UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

Margery Freida Mock and Eric Scott Ogden, Jr., *individually and on behalf of those similarly situated*, Plaintiffs, v. Glynn County, Georgia; E. Neal Jump, Glynn County Sheriff; Alex Atwood, Glynn County Magistrate Judge; and B. Reid Zeh, III, Glynn County Misdemeanor Public Defender; Defendants.	Case No. (Class Action)

MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

Plaintiffs propose a class action to challenge Defendants' operation of a two-tiered, wealth-based pretrial detention system that keeps poor arrestees in jail without legal representation, while allowing wealthy arrestees the opportunity to pay for their freedom and hire an attorney. Plaintiff Margery Freida Mock was arrested and charged with criminal trespass on March 7, 2018. Pursuant to the bail schedule used by Glynn County, Ms. Mock's bail was automatically set at $1,256, an amount she cannot afford. Because she cannot afford this bail amount, Ms. Mock remains in jail. Plaintiff Eric "Scotty" Ogden, Jr., was arrested and charged with criminal trespass on March 7, 2018, and remains incarcerated because he cannot afford the $1,256 bail requirement instantly set in his case upon booking.

Plaintiffs are misdemeanor arrestees who cannot afford to pay the secured money bail that Glynn County; E. Neal Jump, Glynn County Sheriff; and Alex Atwood, Glynn County

Magistrate Judge require for their release. They also qualify for public defense representation, yet remain without the aid of counsel due to the inadequate appointment procedures enforced by the County and B. Reid Zeh, Glynn County Misdemeanor Public Defender. Plaintiffs are therefore being detained solely due to their lack of wealth and without the procedural protections required by the Constitution prior to incarcerating an individual before trial. Conditioning pretrial freedom on the ability to pay a money bail amount—as Defendants Glynn County, Jump, and Atwood do—that is set without a prompt release hearing, inquiry into or findings concerning ability to pay, or any consideration of nonmonetary alternative conditions of release violates Fourteenth Amendment principles of equal protection and due process, as Plaintiffs set forth in Claims 1 (Equal Protection and Due Process) and 2 (Due Process). Further, Defendants Glynn County and Attorney Zeh unreasonably delay the appointment of counsel to indigent misdemeanor arrestees during early, critical stages of their cases, in violation of their right to counsel under the Sixth Amendment and the Equal Protection and Due Process clauses of the Fourteenth Amendment, as Plaintiffs set forth in Claims 3 (Sixth Amendment) and 4 (Equal Protection and Due Process).

Plaintiffs request that this Court certify two classes, the "Bail Class" and a subclass, the "Counsel Class," under Rule 23(b)(2) to facilitate the fair and efficient litigation of this case. Alternatively, to the extent there are contested facts regarding certification, Plaintiffs request that this Court grant leave for the parties to conduct discovery.

II. PROPOSED CLASS

Named Plaintiffs seek to represent a class of individuals (the "Bail Class") to obtain declaratory and injunctive relief requiring Defendants Glynn County, Atwood, and Jump to end their wealth-based pretrial detention and to require all Defendants to provide true, individualized bail determinations. The Bail Class shall be defined as misdemeanor arrestees in Glynn County

who have been or will be detained because they are unable to pay an amount of bail required by Defendants for their release.

Named Plaintiffs seek to represent a subclass (the "Counsel Class") seeking declaratory and injunctive relief from Defendants Glynn County and Zeh's delay in the appointment of counsel to those who cannot afford to hire private counsel. The Counsel Class shall be defined as all arrestees facing a misdemeanor charge in Glynn County whose maximum income is 100 percent of the federal poverty guidelines or less[1] and thus qualify for a public defender.

III. STATEMENT OF FACTS

Defendants are operating a two-tiered pretrial justice system. Defendants condition an arrestee's liberty on their ability to make an upfront, or secured, payment of money bail.[2] Defendants typically predetermine the amount of secured money bail an arrestee must pay with a schedule, written by Defendant Judge Atwood and enforced by Defendant Sheriff Jump, which specifies a monetary amount based solely on the criminal charge.[3] A person arrested in Glynn County on a misdemeanor charge who can afford to pay the preset bail amount is immediately eligible for release from jail upon payment; while, those arrestees who cannot afford the monetary amount remain in jail. They are not brought to court until a rote proceeding, informally referred to in Glynn County as "rights read," at which Atwood briefly interviews arrestees and informs them of certain rights including their right to a jury trial and their right

[1] *See* Ga. Code Ann. §17-12-2.

