*Judge Jerry W. Baxter*

**SUPERIOR COURT OF FULTON COUNTY**

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COMMENTS:

2011.cv.198121

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**IN THE SUPERIOR COURT OF FULTON COUNTY**
**STATE OF GEORGIA**

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



## ORDER ON CLASS CERTIFICATION

Named plaintiffs, five indigent parents who were incarcerated for child support debt, brought this civil rights action for injunctive and declaratory relief on March 22, 2011, against Governor Nathan Deal, Director of the Georgia Department of Human Services ("DHS"), Clyde Reese, and various state officials, contending that the State had denied them the assistance of counsel in their civil child support contempt proceedings. In their Complaint, Plaintiffs allege that they have been incarcerated, some of them repeatedly, for child support debt, without counsel, in civil contempt proceedings in which the State entity seeking their incarceration was represented by a lawyer. After filing the Complaint, Plaintiffs moved to certify a class of similarly situated indigent parents. The parties have submitted briefs and evidence and the Court held argument on class certification on December 14, 2011. After reviewing the record and hearing the evidence and arguments presented, the Court enters the following findings of fact and conclusions of law. *See* O.C.G.A. § 9-11-23(f)(3).

## PROCEDURAL HISTORY

On March 22, 2011, Plaintiffs filed their Complaint. Defendants filed an Answer on April 19, 2011. On April 22, 2011, Defendants filed a motion to stay the case pending resolution by the United States Supreme Court of *Turner v. Rogers*, 131 S. Ct. 504 (2010) (granting petition for writ of certiorari). Plaintiffs consented to the motion. On April 27, 2011, Plaintiffs filed a Motion for Class Certification.[1] On May 5, 2011, this Court granted Defendants' motion to stay, staying the case until thirty days after the decision in *Turner* became final.

On June 20, 2011, the United States Supreme Court issued its decision in *Turner v. Rogers*, 131 S. Ct. 2507 (2011). In *Turner*, the Court held that an indigent parent did not have a categorical right to counsel in a civil child support contempt hearing where the custodial parent seeking the contempt order represented herself and the State was not a party. *See id.* at 2519-20. The Court explained the scope and reach of its ruling as follows:

> [The Due Process Clause] does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings).
>
> 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. *Cf. 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*" (emphasis added)). And this kind of proceeding is not before us.

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[1] In this motion, Plaintiffs requested certification of a class of "all indigent parents in Georgia who are: (1) currently being incarcerated for nonpayment or underpayment of child support following a contempt proceeding at which they were not afforded the right to counsel; or (2) facing the imminent threat of future incarceration in Georgia, without counsel, for nonpayment or underpayment of court-ordered child support."

*Id.* at 2520.

On July 20, 2011, in light of *Turner*, Plaintiffs filed an Amended Motion for Class Certification in which they revised their proposed class definition to include only those indigent parents who face incarceration in contempt proceedings in which DHS was represented by counsel. On August 16, 2011, Defendants filed their Response to Plaintiffs' Amended Motion for Class Certification ("Defs' Resp. Br."). On September 2, 2011, this Court entered an order permitting a brief period of discovery on the issue of class certification and directing the parties to file supplemental briefs on class certification after the close of discovery. The parties engaged in written discovery and depositions around the issue of class certification. Plaintiffs filed their Reply in Support of Amended Motion for Class Certification ("Pls' Reply Br.") on October 28, 2011. On November 10, 2011, Defendants filed their Surreply to Plaintiffs' Reply ("Defs' Surreply"). This Court heard argument on the issue of class certification on December 14, 2011.

## FINDINGS OF FACT

### I. Plaintiffs

The named Plaintiffs are five indigent parents who have been jailed for child support debt, without being provided state-funded counsel, in civil contempt proceedings initiated by DHS.[2] The pertinent facts as to each named Plaintiff are as follows:

A. Randy Miller, age 40, is obligated to pay child support for his two daughters pursuant to an order of the Superior Court of Floyd County. (*See* Miller Depo. at 8, 29, 51, 67 (Ex. 15 to Pls' Reply Br.); Compl. ¶ 21). His child support cases are administered by DHS. (*See* Miller Depo. at 28; Compl. ¶ 21). Mr. Miller served in the military reserves for fourteen years, and is a veteran of the Iraq War. (*See* Miller Depo. at 18, 64). After being honorably discharged from the military, Mr. Miller returned to his civilian job. (*See id.* at 18). To date, he has paid about $75,000 in child support. (*See* Ex. 23 to Pls' Reply Br.). Sometime after his return from Iraq, Mr. Miller lost his job, and in 2010, he lost his

