IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

RANDY MILLER, et al., Plaintiffs, on behalf of themselves and all persons similarly situated, NATHAN DEAL, et al., Defendants.	CIVIL ACTION No. 2011-cv-198121 **CLASS ACTION**

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' AMENDED MOTION FOR CLASS CERTIFICATION

This case raises a significant legal question left unresolved by *Turner v. Rogers*, 131 S. Ct. 2507 (2011): whether the State may jail an indigent parent without providing him counsel in a civil child support contempt hearing at which the State is both a party to the proceeding and is represented by an attorney. In *Turner*, the Supreme Court held that an indigent parent did not have a categorical right to counsel in a child support hearing where the custodial parent seeking the contempt order represented herself and the State was not a party; however, the Court limited its ruling to those specific facts. *See id.* at 2519-20. The *Turner* Court went out of its way to suggest that counsel would be constitutionally required if the State was the party seeking the contempt order. *See id.* at 2520. In this case, unlike in *Turner*, Plaintiffs were jailed following proceedings at which

the State sought the contempt order, the Plaintiffs "represented" themselves, and the State was represented by a Special Assistant Attorney General (SAAG). The constitutionality of this practice is a matter of concern to Plaintiffs and thousands of similarly situated indigent parents, making class certification both appropriate and necessary.

The State's practice of forcing indigent parents to plead for their liberty against experienced SAAGs is fundamentally unfair and has led to numerous instances of injustice involving the named Plaintiffs and others. As explained and documented in further detail below, these instances include the following:

- Plaintiff Russell Davis, a man who takes medications for hallucinations and cannot work due to mental illness and physical injuries sustained in the military, has been jailed three times after hearings at which he "represented" himself against a skilled attorney with 30 years of experience prosecuting child support contempt actions (*see* Ex. 1);

- Plaintiff Reginald Wooten, a destitute man who lives in a small trailer with his terminally ill mother, has been jailed four times since 2007, despite his efforts to find work, in proceedings at which he represented himself against an experienced SAAG (*see* Ex. 2);

- LaShandra Harris, age 21, was recently jailed for child support debt, without counsel, and at the request of a state's attorney; Ms. Harris was six months pregnant at the time of her incarceration, and, unable to pay her purge fee, she remained in jail until the State consented to her release – fifteen days before she gave birth (*see* Ex. 3);

- Quinton Jackson was jailed for over one year, without a hearing and without counsel, for failing to reimburse the state for $619.34 in child support – an amount that became due before Mr. Jackson ever received an order to pay (*see* Ex. 4);

- Frank Hatley was jailed for 19 months after he was forced to represent himself against a SAAG, even though Mr. Hatley had already given the State conclusive DNA evidence showing he was not the father of the child in question (*see* Ex. 5).

The State's practice of sending indigent child support debtors to jail is also packing county jails, costing the taxpayers hundreds of thousands of dollars, driving wedges between parents and children, and causing indigent parents to fall even further behind in their child support payments.[1] Pursuant to O.C.G.A. § 9-11-23, Plaintiffs ask the Court to certify a class defined as follows:

> all indigent parents who, without appointed counsel and without constitutionally mandated procedural protections to ensure fundamentally fair proceedings,[2] face incarceration for nonpayment or underpayment of child support in child support contempt proceedings where the Georgia Department of Human Services (DHS) and/or the custodial parent are represented by state-funded counsel.

Defendants contend that class certification would be inappropriate in this case. However, Plaintiffs fulfill the requirements for certification of a class under O.C.G.A. § 9-11-23(a) and (b)(2). Moreover, class certification is critical for members of the proposed class. Just as they cannot afford lawyers to represent

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[1] *See, e.g.,* Sheriff Johnny Daughtrey Aff., Oct. 19, 2011 (Ex. 6) (stating that in 2009, one third of the persons in his jail (45 out of 140) were incarcerated for child support debt; listing some of the child support debtors who remained in his jail for over a year; and commenting on the tens of thousands of dollars spent on incarcerating parents who owe child support).

[2] Even assuming that DHS has revised its forms to comply with *Turner* (Defs' Resp. at 17), and even assuming a commitment by DHS that it will not return to its old ways, there remains a distinct difference between the Georgia system and the system analyzed in *Turner*: in Georgia, indigent parents are jailed, without counsel, in proceedings at which the State is both a party and is represented by counsel.

them in their contempt hearings, they have no resources to bring individual suits to vindicate their right to counsel. Allowing this case to proceed as a class action will serve the interests of justice and permit an efficient resolution of the straightforward issues in this case.

ARGUMENT AND CITATION OF AUTHORITY

I. Plaintiffs Satisfy All of the Statutory Requirements for Class Certification Under Georgia Law.

A. The Plaintiff Class Satisfies the Numerosity Requirement of Rule 23(a)(1) Because the Class Is So Large That Joinder of All Members Is Highly Impracticable and the Class Includes Future Members.

Because Defendants know that the proposed class likely has hundreds – if not thousands – of members, they cannot and do not argue that Plaintiffs' proposed class is insufficiently numerous. Rather, Defendants claim that: (1) there has been insufficient "evidence of record" of numerosity; (2) the proposed class is insufficiently definite; and (3) the proposed class is subject to change. (*See* Defs' Resp. to Pls' Mot. for Class Cert., Aug. 16, 2011 (Defs' Resp.) at 10-11). The State is incorrect on all three points.

First, now that the parties have engaged in discovery, Plaintiffs can present further evidence that the numerosity standard is satisfied. Specifically, Plaintiffs show that, according to the Defendants, at least 3,538 unrepresented parents were incarcerated between January 1, 2010 and the present in child support contempt

actions initiated by SAAGs on behalf of DHS.[3] This number, moreover, is underinclusive because it is based on data from only 36 of the 59 SAAGs who prosecute child support contempt actions for DHS in Georgia.[4] The Defendants further admitted that 845 parents are currently incarcerated in Georgia for child support debt in DHS-initiated child support contempt cases.[5] The Defendants' own data thus supports a finding that Rule 23(a)(1) is satisfied.

Plaintiffs provide the following three exhibits to further show they satisfy Rule 23's numerosity requirement:

(1) Exhibit 8 summarizes pertinent information from jail rosters provided by Georgia sheriffs. This chart reflects the number of persons who were incarcerated solely for contempt of a child support order in February 2011.[6] According to Georgia sheriffs, there were approximately 573 persons in Georgia jails as of February 2011 solely for civil contempt of a child support

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3 *See* Defs' Interrog. Resp., No. 5, at 8-10 (Ex. 7) (listing the number of unrepresented parents who have been incarcerated since January 1, 2010, in child support contempt actions initiated by SAAGs on behalf of DHS).

4 *See id.*

5 *See* Defs' Interrog. Resp., No. 16, at 20-22 (Ex. 7).