[2] Money bail takes two primary forms: secured and unsecured. Secured bond is required in full and upfront in order for an individual to be released and is forfeited in the event of a failure to appear. Unsecured bond is not required for release, but upon a missed court appearance, an individual becomes liable for the full amount.

[3] Persons accused of misdemeanor offenses involving family violence are not included on the bail schedule, but must wait to have their bail amount set by a judge at the same proceeding all arrestees receive, known as "rights read." Persons accused of misdemeanor offenses involving family violence, like all persons accused of misdemeanors, have a right to bail and are detained if they cannot afford the bail amount set. *See* Ga. Code Ann. §17-6-1(b)(2)(B).

against self-incrimination. Typically, at the "rights read" proceeding, Atwood merely confirms the "standard" bail set in the schedule. The "rights read" proceeding is not a true hearing, let alone an adversarial hearing: arrestees are not provided counsel, nor are they allowed to present witnesses or other evidence, make arguments for their release, or cross-examine government witnesses. At "rights read," Atwood considers neither the arrestees' ability to pay the bail amount that he sets nor the possibility of imposing less restrictive alternatives to secured money bail.

Defendants' two-tiered pretrial system extends to the provision of counsel for the indigent. Misdemeanor arrestees who cannot afford counsel are denied access to appointed counsel for critical functions such as arguing for pretrial release, securing witnesses for a bail determination, or filing motions for bond reductions. Defendant Attorney Zeh—who is tasked with representing all indigent misdemeanor arrestees, including screening clients, responding to requests for his representation, and entering an appearance in criminal cases—has a well-established custom of not visiting incarcerated prospective clients or filing motions for bail reduction in their cases. Instead, he appears on their behalf for the first time when they are brought to court for a weekly hearing to determine whether they will plead guilty ("jail pleas"). As discussed in the Complaint, whether an arrestee proceeds to the monthly arraignment before their bail is examined at "rights read," or before they plead guilty at a weekly hearing, depends largely on chance. Doc. No. 1, p. 10, ¶ 39. As a result, many if not most arrestees do not receive a meaningful advisement of their right to counsel until the moment of entering a guilty plea, which contributes to the difficulty *all* indigent misdemeanor arrestees experience in vindicating that right. Thus, people accused of misdemeanors in Glynn County who cannot afford to hire private counsel receive no pretrial process to speak of, save pleading guilty and facing sentencing.

As a result of the Defendants' pretrial system, indigent misdemeanor arrestees may remain in jail for weeks, even months, without being afforded an individualized adversarial hearing with the assistance of counsel to argue for their release.

IV. ARGUMENT

The proposed Bail Class challenges Defendants' wealth-based pretrial detention scheme, in which arrestees are routinely jailed without a determination that they can afford a preset monetary bail, without consideration of nonfinancial conditions of release, and without the procedural protections required of a valid order of detention. The proposed Counsel Class challenges Defendants' policy of unreasonably delaying the appointment of indigent defense counsel in violation of the Sixth and Fourteenth Amendments. Addressing these common issues with respect to each class is superior to the piecemeal litigation of individual claims.

As set forth below, the requirements provided by Federal Rule of Civil Procedure 23(a) and 23(b)(2) are met with respect to both proposed classes. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997). Both classes satisfy the numerosity, commonality, typicality, and adequacy prongs of Rule 23(a). Moreover, Rule 23(b)(2) permits class certification in cases where, as here, "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2). Accordingly, Plaintiffs respectfully request this Court certify the Bail Class and the Counsel Class.

A. Both Proposed Classes Satisfy All Four Requirements Under Rule 23(a)

The fundamental requirements for class certification set forth in Fed. R. Civ. P. 23(a) provide for certification where: (1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims

or defenses of the class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class ("adequacy of representation"). As explained below, Plaintiffs satisfy all four requirements.

1. Numerosity

The numerosity requirement of Rule 23(a) is satisfied where the number of potential plaintiffs is "so numerous that joinder of all members" of the class would be "impracticable." Fed. R. Civ. P. 23(a)(l). "Practicability of joinder depends on many factors, including, for example, the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion." *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986). The proper focus of the numerosity inquiry "is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors." *Phillips v. Joint Legislative Comm. on Performance & Expenditure Review of State of Miss.*, 637 F.2d 1014, 1022 (5th Cir. Feb. 1981)[4], *cert. denied*, 456 U.S. 960, 102 S. Ct. 2035 (1982). "In determining whether the proposed class contains a sufficient number of members, the Court is permitted to 'make common sense assumptions in order to find support for numerosity.'" *Campos v. ChoicePoint, Inc.*, 237 F.R.D. 478, 485 (N.D. Ga. 2006) (quoting *Evans v. U.S. Pipe & Foundry*, 696 F.2d 925, 930 (11th Cir. 1983)).