[2] Plaintiffs voluntarily dismissed the sixth named Plaintiff, Gregory Carswell, upon Defendants' representation that DHS administratively closed his child support matter.

home to foreclosure. (*See* Miller Depo. at 14, 19). On November 15, 2010, Mr. Miller was jailed in Floyd County, without counsel, after proceedings at which a Special Assistant Attorney General (SAAG) sought his incarceration. (*See id.* at 61). At the time of his incarceration, Mr. Miller had no assets and 39 cents in his bank account. (*See id.* at 62). DHS consented to his release from jail on February 14, 2011. (*See* Compl. ¶ 23). Mr. Miller's child support obligations total nearly $800 per month. (*See* Miller Depo. at 67). While he recently found a new job, it is a temporary position with an uncertain duration. (*See id.* at 25-26). Mr. Miller owes child support arrears and faces re-incarceration for child support debt. (*See id.* at 52, 60).

B. Russell Davis, age 36, is obligated to pay child support for his two sons pursuant to orders of the Superior Court of Cook County. (*See* Davis Aff. ¶ 3 (Ex. 1 to Pls' Reply Br.)). His child support cases are administered by DHS. (*See id.*) Mr. Davis has mental illnesses and has been committed to a mental hospital for treatment of psychiatric conditions.[3] His sole source of income is a monthly disability payment from the Veteran's Administration, $250 of which is apportioned to his youngest son each month. (*See* Davis Aff. ¶ 5). Mr. Davis has been jailed three times after contempt hearings at which he represented himself against a Special Assistant Attorney General who sought Mr. Davis's incarceration. (*See id.* at ¶ 6). On the first occasion, he was jailed for one day on June 23, 2010. (*See id.* at ¶ 7). Next, he was jailed from November 3, 2010 until February 2, 2011. (*See id.* at ¶ 8). He was jailed again from March 9, 2011 until April 6, 2011. (*See id.* at ¶ 11, 12). Due to these incarcerations, Mr. Davis lost his apartment and his vehicle. (*See id.* at ¶ 10). Mr. Davis owes child support arrears, is indigent, and faces re-incarceration for child support debt. (*See id.* at ¶ 15).

C. Lance Hendrix, age 24, is obligated to pay child support for his daughter pursuant to an order of the Superior Court of Cook County. (*See* Hendrix Aff. ¶ 1, 4 (Ex. 18 to Pls' Reply Br.)). His child support case is administered by DHS. (*See id.*) Between his return from military service in 2009 and his arrest for child support debt in July 2010, Mr. Hendrix worked part-time in construction, did odd jobs liking picking pecans and scrap metal, and managed to pay $3,796.36 toward his arrears. (*See id.* at ¶ 6, 7, 9). Mr. Hendrix was, nevertheless, jailed for four months after civil contempt proceedings at which he represented himself against a Special Assistant Attorney General who sought his incarceration. (*See id.* at ¶ 9). Mr. Hendrix currently works as a laborer, but his income places him below the poverty line. (*See id.* at ¶ 22). He owes child support arrears, is indigent, and faces re-incarceration for child support debt. (*See id.*).

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[3] *See* Davis Depo. at 63, 112, 114 (Ex. 24 to Pls' Reply Br.). A doctor who examined Mr. Davis at a Veteran's Administration hospital 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. *See* Letter of Dr. Luis Byrne-Vidal, M.D., Apr. 1, 2010 (Ex. 25 to Pls' Reply Br.).

D. Reginald Wooten, age 36, is obligated to pay child support for his daughter pursuant to an order of the Superior Court of Cook County. (*See* Wooten Aff. ¶ 1, 3 (Ex. 2 to Pls' Reply Br.)). His child support case is administered by DHS. (*See id.* at ¶ 3). Mr. Wooten worked at two factories specializing in the fabrication of metal products for thirteen years and made child support payments during that time. (*See id.* at ¶ 6, 7). Due to a 2006 felony drug conviction, Mr. Wooten has since struggled to find work. (*See id.* at ¶ 8, 9). He is currently under-employed and lives in a trailer with his mother who is terminally ill and depends on him for care. (*See id.* at ¶ 21). Mr. Wooten has been incarcerated for child support debt four times, for a total of over one year, including once after this lawsuit was filed. (*See id.* at ¶ 5, 15(i)). Mr. Wooten has not been represented by counsel at any contempt hearing that led to his incarceration, whereas DHS was represented at every such hearing. (*See id.*) Mr. Wooten owes child support arrears, is indigent, and faces re-incarceration for child support debt. (*See id.* at ¶ 21).