6 In February 2011, Plaintiffs' counsel sent Open Records Act requests to all 159 Georgia sheriffs. Plaintiffs asked the sheriffs to produce jail rosters showing the number of persons then incarcerated in their jails solely for civil contempt of a child support order. Exhibit 8 thus presents a "snapshot" summary of the number of persons jailed for child support debt on one day in or around February 2011. The actual jail rosters provided by the sheriffs fill two banker's boxes, are on file with Plaintiffs' counsel, and are available for inspection upon request.

order. This figure does not include people who were incarcerated for child support debt in work release centers across the state.[7] This figure is also underinclusive because not all sheriffs' offices responded to Plaintiffs' Open Records Act request.

(2) Exhibit 9 contains 32 notarized affidavits and 10 unsworn statements[8] from putative class members who state that they: (a) are indigent; (b) were jailed solely for child support debt in the context of a DHS-initiated proceeding; (c) could not afford to hire counsel to represent them in their contempt hearings; (d) were jailed after a hearing at which the State was represented by counsel; and (e) had no way of paying their purge fee to secure release from incarceration. These affidavits were signed after *Turner* was decided.

(3) Exhibit 10 contains 78 notarized affidavits from putative class members who stated that they (a) are indigent; (b) were incarcerated for civil contempt of a child support order; (c) were unable to pay their purge fees to secure their release from jail; and (d) were unrepresented by counsel. These affidavits were signed before *Turner* was decided.

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[7] There are a number of county-operated work release centers housing child support debtors in counties such as Bibb, Cobb, Coweta, Floyd, and Gwinnett.

[8] Multiple incarcerated putative class members informed Plaintiffs' counsel that they could not secure the services of a notary public while incarcerated.

In sum, the large number of unrepresented parents who face incarceration in DHS-initiated child support contempt actions in which the State is represented by counsel far exceeds the small number of class members required for certification. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) ("more than forty" members was sufficient to satisfy numerosity); *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (thirty-one class members rendered joinder "impracticable" and satisfied numerosity). Joinder has further been found to be impracticable, warranting class certification, where, as here, class members are dispersed over a large geographic area.[9]

Second, contrary to Defendants' argument (Defs' Resp. at 11), Plaintiffs' proposed class is sufficiently definite. Definiteness does not require that members of the proposed class "be so clearly identified that any member can be presently ascertained." *In re Tri-State Crematory Litig.*, 215 F.R.D. 660, 690 (N.D. Ga. 2003) (finding that a "legally definable class can be ascertained through reasonable effort."). Rather, Plaintiffs need only meet a "minimal standard of definiteness which will allow the court to determine membership in the proposed class." *Id.* Class membership is readily ascertainable here since a person is in the class if he is

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[9] *See Kilgo,* 789 F.2d at 878 (joinder was impracticable where the class "include[d] applicants from a wide geographical area"). *See also* Compl. ¶ 23 (stating Plaintiff Miller was jailed following child support contempt proceedings in Floyd County); Compl. ¶ 26, 36, 42 (stating Plaintiffs Hendrix, Davis, and Wooten face child support contempt proceedings in Cook County); Compl. ¶ 58 (stating Plaintiff Hunter faces contempt proceedings in Walton County).

indigent and facing jail in a child support contempt proceeding at which he is *pro se* while DHS is represented by counsel.

Third, the fact that class membership will grow and change as additional class members face incarceration does not undermine Plaintiffs' numerosity argument (Defs' Resp. at 11); rather, it supports it. *See Kilgo*, 789 F.2d at 878 (approving certification of class where "[p]laintiffs have identified at least thirty-one individual class members and the class includes future and deterred job applicants, which of necessity cannot be identified"). Where a proposed class includes future members, such members cannot be identified and their joinder is impracticable. *See id.; see also Phillips v. Joint Legislative Comm. on Performance and Expenditure Review of State*, 637 F.2d 1014, 1022 (5th Cir. Unit A Feb. 1981) (numerosity is met where "joinder of unknown individuals is certainly impracticable") (citations omitted)[10]; *Ford Motor Credit Co. v. London*, 175 Ga. App. 33, 36, 332 S.E.2d 345, 347 (1985) ("precise numbers would not be crucial to a determination of numerousness").

As Defendants' admissions and Plaintiffs' exhibits demonstrate, the proposed class is so numerous that joinder is impracticable. Plaintiffs satisfy the numerosity standard.

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[10] *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (holding that all decisions of the Fifth Circuit Court of Appeals predating October 1, 1981 are binding as precedent in the Eleventh Circuit Court of Appeals).

B. Plaintiffs Satisfy the Commonality Requirement.

This case calls for the resolution of common questions of law left unaddressed by *Turner v. Rogers*. In *Turner*, the Court went out of its way to suggest that counsel would be constitutionally required if the State was the party seeking the contempt order. *See Turner,* 131 S. Ct. at 2520 (citing *Johnson v. Zerbst*, 304 U.S. 458, 462-463) (1938) ("[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."). Plaintiffs are indigent parents who have faced jail for nonpayment of child support obligations, without state-funded lawyers, in proceedings in which DHS was both a party to the case and had the benefit of state-funded counsel. The question of whether Plaintiffs are entitled to counsel under these circumstances is common to all class members, irrespective of the individualized facts of each Plaintiff's contempt case.

While Plaintiffs and putative class members inevitably have some differences in their situations, the commonality requirement does not require that all questions of law and fact be common to every member of the class. *See Brenntag Mid South, Inc. v. Smart*, 308 Ga. App. 899, 903, 710 S.E.2d 569, 575 (2011). Rather, Rule 23(a)(2) requires only that resolution of the common questions affect all or a substantial number of the class members. *See id.*

Variations in the underlying factual circumstances of individual plaintiffs do not destroy the class. *See Bd. of Regents, Univ. Sys. of Georgia v. Rux*, 260 Ga. App. 760, 764, 580 S.E.2d 559, 563 (2003).

Defendants allege that commonality is absent because the Court would have to analyze hundreds of contempt proceedings to adjudicate Plaintiffs' due process claims. However, the Defendants are incorrect. The Court can resolve the common questions left open in *Turner* and presented in the Plaintiffs' Complaint in a single case because all child support contempt proceedings across Georgia are similar in the following respects:

1. DHS Is a Real Party in Interest.

In *Turner*, there was not a state entity involved in the child support contempt action at issue. *See Turner*, 131 S. Ct. at 2519. As a result, the *Turner* Court did not address the question of whether an indigent parent facing a child support contempt action is entitled to counsel where a state entity is a real party in interest to the action. *See id.* at 2520. That question, unanswered by *Turner*, is a common question presented by each and every Plaintiff in this case because in Georgia, DHS is a real party in interest in all DHS-initiated child support contempt actions.[11]

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[11] *See, e.g.*, Compl. for Contempt, *DHS, ex. rel. Regina Wooten v. Reginald Wooten*, Civil Action No. 2011CVU174 (Cook County Superior Court, June 15, 2011) (referring to DHS as "Plaintiff" in the enforcement action); Show Cause Order, *DHS, ex. rel. Jaylon Malik Brown v.*