There is no fixed size requirement to demonstrate numerosity, but "generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors." *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) (citations omitted); *see also Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999)

[4] The Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

(citing 1 Newberg on Class Actions § 3.05, at 3-25 (3d ed. 1992) for the proposition that a class of more than forty members "should raise a presumption that joinder is impracticable"). "A plaintiff need not show the precise number of members in the class," *Evans,* 696 F.2d at 930, but there must be some evidence or a reasonable estimate of the number of purported class members. *See Kilgo*, 789 F.2d at 878. Finally, "where the numerosity question is a close one, a balance should be struck in favor of a finding of numerosity, since the court has the option to decertify pursuant to Rule 23(c)(l)." *Evans*, 696 F.2d at 930.

a. Joinder of the Bail Class is Impracticable

With respect to the proposed Bail Class, the numerosity requirement is satisfied. Joinder of the proposed class members is impracticable due to (1) the size of the proposed class; (2) the fact that the class will contain future members; (3) the inherently transitory nature of claims challenging the constitutionality of pretrial detention; and (4) class members will generally not have the means to pursue their own legal actions.

First, as discussed in the attached Declaration of Erika Basurto, in collecting three months' worth of data, at least 122 people—or forty each month—were arrested for misdemeanors in Glynn County and incarcerated on pending charges. Basurto Decl. Of those 122, 74 did not post the preset money bail within two nights of their arrest, and 30 did not post bail, remaining incarcerated for seven nights or more. *Id.* This number easily satisfies the numerosity requirement as discussed in *Cox*, 784 F.2d at 1553.

Second, this number will almost certainly increase as additional people are arrested in the future and subjected to Defendants' wealth-based detention scheme. Absent injunctive relief, future Bail Class members will suffer the same injuries alleged by Plaintiffs. It is well established that, regardless of the size of the class, traditional joinder of future, unknown

members, is not practicable. *See Kilgo*, 789 F.2d at 878 (finding impracticability of non-class joinder for a class including future members, who necessarily could not yet be identified). In such cases, the numerosity requirement is generally satisfied because the putative class seeks declaratory and injunctive relief against an ongoing policy, a resolution will affect numerous people in the future, and the composition of the class is fluid and unknown. *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975) (granting liberal construction of numerosity prong in a case seeking injunctive relief on behalf of future class members because "[t]he general rule encouraging liberal construction of civil rights class actions applies with equal force to the numerosity requirement of Rule 23(a)(l)."); *see also* Newberg on Class Actions § 25:4 (4th Ed.) ("Even a small class of fewer than 10 actual members may be upheld if an indeterminate number of individuals are likely to become class members in the future or if the identity or location of many class members is unknown for good cause.").

Third, joinder is impracticable because membership in the proposed Bail Class is inherently transitory. All members challenge Defendants' procedures that result in their wealth-based detention prior to trial. As the Supreme Court explained in *Gerstein v. Pugh*, "[p]retrial detention is by nature temporary." 420 U.S. 103, 110-11 n.11 (1975). In addressing the question of mootness for inherently transitory classes, the Court in *Gerstein* stated, "[i]t is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough" to adjudicate her personal claims for injunctive relief, a fate likely to befall most members of the proposed Bail Class. *Id.* Concern that "the transitory nature of the conduct giving rise to the suit would effectively insulate defendants' conduct from review," supports a determination that joinder is impracticable in this case. *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 76 (2013). Given Defendants' practice of continually arresting people for misdemeanors and requiring secured money bail, "this case is particularly suitable for class certification since Plaintiffs' claims are 'inherently transitory' yet there is a 'constant class of persons suffering'

from the conduct." *Hughes v. Judd*, No. 8:12-CV-568-T-23MAP, 2013 WL 1821077, at *21 (M.D. Fla. Mar. 27, 2013).