E. Joe Hunter, age 21, is obligated to pay child support for his son pursuant to an order of the Superior Court of Walton County. (*See* Hunter Aff. ¶ 1, 3 (Ex. 21 to Pls' Reply Br.)). His child support case is administered by DHS. (*See id.* at ¶ 3). Mr. Hunter was jailed three times for child support debt, including as recently as September 2011. (*See id.* at ¶ 5). In 2010, Mr. Hunter was jailed for five months, during which time he was unable to pay either the initial purge fee of $528, or the later-reduced purge fee of $250. (*See id.* at ¶ 6(j)-(l)). Mr. Hunter owes child support arrears, is indigent, and faces re-incarceration for child support debt. (*See id.* at ¶ 10).

Plaintiffs also provided the Court with affidavits from 54 other child support debtors.[4] Among the affiants are: (1) Lashandra Harris, who was jailed in Troup County for two-and-one-half months when she was six months pregnant and held in custody until fifteen days before she gave birth;[5] (2) Oswaldo Vicente, who speaks limited English, but has been jailed for over six months this year in Gordon County, after proceedings at which he did not have a lawyer or an interpreter;[6] (3) Bruce Richard, who is homeless, underwent surgery for lung cancer, and has been incarcerated three times for child support debt in Gordon County;[7] (4) Quinton Jackson, who was jailed for over one year in Cook County for missing his first three months of child

[4] *See* Ex. 3-5, 9, 17, 19, 20 to Pls' Reply Br.; Ex. 1-16 to Pls' Not. of Filing Add'l Affs.

[5] *See* Harris Aff. ¶ 5, 19 (Ex. 3 to Pls' Reply Br.).

[6] *See* Vicente Aff. ¶ 2, 7-9, 11-12 (Ex. 1 to Pls' Not. of Filing Add'l Affs).

[7] *See* Richard Aff. ¶ 4, 6, 8 (Ex. 2 to Pls' Not. of Filing Add'l Affs).

support payments, which became due while he was incarcerated;[8] and (5) Frank Hatley, who was jailed for over one year in Cook County, despite DNA evidence showing he was not the father of the child in question.[9] All of these persons state that they were jailed, without counsel, in DHS-initiated contempt proceedings at which DHS was represented by counsel.

## II. Defendants

The Defendants are Nathan Deal, Governor, Clyde Reese, Commissioner of DHS, Keith Horton, Director of DHS's Division of Child Support Services (DCSS), and managers of four local child support offices. *See* Compl. ¶ 66-96. Defendants refer to themselves, collectively, as "the Department." *See* Defs' Resp. Br. at 2. The Department operates DCSS, which is designated as Georgia's "IV-D" child support enforcement agency and given the responsibility of administering Georgia's Child Support Recovery Act. *See* O.C.G.A. § 19-11-1 *et seq.* The Department participates in the joint federal-state IV-D program, thereby assisting Georgia parents in a variety of activities, including locating non-custodial parents, establishing paternity, enforcing and modifying child support orders, establishing and enforcing medical support orders, and collecting and distributing child support payments. *Id.*

## III. Civil Child Support Contempt Proceedings in Georgia

"Civil contempt proceedings in child support cases constitute one part of a highly complex system designed to assure a noncustodial parent's regular payment of funds typically necessary for the support of his children." *Turner*, 131 S. Ct. at 2517. Under Georgia law, a court may incarcerate a parent for non-payment of child support if it finds the parent wilfully failed to comply with a child support order. *See Dep't of Human Res. v. Tabb*, 221 Ga. App.

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[8] *See* Jackson Aff. ¶ 5, 11 (Ex. 4 to Pls' Reply Br.).

[9] *See* Hatley Aff. ¶ 2, 11, 14 (Ex. 5 to Pls' Reply Br.).

766, 766, 472 S.E.2d 540, 542 (1996) ("A finding of willfulness is necessary to hold a parent in contempt of a support order."). In such cases, the parent may be held in either civil or criminal contempt. *See Ensley v. Ensley*, 239 Ga. 860, 863, 238 S.E.2d 920, 923 (1977) ("A father who willfully refuses to pay child support which he is able to pay and which is required by an order of court may be found guilty of either civil or criminal contempt of court, or both, and dealt with as provided by law."). If the parent is imprisoned for a specified, unconditional period, the purpose of the incarceration is punishment and the contempt is criminal. *See id.* at 861-62, 238 S.E.2d at 921-22. If the parent is imprisoned only until he performs a specified act, such as payment of a purge fee, the purpose is remedial and the contempt is civil. *See id.* at 862, 238 S.E.2d at 922.