2. DHS Is Always Represented by Counsel.

In *Turner*, the party seeking the incarceration of the alleged contemnor was not a lawyer, but a *pro se*, custodial parent. *See Turner*, 131 S. Ct. at 2519. As a result, the *Turner* Court did not address the question of whether an indigent parent facing a child support contempt action is entitled to counsel where the party seeking contempt is represented by counsel. *See id.* at 2520. That question, unanswered by *Turner*, is another common question presented by each and every Plaintiff in this case because in Georgia, DHS is *always* represented by counsel at DHS-initiated child support contempt hearings.[12] In Georgia, unlike in *Turner*, SAAGs representing the State file complaints for contempt against child support debtors[13] and actively participate in child support contempt proceedings.[14] They

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Russell Davis, Civil Action No. 09CVU275 (Cook County Superior Court, September 3, 2009) (referring to DHS as "Plaintiff"); Notice to Produce, *DHR, ex. rel. Jaquavioun Hunter v. Joe Hunter*, Civil Action No. 09-2231-1 (Walton County Superior Court, June 12, 2009) (requiring Mr. Hunter to produce certain documents that "may be used as evidence by Plaintiff, Georgia Department of Human Resources"). (*See* Ex. 11).

[12] *See* Defs' Resp. to Pls' First Req. for Admis., No. 4 at 4 (Ex. 12) (stating that DHS is represented by a SAAG or another attorney at all DHS-initiated child support contempt hearings); Defs' Resp. at 14, n.8 (citing O.C.G.A. § 45-15-3(6) and stating that "[t]he Department is not allowed to proceed in a *pro se* capacity in any court of record in any civil proceeding . . ."). *See also* Reddick Depo. at 29 (Ex. 13) (stating that he appears in court on behalf of DHS in child support contempt proceedings "[e]very time they have court.").

[13] *See* Reddick Depo. at 19 (Ex. 13) (stating that one of his responsibilities as a SAAG is filing complaints against child support debtors).

[14] *See* Wooten Depo. at 63 (Ex. 14) ("You pretty much say what you want, but [SAAG] Charles Reddick, whatever Charles Reddick say, that what the judge going to do."); Miller Depo. at 61 (Ex. 15) (stating that a SAAG represented DHS at each and every contempt hearing that led to his incarceration).

call witnesses in support of their contempt motions,[15] and affirmatively seek incarceration.[16] This is utterly unlike the proceeding in *Turner*, in which:

- the *pro se*, custodial mother argued her own contempt motion;[17]
- the South Carolina Department of Social Services (DSS) was not a party at the time of the contempt hearing under review;[18]
- there was only one hearing over the entire course of the child support contempt matter in which DSS even entered an appearance;[19] and
- "The DSS representative did not say a single word" at that hearing.[20]

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[15] *See* Wooten Depo. at 102 (Ex. 14) (stating that the SAAG called child support agents as witnesses at contempt hearings, but that he would not know how to call a witness to testify); Hendrix Depo. at 27 (Ex. 16) (stating that the state's attorney called him to the stand and asked him questions); Miller Depo. at 72 (Ex. 15) (stating that the SAAG called a child support agent as a witness against him, but that he did not know he could call witnesses); Charles Smith Aff. ¶ 9 (Ex. 17) ("At the hearing, [SAAG] Charles Reddick put my child support agent on the witness stand. . . . Then Mr. Reddick had the opportunity to cross-examine me.").

[16] *See* Hendrix Aff. ¶ 9 (Ex. 18) ("Despite my efforts to pay, the attorney for the state child support office sought to incarcerate me, and I could not afford counsel to defend myself"); Wooten Aff. ¶ 15(h) (Ex. 2) ("On February 2, 2011, I appeared in court for another contempt hearing at which the State's attorney asked that I be jailed."); Harris Aff. ¶ 12 (Ex. 3) ("[T]he state agency that was asking for my incarceration was represented by a lawyer."); Lewis Aff. ¶ 14 (Ex. 19) ("The State's attorney asked that I continue to be held in the jail.); Cecil Aff. ¶ 13 (Ex. 20) ("The State agency that asked for my incarceration, DHS, was represented by an attorney.").

[17] *Turner*, 131 S. Ct. at 2513.

[18] *See* Br. of Resp'ts, *Turner v. Rogers*, Case No. 10-10, 2011 WL 481836, *9 (Feb. 8, 2011).

[19] *See id.* at *9, n. 2.

[20] *See id.*

3. The Special Assistant Attorneys General Who Represent DHS in Child Support Actions Are Highly Trained and Experienced Lawyers.

Third, all child support contempt proceedings across Georgia are similar in that the SAAGs who represent DHS in these proceedings are highly-trained, skilled, and experienced attorneys. The vast majority of SAAGs who bring contempt actions against indigent parents have litigated hundreds or thousands of child support contempt actions.[21] To give one example, attorney Charles Reddick testified that he has represented DHS in child support contempt proceedings in the Alapaha Judicial Circuit for about 25 years.[22] In the past two calendar years alone, he litigated approximately 1,722 child support contempt proceedings on behalf of DHS.[23] SAAGs are also required to attend annual CLE trainings, further increasing their knowledge and expertise in the prosecution of child support contempt cases.[24]

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[21] *See* Defs' Interrog. Resp., No. 4 at 6-8 (Ex. 7) (listing the approximate number of child support contempt proceedings each SAAG has litigated over the past two calendar years; stating that SAAG John Sikes has litigated 7,880 such cases; stating that SAAG Leslie Gresham has litigated 3,789 such cases; and stating that SAAG Douglas Slade has litigated 2,016 such cases).

[22] *See* Reddick Depo. at 12 (Ex. 13) (stating that he has worked as a SAAG representing DHS in child support cases since about 1986).

[23] *See* Defs' Interrog. Resp., No. 4 at 7 (Ex. 7).

[24] *See* Defs' Interrog. Resp., No. 7, at 11 (Ex. 7) (stating that the Attorney General mandates trainings for SAAGs who represent DHS in child support proceedings and that such trainings are generally held annually); Reddick Depo. at 15 (Ex. 13) (stating that in his role as a SAAG he attends annual CLE trainings "specific to child support").

4. Georgia Does Not Provide Counsel to Indigent Parents Who Face Incarceration in Civil Child Support Contempt Proceedings.

Fourth, all child support contempt proceedings across Georgia are similar in that indigent parents facing incarceration in Georgia for child support debt in DHS-prosecuted contempt hearings are *never* provided with state-funded counsel.[25] Accordingly, all Plaintiffs faced jail or were jailed after proceedings at which they represented themselves while the State was represented by counsel.[26]

5. Plaintiffs and Other Class Members Owe Unreimbursed Public Assistance to the State.

Fifth, in *Turner*, the Supreme Court specifically exempted from its ruling contempt cases in which the underlying support is owed to the state:

> We do not address civil contempt proceedings where the underlying child support payment is owed to the State, for example, for reimbursement of welfare funds paid to the parent with custody. . . . Those proceedings more closely resemble debt-collection proceedings. The government is likely to have counsel or some other competent representative. . . . And this kind of proceeding is not before us.