Finally, joinder is impracticable because the proposed class members will lack the financial resources to initiate individual lawsuits and are therefore unlikely to bring litigation on their own. *See, e.g., Jackson* v. *Foley*, 156 F.R.D. 538, 541-42 (E.D.N.Y. 1994) (finding joinder impracticable where the majority of class members came from low-income households, greatly decreasing their ability to bring individual lawsuits); *Sherman v. Griepentrog*, 775 F. Supp. 1383, 1389 (D. Nev. 1991) (holding that joinder was impracticable because the proposed class consisted of poor and elderly or disabled people who could not bring individual lawsuits without hardship).

For all the above-stated reasons, the numerosity requirement of Rule 23(a)(1) is satisfied with respect to the proposed Bail Class.

b. Joinder of the Counsel Class is Impracticable

The proposed Counsel Class also satisfies the numerosity requirement. Similar to the Bail Class, joinder of the Counsel Class members is impracticable due to (1) the size of the proposed class; (2) the fact that the class will contain future members; (3) the inherently transitory nature of claims challenging access to counsel when pretrial detention or release is assessed; and (4) class members are unlikely to have the means to pursue litigation on their own.

First, it is reasonable to conclude that the putative Counsel Class contains over forty members. While a precise count is difficult to obtain—given especially that the screening system for indigent defense lies solely in Defendant Attorney Zeh's control—every week in Glynn County dozens of people are brought before Defendant Judge Atwood for a "rights read" proceeding, many of whom are charged with misdemeanors. *See* Basurto Decl. Because "rights read" occurs approximately every-other day, the majority of the 74 persons who were

incarcerated for two or more nights—and unable to afford misdemeanor money bail—likely proceeded to "rights read" without counsel. *Id.*

Second, the proposed Counsel Class, like the proposed Bail Class, includes future members; so long as law enforcement officials in Glynn County continue to arrest indigent individuals for misdemeanor charges and administer the pretrial system in the same manner, the class will continue to increase in size. As discussed above, where a proposed class contains an unknown number of future members, joinder is particularly impracticable. *See Kilgo*, 789 F.2d at 878.

Third, the proposed Counsel Class brings claims related to a nearly-identical portion of the pretrial process—specifically, the period of time between arrest and resolution of a misdemeanor case—as those brought by the proposed Bail Class. This presents a short window of time during which the Counsel Class members' injuries are manifested. The transitory nature of the Counsel Class Plaintiffs' claims renders joinder even more impracticable, thus supporting a finding of numerosity. *See Gerstein*, 420 U.S. at 110-11 n. 11; *Hughes*, 2013 WL 1821077, at *21.

Finally, as discussed above, joinder is impracticable because the proposed Counsel Class members—by definition—lack the financial resources to hire counsel to initiate individual lawsuits, and are therefore unlikely to initiate litigation on their own.

For all the above-stated reasons, the numerosity requirement of Rule 23(a)(1) is satisfied with respect to the proposed Counsel Class.

2. Commonality

This case also satisfies the requirement that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2); *see also Cox*, 784 F.2d 1557, *cert. denied,* 479 U.S. 883, 177-178 (1986) (determining that the commonality prerequisite does not require that "all of the questions of law or fact raised by the dispute be common" to all the plaintiffs). There are

questions of both law and fact common to both proposed classes that will find common answers through class-wide resolution. This case exemplifies the Supreme Court's explanation of commonality in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). In *Dukes*, the Court clarified that the existence of merely hypothetical common questions does not justify class treatment. *Id.* at 349-50. Rather, there must be common *answers* that resolve the factual or legal claims presented by the plaintiffs. *Id.* at 350. In this case, common answers to fundamental common questions of fact and law are dispositive in determining Defendants' liability to all class members.

Although there may be factual variations in some details of any proposed class member's underlying criminal case—for example differences in arrest charges—these differences do not defeat commonality. Despite any factual variations, Plaintiffs bring identical constitutional claims, which can be resolved "in one stroke." *Dukes*, 564 U.S. at 350. "[E]ven a single common question will do," so long as it "is of such a nature that it is capable of class-wide resolution" and the common questions "predominate." *Id.* at 350, 359. As each proposed class's claims rest on common questions of law and fact, the Court should certify both classes to avoid piecemeal litigation.

a. The Bail Class Satisfies Commonality

The claims raised by the proposed Bail Class members are independent of a given class member's specific arrest charges or even specific bail amount. Instead, the Bail Class claims are based primarily on the longstanding principle that a person cannot be jailed for prolonged periods of time simply because she cannot afford to pay a certain amount of money. To illustrate: if Defendants have a policy and practice of releasing only those arrestees who can afford a fixed monetary bail imposed on them while detaining those who cannot, then this litigation turns on whether Defendants' practice of detaining any pretrial arrestee who cannot afford to pay for their release from jail is unlawful. *See Walker v. City of Calhoun, Georgia*, No.