Because DHS-initiated child support contempt proceedings are civil (*see* Answer ¶ 5), Plaintiffs and other indigent parents are denied legal assistance. Whereas persons charged with criminal contempt are afforded the right to counsel and may be incarcerated for no more than twenty days per violation, *see* O.C.G.A. § 15-6-8, parents charged with civil contempt for child support debt are often jailed for far longer periods, without counsel.[10]

DHS is empowered to bring motions for contempt against child support obligors who fail to comply with child support orders. (*See* Answer ¶ 4). The Department is a party to all DHS-

[10] *See, e.g.*, Hatley Aff. ¶ 2 (stating he was jailed for over one year for child support debt without being able to pay his purge fee); Jackson Aff. ¶ 5 (stating he was jailed for over one year for child support debt without being able to pay his purge fee); Lewis Aff. ¶ 8 (Ex. 19 to Pls' Reply Br.) (stating he was jailed for over one year for child support debt without being able to pay his purge fee). The Supreme Court of Georgia held that the purpose of civil contempt is not served when the contemnor is unable to pay his purge fee. *See Hughes v. Dep't of Human Res.*, 269 Ga. 587, 587, 502 S.E.2d 233, 234 (1998) (holding that a parent who was jailed for two months had to be released after the parent filed a petition for release stating he did not have money to pay the purge fee). However, named Plaintiffs and others have remained in jail for months, and sometimes over a year, without being able to pay their purge fees. *See* Pls' Reply Br. at 2-3, 21. *See also Ridgway v. Baker,* 720 F.2d 1409, 1414 (5th Cir. 1983) (finding that without the assistance of counsel, an indigent contemnor is at risk of "indefinite" confinement if the trial court erroneously determines that he "has the means to comply with the court's order.").

initiated child support contempt proceedings.[11] It represents both the child under the provisions of the Child Support Recovery Act, *see* O.C.G.A. 19-11-1 *et seq.*, and the State's interest in recouping any welfare payments made for the support of the child.[12] 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.[13] In the instant case, four of the six original named Plaintiffs owe or have owed the State unreimbursed public assistance.[14]

In all DHS-initiated child support contempt hearings, the Department is represented by counsel.[15] In Georgia, unlike in the South Carolina system at issue in *Turner*, SAAGs

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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 Ct., June 15, 2011) (referring to DHS as "Plaintiff" in the enforcement action); Show Cause Order, *DHS, ex. rel. Jaylon Malik Brown v. Russell Davis*, Civil Action No. 09CVU275 (Cook County Superior Ct., Sept. 3, 2009) (referring to DHS as "Plaintiff"); Not. to Produce, *DHR, ex. rel. Jaquavioun Hunter v. Joe Hunter*, Civil Action No. 09-2231-1 (Walton County Superior Ct., June 12, 2009) (requiring defendant to produce certain documents that "may be used as evidence by Plaintiff, Georgia Department of Human Resources") (Ex. 11 to Pls' Reply Br.).

[12] *See Dep't Of Human Res. v. Fleeman*, 263 Ga. 756, 758, 439 S.E.2d 474, 475 (1994) (noting that O.C.G.A. § 19-11-5 "creates a direct and independent . . . debt to the state by the 'parent or parents responsible for the support of the child,' which debt DHR may pursue on behalf of the state.").

[13] *See* Defs' Interrog. Resp., No. 17 at 22 (Ex. 7 to Pls' Reply Br.).

[14] *See* Wooten Aff. ¶ 14 (stating his child's mother received public assistance); Hunter Aff. ¶ 3 (son's guardian assigned her right to collect child support to DHS because she received public assistance); Order for Supp., *DHR ex rel. Jontavious Carswell v. Gregory Carswell*, No. 96-M-62 (Emanuel County Superior Ct.) (Ex. 22 to Pls' Reply Br.) (guardian's income was derived in part from "AFDC"); DHS-Generated Payment Summ. for Randy Miller, Case No. 940004284 (Ex. 23 to Pls' Reply Br.) (listing "case subtype" as "Regular Former AFDC")).