Turner, 131 S. Ct. at 2520.

In the instant case, four of the six named Plaintiffs (Randy Miller, Reginald Wooten, Gregory Carswell, and Joe Hunter) owe or have owed the State

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[25] *See* Defs' Resp. at 23 ("[T]here is no Georgia statute providing for the appointment of counsel in civil proceedings"); Reddick Depo. at 30 (Ex. 13) (stating that he is "not aware" of the State of Georgia providing counsel to indigent child support obligors at contempt hearings).

[26] *See* Davis Aff. ¶ 6 (Ex. 1); Hendrix Aff. (Ex. 17) ¶ 9, 19; Wooten Aff. ¶ 5 (Ex. 2); Hunter Aff. (Ex. 21) ¶ 2; Miller Depo. at 60-61 (Ex. 15).

unreimbursed public assistance.[27] Plaintiffs are similar in this regard to other, proposed class members. According to DHS, there are about 102,150 open child support cases with a public assistance arrearage – meaning that some or all of the "child support" arrears are owed to the State of Georgia.[28]

6. DHS's Standardized Forms and Procedures, Used Statewide, Failed the *Turner* Due Process Test and Deprived Plaintiffs of Fundamental Fairness In Their Child Support Hearings.

Sixth, DHS uses standardized forms and proposed orders, statewide, in connection with its prosecution of child support contempt proceedings in Georgia.[29] A review of the forms that DHS used before this litigation was filed shows that child support contempt proceedings in Georgia failed *Turner*'s due process "fairness" test. For example, according to Defendants, before June 2011, a minimum of 19 of 56 local child support offices (or about one third of offices) did not "routinely" provide notice to defendants that their ability to pay would be a

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[27] *See* Wooten Aff. ¶ 14 (Ex. 2) (stating that his daughter's mother received public assistance, which triggered DHS's involvement in his case); Joe Hunter Aff. ¶ 3 (Ex. 21) (stating that his son's guardian assigned her right to collect child support to DHS because she received public assistance); Order for Support, *DHR ex rel. Jontavious Carswell v. Gregory Carswell*, No. 96-M-62 (Emanuel County Superior Court) (guardian's income was derived in part from "AFDC") (Ex. 22); DHS-generated Payment Summary for Randy Miller in case number 940004284 (listing the "case subtype" as "Regular Former AFDC" (*See* Ex. 23)).

[28] *See* Defs' Interrog. Resp., No. 17 at 22 (Ex. 7).

[29] *See* Defs' Resp., Ex. A; *see also* Defs' Resp., Ex. B, ¶ 3 (stating that DHS promotes the use of "standard form pleadings" that are distributed to Special Assistant Attorneys General statewide); Reddick Depo. at 16 (Ex. 13) ("[T]he attorney general's office and the Division of Child Support Services would like us to use the same types of forms statewide . . . .").

critical issue at their child support contempt hearing.[30] *Cf. Turner*, 131 S. Ct. at 2519 (emphasizing the importance of providing such notice to accused contemnors).

In addition, before June 2011, according to Defendants, a minimum of 19 of 56 local child support offices (about one third of offices) did not give accused contemnors the opportunity to fill out any financial forms in the context of child support contempt proceedings.[31] *Cf. Turner*, 131 S. Ct. at 2519 (emphasizing the importance of a mechanism to elicit financial information from accused contemnors).

Similarly, before June 2011, according to Defendants, in at least 46 of 56 child support offices (over four fifths of offices), the form contempt orders prepared and promulgated by DHS did not contain the phrase "ability to pay."[32] *Cf. Turner*, 131 S. Ct. at 2519 (contempt orders mandating incarceration for civil

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30 *See* Defs' Interrog. Resp., No. 8 at 11-13 (Ex. 7).

31 *See id.; see also* Defs' Resp. to Pls' First Req. for Admis., No. 11 at 7 (Ex. 12) (admitting that, prior to June 2011, alleged child support contemnors in Floyd County were not asked or given the opportunity to fill out financial affidavits, financial forms, or their equivalent in the context of DHS-initiated child support contempt proceedings). Defendants contend that, prior to June 2011, the Alapaha child support office gave alleged child support contemnors the ability to fill out financial forms in the context of their child support proceedings. *See* Defs' Interrog. Resp., No. 8 at 12. (Ex. 7). Plaintiffs Davis and Hendrix deny ever having seen or been offered any such forms. *See* Davis Aff. ¶ 14(c) (Ex. 1); Hendrix Aff. ¶ 12 (Ex. 18). Plaintiff Wooten recalls that a child support agent asked him where he was employed and wrote down his answers on a form. Wooten Aff. ¶ 16(c), n.2. (Ex. 2). No judge ever discussed the content of any such financial affidavit with him or asked him even one question pertaining to any such financial form. *See id.*

32 *See* Defs' Interrog. Resp., No. 9 at 13-15 (Ex. 7).

child support debt should contain an "express finding" by the court that the defendant has the ability to pay).

The named Plaintiffs are from different jurisdictions, but they tell similar stories of child support proceedings that lacked the fundamental fairness required by *Turner*. Before this lawsuit was filed:

a) the Plaintiffs were not given clear and sufficient notice that their ability to pay would be a critical issue at their hearings;[33]

b) four of the six Plaintiffs were never given any forms to elicit relevant financial information;[34]

c) none of the contempt orders sending Plaintiffs to jail contained an express finding by the court that the defendant had the ability to pay.[35]

Defendants allege that they revised their standard forms in June 2011 in light of *Turner*. But even assuming that DHS now uses forms that align with *Turner*, and even assuming a commitment by DHS that it will not return to its old ways, there remains a distinct difference between the Georgia system and the system analyzed in *Turner*: in Georgia, indigent parents are jailed, without counsel, following hearings at which the State is a party and is represented by counsel. In addition, voluntary cessation of a challenged practice in the midst of litigation does

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[33] *See* Davis Aff. ¶ 14(b) (Ex. 1); Hendrix Aff. ¶ 11 (Ex. 18); Wooten Aff. ¶ 16(b) (Ex. 2); Hunter Aff. ¶ 7(b) (Ex. 21).

[34] *See supra* n.31.

[35] *See* Davis Aff. ¶ 14(f) (Ex. 1); Hendrix Aff. ¶ 15 (Ex. 18); Wooten Aff. ¶ 16(f) (Ex. 2); Hunter Aff. ¶ 7(e) (Ex. 21).

not moot a case. *See Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 719 (2007) ("Voluntary cessation does not moot a case or controversy unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur") (internal quotation marks and alterations omitted).[36]

The foregoing common questions of law and fact are more than sufficient to satisfy the commonality standard. *See Hillis v. Equifax Consumer Svs., Inc.*, 237 F.R.D. 491, 497 (N.D. Ga. 2006) (stating that there need only be one issue common to all members of the class); *Lake v. Speziale*, 580 F. Supp. 1318, 1333 (D. Conn. 1984) (finding no commonality problem where the claim of each similarly situated person is the entitlement to appointed counsel). Plaintiffs satisfy Rule 23(a)(2).