4:15-CV-170-HLM, 2016 WL 361580, at *6 (finding that the factual and legal questions surrounding city's bail policies and practices presented questions common to the entire class), *appeal docketed*, No. 17-13139 (11th Cir. July 13, 2017). Although there need only be common issues of law *or* fact under Rule 23(a), this case presents numerous issues of both law *and* fact that are common to the proposed Bail Class. Common questions of fact include the following:

(1) Whether Defendants Glynn County and Jump use a predetermined bail schedule created by Defendant Judge Atwood[5];

(2) Whether Jump releases arrestees from jail who pay the monetary amount required by the bail schedule and detains those who cannot;

(3) Whether Jump detains all individuals who are unable to pay the monetary amount required in their case regardless of whether an inquiry into their ability to pay has been made;

(4) Whether Atwood conducts individualized determinations and provides procedural protections, including counsel;

(5) Whether Atwood inquires into arrestee's ability to pay before setting bail; and

(6) Whether Atwood allows arrestee to present witnesses or argument demonstrating their suitability for release before setting bail.

Each of these factual questions relates to Defendants' post-arrest procedures for determining pretrial release in Glynn County for all members of the proposed Bail Class.

Similarly, there are numerous questions of law common to the proposed Bail Class, including:

(1) Whether enforcing a wealth-based pretrial detention system in which arrestees are jailed solely based on their ability to access money violates the Fourteenth Amendment's promise of equal protection;

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[5] *See* Ga. Code Ann. § 17-6-1(f)(1).

(2) Whether requiring a financial condition of pretrial release without inquiry into and findings concerning a person's ability to pay and without consideration of alternative conditions of release violates the Fourteenth Amendment;

(3) Whether requiring a person arrested for a misdemeanor offense to pay a monetary bail amount predetermined by a bail schedule is narrowly tailored to achieve the government's interests in securing a defendant's appearance in court or public safety, thus contravening substantive due process protections;

(4) Whether procedural due process requires individualized, adversarial hearings with counsel prior to pretrial detention on money bail; and

(5) Whether detention of arrestees on money bail they cannot afford requires justification by clear and convincing evidence supported by recorded findings of fact.

These common questions of law and fact predominate the Bail Class's claims. Accordingly, the Court should find the commonality requirement of Rule 23(a)(2).

b. The Counsel Class Satisfies Commonality

There are questions of both law and fact common to the proposed Counsel Class that will find common answers through class-wide resolution. As with the proposed Bail Class, common answers resolve the factual and legal claims presented by the Counsel Class members. *Dukes*, 564 U.S. at 350.

While, as with the proposed Bail Class, there may be individual variations in the cases of members of the proposed Counsel Class, these differences do not defeat a finding of commonality. *See Dukes*, 564 U.S. at 350. All members of the proposed Counsel Class suffer indefinite delays in the appointment of counsel that prevent them from asserting their fundamental right to pretrial liberty, in violation of their Sixth and Fourteenth Amendment rights to the assistance of counsel.

The answers to fundamental questions of fact and law common to the Counsel Class are dispositive in determining Defendants' liability to all proposed class members. In short, a determination as to whether equal protection, due process, and Sixth Amendment principles require indigent misdemeanor arrestees be provided counsel to advocate for the least restrictive bail determination will resolve all class claims with respect to all proposed Counsel Class members.

As discussed above, while there need only be common issues of law *or* fact under Rule 23(a), this case presents numerous issues of both law and fact that are common to the proposed class.

Common questions of fact include, but are not limited to:

(1) Whether and when indigent misdemeanor arrestees are informed of their right to counsel;

(2) Whether Defendant Zeh contacts indigent misdemeanor arrestees pursuant to their arrest, or whether Zeh's contact with indigent misdemeanor arrestees occurs pursuant to their reaching out to his office;

(3) What is the mean and median delay between an indigent person's arrest for a misdemeanor charge and Zeh entering an appearance in their case;

(4) Whether Zeh unilaterally determines who is eligible for misdemeanor public defense services in Glynn County;

(5) Whether Zeh visits indigent misdemeanor arrestees in the Glynn County Detention Center;

(6) Whether Zeh represents indigent misdemeanor arrestees at "rights read" proceedings; and

(7) Whether Zeh files motions to modify or reduce bail on behalf of indigent misdemeanor arrestees.