[15] *See* Defs' Resp. Br. 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 . . ."); Defs' Resp. to Pls' First Req. for Admis., No. 4 at 4 (Ex. 12 to Pls' Reply Br.) (stating that DHS is represented by a SAAG or another attorney at all DHS-initiated child support contempt hearings); Reddick Depo. at 29 (Ex. 13 to Pls' Reply Br.) (stating that he appears in court on behalf of DHS in child support contempt proceedings "[e]very time they have court.").

representing DHS actively participate in contempt proceedings. They call witnesses in support of their contempt motions,[16] and affirmatively seek incarceration.[17] This is different from the proceedings in *Turner*, in which:

- the *pro se*, custodial mother argued her own contempt motion;[18]
- the South Carolina Department of Social Services (DSS) was not a party at the time of the contempt hearing under review; [19]
- there was only one hearing over the entire course of the child support contempt matter in which DSS even entered an appearance;[20] and
- "The DSS representative did not say a single word" at that hearing.[21]

While DHS has a number of tools at its disposal to encourage parents to comply with child support obligations,[22] the sanction of imprisonment has become a routine part of child

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[16] *See* Wooten Depo. at 102 (Ex. 14 to Pls' Reply Br.) (stating that the SAAG called child support agents as witnesses at his contempt hearings, but that he would not know how to call a witness to testify); Hendrix Depo. at 27 (Ex. 16 to Pls' Reply Br.) (stating that the state's attorney called him to the stand and asked him questions); Miller Depo. at 72 (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 to Pls' Reply Br.) ("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.").

[17] *See* Hendrix Aff. ¶ 9 ("[T]he attorney for the state child support office sought to incarcerate me, and I could not afford counsel to defend myself"); Wooten Aff. ¶ 15(h) ("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 ("[T]he state agency that was asking for my incarceration was represented by a lawyer."); Lewis Aff. ¶ 14 ("The State's attorney asked that I continue to be held in the jail."); Cecil Aff. ¶ 13 (Ex. 20 to Pls' Reply Br.) ("The State agency that asked for my incarceration, DHS, was represented by an attorney.").

[18] *Turner*, 131 S. Ct. at 2513 ("[Both parents] were present, each without representation by counsel.").

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

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

[21] *See id.*

support enforcement practice in Georgia. As of October 2011, about 845 parents were incarcerated in Georgia for child support debt in the course of DHS-initiated contempt proceedings.[23] In addition, since January 1, 2010, at least 3,538 parents have been jailed, without counsel, in DHS-initiated civil contempt hearings.[24]

Having entered the foregoing findings of fact, the Court turns to consider Plaintiffs' request for class certification.

## CONCLUSIONS OF LAW

Plaintiffs' Amended Motion for Class Certification seeks certification of a class comprised 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.

Pls.' Amend. Mot. for Class Cert. at 1.

Defendants have not disputed that there are numerous indigent individuals who have been jailed, without state-funded counsel, in civil contempt proceedings in which the State is represented by an attorney. Rather, Defendants contend that Plaintiffs' claims are moot. Defendants further contend that Plaintiffs fail to meet the statutory class certification

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[22]Statutorily authorized collection procedures include: the issuance of demand letters; notification to employers that a wage assignment is in effect; use of state and federal income tax refund intercept programs; liens, levies, and seizures of property. *See* O.C.G.A. § 19-11-18(a). The State can also garnish the earnings of non-compliant parents, *see* O.C.G.A. § 19-11-19(b), or suspend occupational and driver's licenses for non-payment. *See* O.C.G.A. § 19-11-9.3.

[23]*See* Defs' Interrog. Resp., No. 16, at 20-22.

[24]*See* Defs' Interrog. Resp., No. 5, at 8-10 (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).

requirements. For the reasons that follow, the Court finds that Plaintiffs' claims are not moot and that class certification is proper in this action.

## I. Named Plaintiffs' Claims Are Not Moot.

Defendants argue that Plaintiffs' claims are moot because Plaintiffs did not appeal their contempt orders, and Plaintiffs can avoid future incarceration by appealing any future contempt orders. (*See* Defs' Resp. Br. at 24-26; Defs' Surreply at 12-13). The Court finds that Defendants have not met their "heavy burden"[25] of showing this case is moot because: (1) nothing has happened since the 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.

### A. The Court Has the Authority to Give Plaintiffs Meaningful Relief.

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 since the Complaint was filed to deprive the Court of authority to grant Plaintiffs meaningful relief. Plaintiffs have been repeatedly jailed for child support debt. They are still indigent, and still in arrears. Accordingly, they face a reasonable expectation that they will again be incarcerated without the assistance of counsel. Indeed, Plaintiffs presented evidence at the December 14, 2011 hearing regarding putative class members who were imprisoned, without counsel, in recent weeks – at least one of whom had limited English

[25] *See Friends of the Earth v. Laidlaw Envtl. Servs. (Toc), Inc.*, 528 U.S. 167, 189 (2000) (holding that the party asserting mootness bears the "heavy burden" of persuading the court that the challenged conduct cannot reasonably be expected to recur).