C. Plaintiffs Satisfy the Typicality Requirement.

The typicality requirement is satisfied upon a showing that the State committed the same unlawful acts in the same method against an entire class. *See Brenntag*, 308 Ga. App. at 904, 710 S.E.2d at 575.

The named Plaintiffs are similarly situated to the proposed class members because they are in danger of being incarcerated, without counsel, in child support

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[36] *See also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (holding that a defendant claiming that its voluntary compliance moots a case bears the "formidable burden" of showing that it is "absolutely clear" the allegedly wrongful behavior could not reasonably be expected to recur).

contempt proceedings in which the State is a party and is represented by counsel. This is typical of other class members who also face imprisonment, without counsel, at hearings in which DHS is a party and a skilled SAAG represents the State. *See Konberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (holding that a "sufficient nexus" between the named Plaintiffs' claims and the class claims is established if they "arise from the same event or pattern or practice and are based on the same legal theory").

Defendants suggest that Plaintiffs' claims are not typical because Plaintiffs are not "incarcerated" or "under any imminent threat of incarceration." (Defs' Resp. at 18). On the contrary, the Plaintiffs and putative class members face an imminent threat of re-incarceration:

- **Russell Davis** has been diagnosed with schizophrenia and bipolar disorder, and has previously been committed to a mental hospital for treatment of his psychiatric condition.[37] A doctor who examined Mr. Davis at the VA in 2010 opined that Mr. Davis (1) has bipolar disorder and is hypomanic with psychosis; (2) takes medications for hallucinations; (3) suffers persecutory delusions, hears voices, has poor memory, and has a short attention span; (4) limps and walks with a cane; and (5) cannot work due to mental and physical disabilities.[38] Mr. Davis subsists on veteran's disability benefits. Despite these facts, Mr. Davis has been jailed *three times* in Cook County after hearings at which he represented himself against a SAAG – most recently from March 9, 2011 until April 6, 2011.[39] He has been ordered to

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[37] *See* Davis Depo. at 63, 112, 114 (Ex. 24).

[38] *See* Letter of Dr. Luis Byrne-Vidal, M.D., Apr. 1, 2010 (Ex. 25).

[39] See Davis Aff. ¶ 11-12 (stating he was jailed for child support debt from March 9, 2011 until April 6, 2011) (Ex. 1).

appear in court again on November 23, 2011 to show cause as to why he should not be jailed again.

- **Randy Miller**, an Iraq War veteran who has paid over $75,000 in child support to date, was recently jailed in Floyd County for three months, without counsel, after proceedings at which a SAAG sought his incarceration.[40] Mr. Miller's child support obligations total nearly $800 per month. While he recently found a new job through a temp agency, it is a temporary position with an uncertain duration.[41] Mr. Miller is in arrears on his child support obligation and faces a future threat of incarceration for child support debt.

- **Lance Hendrix** was jailed for five months in Cook County after he returned from military service to his economically depressed town at a time when unemployment was at an all-time high.[42] Between his return from military service in 2009 and his arrest for child support debt in July 2010, he managed to pay $3,796.36 toward his arrears. Despite his efforts, a SAAG asked the court to send Mr. Hendrix to jail. Mr. Hendrix remained incarcerated for five months, during which time he was never informed of his purge fee. Mr. Hendrix has since made every effort to make payments, but is currently under-employed as a laborer. He is still in arrears and faces an immediate threat of re-incarceration without counsel.

- **Reginald Wooten** was incarcerated in the Cook County Jail for child support debt *on four occasions*, including once after this lawsuit was filed.[43] Mr. Wooten has never been represented by counsel at any child support hearing that led to his incarceration, whereas the State was represented at every such hearing. Mr. Wooten worked at a factory specializing in the fabrication of metal products for over 13 years and made child support payments for his daughter's support during that time. In 2006, Mr. Wooten

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[40] *See* Compl. ¶ 8.

[41] *See* Miller Depo. at 25-26 (stating he is still employed by the temp agency and that he does not know how long the job will last) (Ex. 15).

[42] *See* Hendrix Aff. ¶ 6. (Ex. 18).

[43] *See* Wooten Aff. ¶ 5 (stating he was jailed four times since 2007); ¶ 15(i) (stating he was jailed from July 13, 2011 until August 3, 2011) (Ex. 2).

was convicted of a felony drug sale charge, and since then has had a difficult time finding work. Mr. Wooten is unemployed and lives in a trailer with his dying mother who depends on him for care. He has been ordered to appear in court again on November 23, 2011 to show why he should not be re-incarcerated for child support debt.[44]

- **Joe Hunter** was jailed three times for child support debt, including as recently as September 2011, in Walton County.[45] In 2010, Mr. Hunter was jailed for five months – during which time he was unable to pay either the initial purge fee of $500, or the later-reduced purge fee of $250. Mr. Hunter is in arrears and thus currently faces a threat of re-incarceration for child support debt.

Just as the named Plaintiffs (with the exception of Mr. Carswell[46]) face a risk of reincarceration in their child support cases, so too do other members of the putative plaintiff class. For example[47]:

- **Nathan Lewis** was jailed for child support debt for over a year – from May 4, 2010 until June 24, 2010 – in Ware County.[48] Unable to pay his purge fee or any portion thereof to secure his release, Mr. Lewis was only freed when

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44 *See* Wooten Aff. ¶ 21 (Ex. 2).

45 *See* Hunter Aff. ¶ 5 (Ex. 21).

46 Plaintiffs agree that Plaintiff Carswell's cases are currently administratively closed. (Defs' Resp. at 18). Accordingly, Plaintiffs will move to add Lashandra Harris as a named plaintiff in Mr. Carswell's place. (*See* Ex. 3). However, Defendants' claim that Mr. Carswell's child support cases were closed before this lawsuit was filed on March 22, 2011 is uncorroborated. (*See* Answer ¶ 50; Defs' Resp. at 18). On September 20, 2011, the Department provided Plaintiffs with two "Case Action Logs" which purport to show that Mr. Carswell's case is "closed," and state that his "account status" was "changed" in July 2011, but do not reflect the dates on which the cases were closed. (*See* Ex. 26).

47 To the extent Defendants disagree with Plaintiffs' factual assertions regarding Plaintiffs' circumstances, Defendants' arguments "go to the merits of Plaintiffs' claims, and they are raised more properly in a motion for summary judgment, or at trial." *Cooper v. Pacific Life Ins. Co.*, 458 F. Supp. 2d 1368, 1377 (S.D. Ga. 2006) (denying motion for decertification of class).

48 *See* Lewis Aff. ¶ 8 (Ex. 19).

the State consented to his release, thirteen months later. Mr. Lewis was unrepresented in his child support proceeding, whereas the State was represented by counsel.