Similarly, there are fundamental questions of law common to the proposed Counsel Class, including, but not limited to:

(1) Whether depriving indigent misdemeanor arrestees of the timely appointment of counsel in order to argue for their pretrial liberty, when individuals who can afford counsel are able to assert their right to pretrial liberty, violates the Fourteenth Amendment's Equal Protection Clause;

(2) Whether, under the facts of this case, a bail determination presents a "critical stage" for which counsel must be provided under the Sixth Amendment; and

(3) Whether delaying legal representation for indigent misdemeanor arrestees deprives them of their Sixth and Fourteenth Amendment rights to a fair trial, equal protection, and procedural due process.

These common questions predominate the Counsel Class's claims. Accordingly, the Court should find the commonality requirement of Rule 23(a)(2).

3. Typicality

Rule 23(a)(3)'s typicality requirement is also met for both classes. Under Rule 23(a)(3), "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.'" *East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974)). "Typicality, however, does not require identical claims or defenses." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984). Rather, "typicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 (2000). "A sufficient nexus 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*, 741 F.2d at 1337; *see also, e.g.*, *Hardy v. D.C.*, 283 F.R.D. 20, 25 (D.D.C. 2012) (typicality requires only that "the class representatives have suffered injuries in the same general fashion as absent class members"); Moore's Federal Practice - Civil § 23.24 ("Because the claims need only share the same essential characteristics and need not be identical, courts have concluded that the typicality requirement is not highly demanding.").[6]

a. The Bail Class Satisfies Typicality

The named Plaintiffs' claims and interests squarely align with those of the proposed Bail Class: all are detained because they are unable to afford the amount of secured money bail that Defendants Glynn County, Atwood, and Jump require as a condition for their pretrial freedom. The named Plaintiffs are threatened with the same ongoing and future injury as the proposed Bail Class, specifically, confinement in jail because of the inability to pay an arbitrary amount of money. *See* Newberg on Class Actions § 23:4 (4th Ed.) ("[T]he typicality requirement is generally satisfied when the representative plaintiff is subject to the same statute, regulation, or policy as class members."). The claims of the named Plaintiffs also rely on the same legal theories as the claims of all other proposed Bail Class members concerning whether Defendants' wealth-based detention scheme is unconstitutional. *See Piazza v. Ebsco Industries, Inc.*, 273 F.3d 1341, 1346 (11th Cir. 2001) (typicality "focuses on whether a sufficient nexus exists between the legal claims of the named class representatives and those of individual class members to warrant class certification"). The proof concerning whether Defendants engage in those policies and the legal argument about whether those policies are unlawful are critical for

[6] The typicality and commonality requirements of Rule 23(a) "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Prado-Steiman*, 221 F.3d at 1279 (quotations omitted).

each proposed Bail Class member in this case to establish the liability of Defendants. *See Walker*, 2016 WL 361580, at *7 (finding typicality requirement satisfied in a case where plaintiff sought to represent class of arrestees unable to pay for their release as a result of an arrest because the plaintiff's claims arose out of the same conduct as the class's claims, his claims were the same as those of the proposed class, and he was injured in the same way as other class members).

Thus, if the named Plaintiff succeeds in proving that Defendants' policies and practices concerning pretrial detention as alleged in the Complaint are unlawful, then that ruling will necessarily benefit every other member of the proposed Bail Class. That is the essence of Rule 23(a)'s typicality requirement.

b. The Counsel Class Satisfies Typicality

As with the proposed Bail Class, named Plaintiffs' claims and interests squarely align with those of the proposed Counsel Class and thus satisfy the typicality requirement. The nature of the Plaintiffs' claims and injuries is substantially identical to the nature of the claims and injuries of the proposed Counsel Class: they qualify for public defender representation, are charged with misdemeanors, but have not met with or been appointed counsel for unreasonable periods of time. Given the well-established custom in Glynn County of delaying the appointment of a public defender, named Plaintiffs—like all members of the Counsel Class—cannot reasonably expect to be provided counsel to assert their right to pretrial release.