proficiency.[26] While Defendants maintain they have altered some of the forms they use in contempt proceedings in light of *Turner* (*see* Defs' Resp. Br. at 16-17), it is undisputed that indigent defendants still face incarceration without counsel. As such, a favorable ruling from this Court on the right to counsel issue would benefit class members.[27]

**B. Plaintiffs' Claims Are Capable of Repetition, Yet Evading Review.**

Second, this case is not moot because Plaintiffs' claims are capable of repetition, yet evading review. *See Turner*, 131 S. Ct. at 2515; *Bourgeois v. Peters*, 387 F.3d 1303, 1308 (11th Cir. 2004); *Wall v. Thurman*, 283 Ga. 533, 534, 661 S.E.2d 549, 551 (2008). In *Turner,* the Supreme 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, incarcerations for contempt in child support cases are often days or months long, making them too short to be subject to complete judicial review before their expiration. *See id.* (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.* Several of the named Plaintiffs have experienced repeated incarcerations for contempt, and three of them, Reginald Wooten, Russell Davis, and Joe Hunter,

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[26] *See, e.g.,* Vicente Aff. ¶ 2, 7-9, 11-12 (stating that he was confined to the Gordon County Jail following a civil contempt hearing at which he was required to plead for his liberty against a SAAG, without counsel or an interpreter, even though he speaks limited English).

[27] *See 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); *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.").

have been re-incarcerated since Plaintiffs filed their Complaint.[28] Thus, as the Supreme Court held, Plaintiffs' claims are capable of repetition yet evading review.

### C. O.C.G.A. § 5-6-13 Does Not Moot Plaintiffs' Case.

Defendants argue that this case is moot because a contemnor who asserts that his constitutional rights have been infringed in a contempt proceeding may stay his incarceration while he seeks appellate review. *See* Defs' Resp. Br. at 25. In support of their assertion, Defendants cite O.C.G.A. § 5-6-13(a), which 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.

The Court finds that O.C.G.A. § 5-6-13 does not moot Plaintiffs' case because the named Plaintiffs and others have been jailed and likely will continue to be jailed, without counsel, despite the existence of O.C.G.A. § 5-6-13. Defendants' argument with respect to O.C.G.A. § 5-6-13 is flawed in the following respects:

First, 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. Plaintiffs, however, presented evidence that they 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.[29] The Defendants did not produce any

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[28] *See* Wooten Aff. ¶ 5; Hunter Aff. ¶ 5; Davis Aff. ¶ 11-12.

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

documents or forms used in DHS-initiated child support contempt proceedings to inform contemnors of the existence, content, or substance of O.C.G.A. § 5-6-13.[30] Despite Defendants' "heavy burden" to prove mootness, there is no evidence in the record to show that the State or any court ever informed Plaintiffs or other *pro se* 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 them for not pursuing the remedy. Moreover, under the circumstances, statutory notice alone is insufficient to apprise Plaintiffs and other class members of their rights under O.C.G.A. § 5-6-13.[31]

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intent to appeal); Hunter Depo. at 63 (Ex. 27 to Pls' Reply Br.) (stating he was not told at any of his contempt hearings that he could file a notice of appeal to stay his incarceration).

[30]*See* Defs' Resp. to Pls' Req. for Admis., No. 13 at 8 (Ex. 12 to Pls' Reply Br.). *See also* Ex. A to Defs' Resp. Br. (containing a DHS-generated, form contempt order that makes no mention of the right to appeal); Reddick Depo. at 53 (stating that he does not inform child support obligors facing incarceration of their right to seek a stay under O.C.G.A. § 5-6-13).

[31] *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. *See also Garzon v. Bd. of Review, Dep't of Labor*, 850 A.2d 524, 527-28 (N.J. 2004) (holding that failure to provide notice of statutory right to appeal the termination of unemployment benefits – contemporaneous with the denial of benefits – violated due process when "all applicants for benefits are known to be proceeding without the benefit of a lawyer"); *cf. In re Kilton*, 939 A.2d 198, 204-5 (N.H. 2007) (due process satisfied where written notice of termination of public assistance benefits informed recipient of the right to appeal, the right to counsel on appeal, and the existence of organizations providing free legal assistance).

Second, Defendants base their argument with respect to O.C.G.A. § 5-6-13 upon an erroneous assumption that Plaintiffs can avoid any period of incarceration by complying with the requirements of this statute *before* they are incarcerated. This argument presupposes that unrepresented, indigent defendants can pursue such remedies without counsel. Yet, 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 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). Most laymen do not know how to file a motion for supersedeas.[32] No *pro se* litigant is likely 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. Nor, in any event, is an appeal an adequate remedy, since unrepresented, indigent parents do not know how to file an appeal, write an appellate brief, or argue their cases in an appellate court.[33] Tellingly, both cases Defendants

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[32] *See* Davis Depo. at 119 (stating he did not know what a motion for supersedeas was, and did not know how to file one); Hendrix Depo. at 57 (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 (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 (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 (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).