- **Charles Smith** was recently jailed twice, without counsel, in Cook County.[49] On the first occasion, he was jailed from May 25, 2011 until July 13, 2011 even though he had made payments totaling $3,577.86 between July 2010 and January 2011 from his job at a poultry plant. At his release hearing on July 13, he was ordered to find a job by August 3 and to pay $575 per month. On August 3, Mr. Cook brought 15 job applications to court with him and informed the judge and the SAAG that he was scheduled to start work at a watermelon farm just two days later. Nonetheless, Mr. Smith, who represented himself against a trained and experienced SAAG, was re-incarcerated. He was still in jail at the time he signed his affidavit on August 30, 2011.

- **Michael Cecil** was jailed in Ware County for child support debt for over three months in 2011, despite best efforts to find work.[50] He was jailed after the economy slowed and he was laid off from employment at a factory that manufactured beef patties. Mr. Cecil was not represented in his child support contempt proceeding, but the State was represented by counsel. He currently owes arrears and faces an immediate threat of incarceration.

- **LaShandra Harris**, age 21, was recently jailed for child support debt in Troup County, without counsel, and at the request of a state's attorney.[51] Ms. Harris was six months pregnant at the time of her incarceration, and, unable to pay her purge fee, she remained in jail until the State consented to her release – fifteen days before she gave birth. Ms. Harris is in arrears and faces a risk of re-incarceration.

All of the persons listed above face an imminent threat of future incarceration without counsel. The fact that two named Plaintiffs were re-

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49 *See* Smith Aff. ¶ 7 (Ex. 17).

50 *See* Cecil Aff. ¶ 7-14, 18 (Ex. 20).

51 *See* Harris Aff. ¶ 12, 19 (Ex. 3).

incarcerated, without counsel, even after this case was filed, amply demonstrates that Plaintiffs and other members of the putative class face a continued risk of loss of liberty. Plaintiffs' claims are typical of those of the rest of the proposed class.

D. Plaintiffs Satisfy the Adequacy Requirement.

The adequacy prong considers whether the named Plaintiffs' interests are antagonistic to those of the class. *See Brenntag*, 308 Ga. App. at 905, 710 S.E.2d at 576. Nothing in the record suggests any such antagonistic interests or that named Plaintiffs would not vigorously pursue the claims on behalf of the class.

The Defendants argue that Plaintiffs are not adequate class representatives because they have been found to have violated a contempt order and because *Adkins v. Adkins*, 242 Ga. 248, 248 S.E.2d 646 (1978) controls the right to counsel issue under the Georgia Constitution. (*See* Defs' Resp. at 20-21). However, the State is incorrect on both points.

First, just because the named Plaintiffs have been held in contempt does not mean that their constitutional rights were not violated. Rather, in *Turner* itself, the Court found that the petitioner's constitutional rights were violated even though a judge had found Mr. Turner in contempt. *See Turner*, 131 S. Ct. at 2520.

Second, contrary to Defendants' argument (Defs' Resp. 20-21), *Adkins* is not controlling of Plaintiffs' right to counsel claim under the Georgia Constitution.[52] Over thirty years ago, before *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981), the Supreme Court of Georgia stated in a four-paragraph opinion in *Adkins* that a trial court did not err "in failing to inquire whether [a child support contemnor] was entitled to counsel" because the proceeding was "civil" and did not implicate the Sixth Amendment right to counsel. *Adkins*, 242 U.S. at 249, 248 S.E.2d at 646. *Lassiter* and subsequent decisions make it clear that *Adkins* was wrongly decided. Perhaps more significantly, *Adkins* was a private divorce case in which the State was not a party and in which the State did not represent the custodial parent. In the instant case, by contrast, Plaintiffs ask the Court to examine a very different set of facts in which the State is a party and had counsel to represent its interests at the contempt hearing. The Defendants have not challenged the adequacy of Plaintiffs' counsel. The adequacy requirement is satisfied.

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[52] Defendants' argument regarding *Adkins v. Adkins* goes to the merits of Plaintiffs' claim and does not bear on the adequacy prong of the class certification inquiry. "[I]n determining the propriety of a class action, the first issue to be resolved is not whether the plaintiffs have stated a cause of action or may ultimately prevail on the merits but whether the requirements of [O.C.G.A. § 9-11-23] have been met." *Gay v. B.H. Transfer Co.*, 287 Ga. App. 610, 612, 652 S.E.2d 200, 202 (2007) (citing *Sta-Power Indus. v. Avant,* 134 Ga. App. 952, 954, 216 S.E.2d 897, 900 (1975) and reversing trial court's denial of class certification "to the extent the court denied the motion for class action certification by looking solely to the merits of the action."). While a trial court may consider the merits of an action, it may do so only to the degree necessary to determine whether the class certification requirements have been met. *See id.*

II. Plaintiffs Satisfy Rule 23(b)(2).

Plaintiffs set forth their argument with respect to Rule 23(b)(2)[53] at p. 20-23 of their *Memorandum of Law in Support of Amended Motion for Class Certification*. In response, Defendants state that they are improper defendants because they cannot appoint counsel and thus cannot grant Plaintiffs the relief they seek. (Defs' Resp. at 23-24). Defendants further argue that Rule 23(b)(2) is not satisfied because Plaintiffs did not ask the judges in their contempt hearings to appoint counsel for them. (Defs' Resp. at 22-24). Defendants are incorrect on both counts.

First, Defendants do, in fact, have the power to grant the Plaintiffs the relief they seek. Specifically, Defendants have the authority to stop seeking the incarceration of indigent, *pro se* child support debtors in cases in which the State is represented by counsel. At present, the Defendants exercise their power to seek the incarceration of *pro se* child support debtors with great frequency; they have succeeded in jailing such persons on at least 3,538 occasions in the past 22 months alone.[54] In so doing, they are "act[ing] . . . on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the

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[53] O.C.G.A. § 9-11-23(b)(2) authorizes class certification where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

[54] *See supra* n.3.

class as a whole." O.C.G.A. § 9-11-23(b)(2). In their Complaint, Plaintiffs have asked that Defendants be enjoined from seeking incarceration as a remedy in proceedings in which the State is represented by counsel and the Defendant is not.[55] This question is best addressed in the context of a class action certified under O.C.G.A. § 9-11-23(b)(2).

Second, Plaintiffs did not abandon their constitutional right to counsel by failing to ask the court to appoint counsel. Plaintiffs, some of whom have limited education and/or have mental illness, had no idea they could ask for or receive counsel, and no one advised them of their right to counsel.[56] *Cf. Powell v. Alabama*, 287 U.S. 45, 71 (1932) ("[A] defendant does not forfeit his constitutional right to appointment of counsel by failing to ask for a lawyer at the hearing that results in his incarceration.")

Plaintiffs satisfy Rule 23(b)(2) for the foregoing reasons. In addition, class certification will promote the goals of judicial economy and access to the legal

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[55] *See* Compl. at 61 (asking the court to "[e]njoin all persons within the scope of an injunction under O.C.G.A. § 9-11-65(d) from incarcerating Plaintiffs in their child support cases until such time as counsel is in fact provided to each Plaintiff").