If named Plaintiffs succeed in proving that Defendants Glynn County and Zeh's policies and practices in delaying the appointment of counsel as alleged in the Complaint are unlawful, that ruling will necessarily benefit all members of the Counsel Class. Thus, the typicality requirement under Rule 23(a)(3) is satisfied.

4. Adequacy

Rule 23(a)(4) requires that the named Plaintiffs will "fairly and adequately protect the interests of the class." To satisfy the adequacy requirement, the named plaintiffs must show "that their interests are not 'antagonistic' to the interests of other class members." *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987). As the U.S. Supreme Court explained, this inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)). Minor conflicts among class members, however, will not defeat class certification. *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003)).

a. Named Plaintiffs are Adequate Representatives of the Bail Class

The named Plaintiffs are adequate representatives of the proposed Bail Class because their interests in the vindication of the legal claims that they raise are completely aligned with the interests of the other class members. The named Plaintiffs are members of the proposed Bail Class, and their interests coincide with, and are not antagonistic to, those of the other proposed Bail Class members. The named Plaintiffs, like other putative class members, have a strong interest in no longer being detained unlawfully. There are no known conflicts of interest among members of the proposed Bail Class, all of whom have a similar interest in vindicating their constitutional rights in the face of their unlawful treatment by Defendants Glynn County, Atwood, and Jump.

b. Named Plaintiffs are Adequate Representatives of the Counsel Class

Finally, the adequacy requirement is satisfied with respect to the proposed Counsel Class. The Plaintiffs are adequate representatives of the proposed class because their interests in the vindication of the legal claims that they raise are completely aligned with the interests of the other class members. The Plaintiffs are members of the Counsel Class as defined in this memorandum, and their interests coincide with, and are not antagonistic to, those of the other

proposed class members. The Plaintiffs, like other Counsel Class members, have a strong interest in the aid of counsel to argue for their pretrial release. There are no known conflicts of interest among members of the proposed Counsel Class, all of whom have a similar interest in vindicating their constitutional rights in the face of their unlawful treatment by Defendants.

B. Both Proposed Classes Satisfy the Requirements of Rule 23(b)(2)

The named Plaintiffs in this action seek certification under Rule 23(b)(2), which permits class certification in cases where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). There are two basic requirements to satisfy Rule 23(b)(2): "(1) the opposing party's conduct or refusal to act must be 'generally applicable' to the class; and (2) final injunctive or corresponding declaratory relief must be requested for the class." *Anderson v. Garner*, 22 F. Supp. 2d 1379, 1386 (N.D. Ga. 1997). The key is whether the defendants' actions "would affect all persons similarly situated so that [their] acts apply generally to the whole class." *Id.* The claims raised by both classes fall squarely within these 23(b)(2) requirements.

1. The Bail Class is Properly Certified Under 23(b)(2)

The allegations brought by the proposed Bail Class are emblematic of those envisioned for certification under Rule 23(b)(2). First, Defendants Glynn County, Judge Atwood, and Sheriff Jump have created and applied a uniform wealth-based detention scheme, rendering their conduct "generally applicable" to all misdemeanor arrestees and therefore all proposed Bail Class members. Defendants demand money bail from every misdemeanor arrestee as a requirement for pretrial freedom. Defendant Sheriff Jump immediately releases those arrestees wealthy enough to pay and detains those arrestees too poor to pay.

Second, as set forth in the Complaint, named Plaintiffs in this action seek declaratory and injunctive relief on behalf of the entire Bail Class. The proposed Bail Class seeks to enjoin

Defendants Glynn County, Atwood, and Jump from continuing to enforce their policy of conditioning post-arrest freedom on access to money. The relief sought—an order declaring these money bail practices unconstitutional and an injunction and judgment preliminarily and permanently enjoining Defendants Glynn County, Atwood, and Jump from enforcing those unconstitutional policies—would apply equally to the entire putative class. Accordingly, certification under Rule 23(b)(2) is appropriate and necessary. *See, e.g., In re Veneman*, 309 F.3d 789, 792 (D.C. Cir. 2002) ("Rule 23(b)(2) certification is appropriate where plaintiffs seek declaratory or injunctive relief for class-wide injury.").[7] As the Supreme Court explained in *Dukes*: "When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident." *Dukes*, 564 U.S. at 362-63. A declaration and an injunction stating that Defendants cannot use money bail to keep poor arrestees in jail without any inquiry into or findings concerning their ability to pay would provide relief to every member of the proposed Bail Class. *See Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983) (finding Rule 23(b)(2) applies to "claims resting on the same grounds and applying more or less equally to all members of the class.")).