[33] *See, e.g., Fulton County Bd. of Tax Assessors v. Marani*, 299 Ga. App. 580, 585, 683 S.E.2d 136, 141 (2009) (equitable relief was appropriate in class action involving improper assessment of property taxes, even where class members had right to appeal tax assessments, where equitable relief was imposed to protect the taxpayers' appeal rights and to ensure that they did, in fact, have access to appropriate remedies).

cite in support of their argument that *pro se* parents can avoid jail pursuant to O.C.G.A. § 5-6-13 involved contemnors represented by counsel.[34]

The named Plaintiffs are similar to the rest of the class in their lack of knowledge of the existence of O.C.G.A. § 5-6-13. Plaintiffs presented evidence – evidence the Defendants did not refute – showing that only one *pro se* child support contemnor of thousands ever filed a motion for supersedeas seeking to stay his incarceration in Georgia in the past five years – and that parent's motion was denied.[35] 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.[36] 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. Defendants have failed to carry their heavy burden as to mootness.

## II. Requirements of Class Certification

Having determined that Plaintiffs' claims are not moot, the Court now turns to consider whether Plaintiffs meet the requirements of class certification.

A party seeking to certify a class must demonstrate that it has met all four requirements of O.C.G.A. § 9-11-23(a) and at least one of the requirements of § 9-11-23(b). Section 9-11-23(a) states that class certification is proper if Plaintiffs demonstrate that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact

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

[35]*See* Pls' Reply Br. at 32 (citing Defs' Interrog. Resp. No. 13 at 16-18). 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; the trial court denied Mr. Watson's *pro se* motion. *See* Ex. 30 to Pls' Reply Br.

[36]*See* Defs' Interrog. Resp., No. 14 at 18-19.

common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. O.C.G.A. § 9-11-23(a).

Plaintiffs seek to certify the proposed class under § 9-11-23(b)(2). Under § 9-11-23(b)(2), a court may authorize class certification where "[t]he 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."

In their opposition papers, Defendants challenge all elements of § 9-11-23(a) and the requirement for class certification under § 9-11-23(b)(2). The Court will consider whether Plaintiffs have established all elements of class certification.

### A. O.C.G.A. § 9-11-23(a)

#### 1. Numerosity

A class must be "so numerous that joinder of all members is impracticable." O.C.G.A. § 9-11-23(a)(1). Defendants argue that there is insufficient evidence of numerosity, but, based on the following evidence of record, this Court disagrees.

First, according to the Defendants' discovery responses, at least 3,538 parents have been jailed without counsel in DHS-initiated civil contempt hearings since Jan. 1, 2010.[37] Plaintiffs contend, and Defendants have not disputed, that this number is likely to be under-inclusive because it is based on data from only 36 of the 59 SAAGs who prosecute child support contempt actions for DHS in Georgia.[38]

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[37] *See* Defs' Interrog. Resp., No. 5, at 8-10.

[38] *See id.*

Second, Plaintiffs presented evidence that, as of October 2011, about 845 parents were incarcerated for child support debt in DHS-initiated child support contempt cases.[39] With respect to the question of how many of these people are indigent, the Court notes that 70% of child support arrears nationally are owed by parents with either no reported income or income of less than $10,000 per year. *See Turner*, 131 S. Ct. at 2518.

Third, Plaintiffs presented sworn affidavits from a total of 58 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.[40]

Courts have found that classes comprised of far fewer people satisfy the numerosity requirement. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) ("more than forty" members satisfies numerosity); *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (thirty-one class members satisfied numerosity); *Sta-Power Indus. v. Avant*, 134 Ga. App. 952, 955, 216 S.E.2d 897, 901 (1975) (noting that courts have held that a class of 25 or 40 persons is sufficient to satisfy numerosity).

In addition to contesting the size of the putative class, Defendants argue that Plaintiffs fail to identify a "definable" class. The Court, however, finds that Plaintiffs' class definition satisfies the "minimal standard of definiteness which will allow the court to determine

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[39] *See* Defs' Interrog. Resp., No. 16, at 20-22.