[56] *See* Davis Depo. at 119 (Ex. 24) (stating that he had not previously asked for appointed counsel because he never saw any other alleged contemnor with a lawyer and he did not think he could get one); Wooten Depo. at 99 (Ex. 14) (stating that he has not asked a judge to appoint him a lawyer because "the judge is not going to appoint you one" and because "[w]hat [SAAG] Mr. Reddick tell the judge, that's basically, that's what [the judge] going to do."); Hunter Depo. at 44 (Ex. 27) (stating that he did not ask the court to appoint counsel because he "didn't know it was available"); Hendrix Depo. at 68 (Ex. 16) (stating that he did not ask the judge to appoint counsel because he "didn't know [he] could get a lawyer."); Miller Depo. at 68 (Ex. 15) (stating he did not ask the judge to appoint a lawyer because he "didn't know [he] had the option.").

system. *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("[T]he class-action device saves the resources of both the courts and the parties").

III. Plaintiffs' Claims Are Not Moot.

Defendants have not met their "heavy burden" of showing that this case is moot because: (1) nothing has happened since this case was filed to deprive the Court of authority to give Plaintiffs meaningful relief; (2) Plaintiffs' claims are capable of repetition, yet evading review; and (3) O.C.G.A. § 5-6-13 does not moot Plaintiffs' claims.[57]

First, while "[a] case is moot when events subsequent to the commencement of a lawsuit create a situation in which the court can no longer give the plaintiff meaningful relief," *Jews for Jesus, Inc. v. Hillsborough County Aviation Auth.*, 162 F.3d 627, 629 (11th Cir. 1998), in this case, nothing has happened to deprive the Court of its authority to give Plaintiffs the relief they have requested. On the contrary, Plaintiffs and putative class members face a reasonable expectation that they will again be incarcerated for civil contempt of a child support order without counsel. Indeed, Plaintiff Wooten has been jailed four times for child support debt since 2007, while Plaintiffs Hunter and Davis have each been jailed three times for

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[57] *See Friends of the Earth*, 528 U.S. at 189 (holding that the party asserting mootness bears the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur).

child support debt since 2010.[58] In addition, at least three of the named Plaintiffs have contempt hearings in the near future at which they will be required to defend themselves against the State's motions to incarcerate them. A favorable ruling from this Court will benefit Plaintiffs and other similarly situated persons. *Cf. Nat'l Council of Jewish Women v. Cobb County,* 247 Ga. 198, 199, 275 S.E.2d 315, 316-17 (1981) ("[An appeal is moot] where it affirmatively appears that a decision would not benefit the complaining party."). [59]

Second, this case is not moot because Plaintiffs' claims are capable of repetition, yet evading review.[60]

Finally, O.C.G.A. § 5-6-13[61] does not moot Plaintiffs' case because the named Plaintiffs and thousands of other class members have been jailed and will

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[58] *See* Wooten Aff. ¶ 5 (Ex. 2); Hunter Aff. ¶ 5 (Ex. 21); Davis Aff. ¶ 11-12 (Ex. 1).

[59] *See also Horton v. City of Augustine,* 272 F.3d 1318, 1328 (11th Cir. 2001) (holding that where a government entity amended a portion of a challenged policy, the case was not moot where the amendment left other challenged features of the policy substantially undisturbed).

[60] *See Turner*, 131 S. Ct. at 2515; *Bourgeois*, 387 F.3d at 1308; *Wall v. Thurman*, 283 Ga. 533, 534, 661 S.E.2d 549, 551 (2008). The *Turner* Court held that a case is not moot if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. *Turner*, 131 S. Ct. at 2515. As *Turner* demonstrates, Plaintiffs meet both prongs of this exception. First, contempt sanctions in child support cases are too short in duration to be subject to complete judicial review before their expiration. *See Turner*, 131 at 2515 (holding Turner's case was not moot because Turner could not have appealed his case through the court system during the single year of his jail sentence). Second, like Mr. Turner, Plaintiffs are likely to suffer future imprisonment. *See id.*; *see supra* at 18-21. Thus, as the Supreme Court definitively held, Plaintiffs' claims are capable of repetition yet evading review.

continue to be jailed, without counsel, despite the existence of O.C.G.A. § 5-6-13. (*Cf.* Defs' Resp. at 24-25). Defendants' argument with respect to O.C.G.A. § 5-6-13 is flawed in the following respects:

As an initial matter, Defendants' argument rests on a disproven assumption that Plaintiffs are aware of their right to appeal and know about the existence of O.C.G.A. § 5-6-13. This assumption is wholly inaccurate. The *pro se* Plaintiffs did not know about the right to appeal their jail sentences, or about O.C.G.A. § 5-6-13, and no one told them otherwise.[62] The Defendants could not produce *any* documents or forms used in the context of DHS-initiated child support contempt proceedings to inform contemnors of the existence, content, or substance of O.C.G.A. § 5-6-13.[63] Despite Defendants' "heavy burden" to prove mootness,

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[61] O.C.G.A. § 5-6-13(a) states: "A judge of any trial court or tribunal having the power to adjudge and punish for contempt shall grant to any person convicted of or adjudged to be in contempt of court a supersedeas upon application and compliance with the provisions of law as to appeal and certiorari, where the person also submits, within the time prescribed by law, written notice that he intends to seek review of the conviction or adjudication of contempt. It shall not be in the discretion of any trial court judge to grant or refuse a supersedeas in cases of contempt."

[62] *See* Davis Depo. at 119 (Ex. 24) (stating no one told him he could appeal his incarceration after being found in contempt); Hendrix Depo. at 57 (Ex. 16) (stating he was not informed that he had a right to file a notice of intent to appeal); Miller Depo. at 61 (Ex. 15) (stating he was not told at his contempt hearing that he had a right to appeal his incarceration order); Wooten Depo. at 86-87 (Ex. 14) (stating no one from the court or child support office told him he could stay his incarceration by filing a notice of intent to appeal); Hunter Depo. at 63 (Ex. 27) (stating he was not told at any of his contempt hearings that he could file a notice of appeal to stay his incarceration).

[63] *See* Defs' Resp. to Pls' Req. for Admis., No. 13 at 8 (Ex. 12). *See also* Ex. A to Defs' Resp. (containing a form contempt order that makes no mention of the right to appeal); Reddick

there is no evidence in the record to show that either the state or any court informed Plaintiffs or other indigent parents of their right to appeal, or their rights under O.C.G.A. § 5-6-13. The State cannot fail to inform indigent, unrepresented litigants about a potential legal remedy and then fault indigent, unrepresented litigants for not pursuing the remedy. Moreover, statutory notice alone is insufficient to apprise Plaintiffs and other class members of their rights under O.C.G.A. § 5-6-13.[64]

Defendants also base their argument with respect to O.C.G.A. § 5-6-13 upon an additional, erroneous assumption that Plaintiffs can avoid any period of incarceration by complying with the requirements of this Code section *before* they are incarcerated. This is totally unrealistic. O.C.G.A. § 5-6-13 requires a court to grant supersedeas only if a person *both* applies for a supersedeas *and* submits a notice of intent to appeal. *See Blake v. Spears*, 254 Ga. App. 21, 25, 561 S.E.2d

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Depo. at 53 (Ex. 13) (stating that he does not inform child support obligors facing incarceration at contempt hearings of their right to seek a stay of incarceration under O.C.G.A. § 5-6-13).

