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 Benchmark court records or other documents indicate the individuals were represented by Branch Kloess for the commutation.	N/A
False Imprisonment Class (JCS)	All individuals the Montgomery Municipal Court 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 September 11, 2009 (*Carter*)/July 1, 2009 (*McCullough*).	**False Imprisonment Class** (JCS)
N/A	All individuals the Montgomery Municipal Court 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.	**Abuse of Process Class** (JCS)