2. The Counsel Class is Properly Certified Under 23(b)(2)

Similarly, the declaratory relief sought by the Counsel Class falls squarely within the relief anticipated by Rule 23(b)(2) classes. Defendants Glynn County and Attorney Zeh have

[7] Rule 23(b)(2) arose out of experience "in the civil rights field," *Amchem*, 521 U.S. at 614 (citation omitted), in which the government typically treats a whole class in an unconstitutional manner based on law or government policy. "Rule 23(b)(2) was promulgated in 1966 essentially as a tool for facilitating civil rights actions." Moore's Federal Practice§ 23.43; *see also* Newberg on Class Actions§ 1:3 (5th ed.) ("Rule 23(b)(2) authorizes a class action when a party has taken or refused to take action with respect to a class, and final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole.... The (b)(2) class action is often referred to as a 'civil rights' or 'injunctive' class suit.").

delayed the appointment of counsel such that indigent misdemeanor arrestees proceed alone at critical stages of the pretrial process. This policy and custom is "generally applicable" to all members of the proposed Counsel Class.

Further, the relief sought—an order declaring unconstitutional Defendants' practices of delaying appointment of counsel to indigent arrestees facing misdemeanor charges and an injunction and judgment preliminarily and permanently enjoining the County and Defendant Zeh from continuing those unconstitutional policies—would apply equally to the entire proposed Counsel Class. Because the current practices are unconstitutional, any new lawful policies and procedures would have to be applied by Defendants in a consistent way to all indigent arrestees accused of misdemeanor crimes. *See Anderson*, 22 F. Supp. 2d at 1386; *see also, e.g.*, *In re Veneman*, 309 F.3d 789, 792 (D.C. Cir. 2002) ("Rule 23(b)(2) certification is appropriate where plaintiffs seek declaratory or injunctive relief for class-wide injury.").

C. Undersigned Counsel Satisfy the Requirements of Rule 23(g).

Prior to certification, the Court must determine that the undersigned counsel are adequate under Rule 23(g)(1) and (4). This determination requires the Court to consider, *inter alia*, "the work counsel has done in identifying or investigating potential claims in the action," "counsel's experience in handling class actions," "counsel's knowledge of the applicable law," and "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). Whether class counsel "are qualified, experienced, and generally able to conduct the proposed litigation" has traditionally been analyzed under Rule 23(a)(4). *See Kirkpatrick.*, 827 F.2d at 726-28. In determining the appropriateness of certification of class counsel, the Court may wish to consider "the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class." *Id.* at 726 (discussing counsel's role in a determination of adequacy under 23(a)(4)).

Here, the Plaintiffs and proposed classes are represented by attorneys from the American Civil Liberties Union, the American Civil Liberties Union of Georgia, and James Yancey, Jr. of Brunswick, Georgia, who have experience litigating complex civil rights matters in federal court and extensive knowledge of both the details of unlawful money bail practices and the relevant constitutional law. *See* Decls. of Buskey, Carter, Woods, Tucker, Yancey, and Young. In sum, proposed class counsel have devoted substantial resources to becoming familiar with Defendants' two-tiered pretrial practices and with the state and federal laws and procedures that govern Plaintiffs' claims. Moreover, the attorneys representing Plaintiff and the putative classes are experienced in handling class action and civil rights litigation and have particular knowledge of, and experience in, litigating legal claims concerning unlawful policies and practices in court systems. *See id.* In addition, proposed class counsel has sufficient financial and human resources to litigate this matter.

V. CONCLUSION

For the reasons stated above, the Plaintiffs respectfully ask this Court to certify the Bail Class and the Counsel Class as proposed in this Memorandum.

Dated: March 9, 2018.

Respectfully submitted,

/s/ James A. Yancey, Jr.
James A. Yancey, Jr.
On behalf of Attorneys for Plaintiff

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Attorneys for Plaintiff

Certificate of Service

This motion was filed simultaneously with the complaint in this action. This motion and all accompanying exhibits, along with copies of the summons and complaint, will be served on each Defendant by delivery to Professional Civil process on the same date that the Clerk of Courts issues a summons for that Defendant.

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Certificate of Conference

This motion was filed simultaneously with the complaint in this action. This motion will be opposed, and will confer with Defense counsel as soon as counsel files a notice of appearance. Plaintiffs will notify the Court promptly if Defendants do not oppose this motion.

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