[64] *See, e.g., Grayden v. Rhodes*, 345 F.3d 1225 (11th Cir. 2003) (holding that statutory notice of a potential legal remedy, standing alone, did not satisfy due process because it was not reasonably calculated, under the circumstances, to apprise litigants of the existence of the remedy.) In *Grayden*, the Court of Appeals held that a city code providing a right to a post-condemnation hearing was insufficient to apprise tenants of their right to challenge their removal from their homes, especially when the tenants had only thirty-six hours to vacate their homes. *Grayden*, 345 F.3d at 1243. As the Court recognized, "[t]he law does not entertain the legal fiction that every individual has achieved a state of legal omniscience... there is no presumption that all of the citizens actually know all of the law all of the time." *Id.* Just as in *Grayden*, here, statutory notice of O.C.G.A.§ 5-6-13, standing alone, is insufficient to apprise indigent, unrepresented litigants of this statute's "supersedeas" mechanism, where the litigants have mere moments to assert their reliance on this statute after being held in contempt and before being taken to jail.

173, 177 (2002). Moreover, the notice of intent to appeal must be in writing. *See id.* (contemnor's counsel's in-court, verbal announcement that he "had a supersedeas" was not sufficient to stop incarceration where no written notice of intent to appeal was filed). No *pro se* litigant can be expected to come to court armed with an application for supersedeas and a written notice of intent to appeal – and to file both documents within moments of the court ordering him to jail. Plaintiffs do not know how to file a motion for supersedeas – they do not even know what a motion for supersedeas is.[65] Nor do they know how to file an appeal, write an appellate brief, or argue their cases in an appellate court. Tellingly, both cases that Defendants cite in support of their argument that indigent, *pro se* parents can avoid jail pursuant to O.C.G.A. § 5-6-13 involved contemnors who were represented by counsel.[66]

The named Plaintiffs are similar to the rest of the class in their lack of knowledge of the existence and requirements of O.C.G.A. § 5-6-13. According to

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[65] *See* Davis Depo. at 119 (Ex. 24) (stating he did not know what a motion for supersedeas is, and did not know how to file one); Hendrix Depo. at 57 (Ex. 16) (stating that no one, including the judge, SAAG, or DCSS representative, informed him of his right to file a motion for supersedeas); Miller Depo. at 61 (Ex. 15) (stating he did not know what a motion for supersedeas was when he appeared at his contempt hearing, nor did anyone inform him of his right to file one); Wooten Depo. at 87 (Ex. 14) (stating no one with the court or the child support office told him he could stay his jail sentence by filing a motion for supersedeas); Hunter Depo. at 62-63 (Ex. 27) (stating he does not know how to file a motion for supersedeas, and that no one informed him of his right to file one when he appeared at contempt hearings).

[66] *See Calvert Enters., Inc. v. Griffin-Spalding County Hosp. Auth.*, 197 Ga. App. 727, 399 S.E.2d 287 (1990), and *Binkley v. Flatt*, 256 Ga. App. 263, 568 S.E.2d 95 (2002).

Defendants' interrogatory responses, only seven *pro se* child support contemnors even filed a motion for supersedeas seeking to stay their incarceration in Georgia in the past five years.[67] In fact, documents that Defendants produced in discovery show that only one *pro se* parent (not seven) – out of the thousands of parents jailed for child support debt in the last five years – filed a motion for supersedeas, and that parent's motion was denied.[68] Similarly, according to Defendants' interrogatory responses, only two *pro se* parents filed a notice of appeal or notice of intent to appeal a child support contempt order in Georgia in the past five years.[69] By contrast, and to put these numbers in perspective, at least 3,538 *pro se* parents were incarcerated since January 1, 2010 in child support contempt actions initiated by SAAGs. In other words, fewer than 0.1% of *pro se* parents jailed for

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[67] *See* Defs' Interrog. Resp. No. 13 at 16-18 (Ex. 7).

[68] In their Response to Plaintiffs' First Interrogatories, Defendants state that the following seven parents filed *pro se* motions for supersedeas in the context of DHS-initiated contempt proceedings: Isham Alexander, Tyrone Brown, Christopher Bernard Chambliss, George Olmstead, Monroe Jackson, Antonio Brooks, and Zolton Watson. *See* Defs' Interrog. Resp., No. 13 at 16-18 (Ex. 7). However, according to Defendants' underlying documents, Isham Alexander and Tyrone Brown were represented by lawyers. *See* Ex. 28. Moreover, Christopher Chambliss and George Olmstead, while *pro se*, did not file motions or requests for supersedeas. Rather, Mr. Chambliss filed a "Pleading to Wave (sic)," and Mr. Olmstead filed a "Petition for Emergency Motion to Dismiss Final Contempt Order," neither of which mentions the word "supersedeas" or O.C.G.A. § 5-6-13. *See* Ex. 29. While Defendants state that Monroe Jackson and Antonio Brooks filed *pro se* motions for supersedeas, they did not provide documentation of these motions. Thus, Defendants have only been able to show that one *pro se* parent, Zolton Watson, filed a motion for supersedeas in a DHS-initiated child support contempt action in the past five years in Georgia; the trial court denied Mr. Watson's *pro se* motion. *See* Ex. 30.

[69] *See* Defs' Interrog. Resp., No. 14 at 18-19 (Ex. 7).

child support debt in the past five years sought to stay their jail sentence in reliance on O.C.G.A. § 5-6-13 or by filing a notice of intent to appeal.

Even if Plaintiffs could stay their incarceration pursuant to O.C.G.A. § 5-6-13, a stay is only a temporary reprieve. Even a parent who somehow avoided jail under O.C.G.A. § 5-6-13 would still face a potential term of incarceration – without counsel – depending on the ruling of the appellate court; thus the right to counsel claim would not be mooted.

In sum, Defendants have failed to carry their heavy burden as to mootness.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court certify, pursuant to O.C.G.A. § 9-11-23, a class of all indigent parents who, without appointed counsel and without constitutionally mandated procedural protections to ensure fundamentally fair proceedings, face incarceration for nonpayment or underpayment of child support in child support contempt proceedings where the Georgia Department of Human Services (DHS) and/or the custodial parent are represented by state-funded counsel.

Respectfully submitted this 28th day of October, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to O.C.G.A. § 9-11-5, I have this day perfected service of this **PLAINTIFFS' REPLY IN SUPPORT OF AMENDED MOTION FOR CLASS CERTIFICATION** upon Defendants at the following address:

Mark J. Cicero
Jason S. Naunas
Assistant Attorneys General
40 Capitol Square, S.W.
Atlanta, GA 30334-1300

This 28th day of October, 2011.

Atteeyah Hollie