[40] *See* Ex. 9 to Pls' Reply Br.; Ex. 1-16 to Not. of Filing Add'l Affs. in Supp. of Class Cert. Plaintiffs also presented 78 additional affidavits from putative class members who: (a) are indigent; (b) were incarcerated for civil contempt of a child support order; (c) were unable to pay their purge fees; and (d) were unrepresented by counsel. *See* Ex. 10 to Pls' Reply Br.

membership in the proposed class." *Brenntag Mid South, Inc. v. Smart*, 308 Ga. App. 899, 903, 710 S.E.2d 569, 574 (2011) (internal citations and quotations omitted).[41] Contrary to the Defendants' argument, inclusion of the term "indigent parent" does not render the class definition inadequate. Indeed, numerous courts have certified classes of "indigent" persons.[42] Neither need Plaintiffs prove that class members are limited to a specific geographic area. (*See* Defs' Surreply at 5). Rather, joinder has been found impracticable, warranting class certification, where, as here, class members are dispersed over a large geographic area.[43]

Finally, Defendants contend in their Surreply that "it is impossible to determine if any individual is facing incarceration at a child support contempt proceeding prior to the proceeding's conclusion." Plaintiffs, however, show that DHS has a policy of affirmatively

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[41] Defendants cite *DeBremaecker v. Short*, 433 F.2d 733 (5th Cir. 1970), for the proposition that the proposed class is not adequately defined. However, in *DeBremaecker*, the proposed class was comprised of "residents in the state active in the peace movement." *Id.* at 734. This amorphous definition was rejected. *See id.* By contrast, in this case, the class definition will allow the Court to determine membership in the proposed class.

[42] *See, e.g.*, *Powers v. Hamilton County Pub. Defender Comm'n*, 501 F.3d 592, 617-19 (6th Cir. 2007) (upholding the certification of a class of "indigent" criminal defendants jailed for failure to pay court-ordered fines); *Lake v. Speziale*, 580 F. Supp. 1318, 1332-34 (D.C. Conn. 1984) (certifying class of "indigent" persons unable to procure counsel to represent them in civil child support contempt hearings); *Johnson v. Zurz*, 596 F. Supp. 39, 43-44 (D.C. Ohio 1984) (certifying class of "indigent" defendants who face incarceration without counsel in child support contempt proceedings); *Morales v. Minter*, 393 F. Supp. 88, 95 (D.C. Mass. 1975) (certifying a class of "indigent" teenagers who were unable to obtain public assistance due to a statutory age restriction); *Whiteside v. Smith*, 67 P.3d 1240, 1244, n.5 (Colo. 2003) (upholding a lower court's certification of a class of "indigent" workers challenging imposition of a fee to obtain review of denied disability benefits and medical treatment).

[43] *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).

seeking incarceration for child support debt, weakening the Defendants' argument that it is impossible to identify persons who will be subject to a deprivation of their liberty.[44]

The Court finds that joinder is impractical in this case because of the large number of proposed class members, the number of future potential class members, and the impracticality of individuals incarcerated or facing incarceration across the state joining in a single action. Therefore, the Plaintiffs have satisfied the "numerosity" requirement.

**2. Commonality**

Section 9-11-23(a)(2) requires that common questions of law or fact exist among class members. O.C.G.A. § 9-11-23(a)(2). Plaintiffs need only make a showing that a single issue common to all members of the class exists to satisfy the commonality requirement. *See Hillis v. Equifax Consumer Servs., Inc.*, 237 F.R.D. 491, 497 (N.D. Ga. 2006).

The principal issue in this case is whether indigent parents have a right to counsel in civil contempt proceedings in which they face incarceration, where DHS is represented by counsel. Each of the proposed class members shares the common facts of (i) being indigent (ii) being jailed or facing jail for child support debt in the context of a DHS-initiated proceeding; and (iii) pleading for his liberty, *pro se*, while the State seeking his incarceration is represented by counsel. Likewise, Plaintiffs' and the proposed class members' entitlement to relief in this case is governed by the same constitutional and statutory framework. Thus, the claims of the Plaintiffs and proposed class members share common questions of law and fact.

Defendants argue that Plaintiffs fail to meet the commonality requirement because there is no right to counsel, and, thus, adjudication of Plaintiffs' claims would require individualized determinations about each class member's contempt proceeding. *See* Defs' Resp. Br. at 3 ("[A]s

[44] *See supra*, n. 17.

there is no categorical right to counsel, the only possible right asserted by Plaintiffs herein is the due process right to a 'fundamentally fair' hearing in child support contempt proceedings.").

This Court disagrees. Defendants' argument opposing commonality relies upon the assumption that Plaintiffs have no right to counsel. While evaluation of the merits is premature,[45] the Court notes that numerous state courts of last resort have held that indigent plaintiffs have a right to counsel in civil contempt proceedings in which they must plead for their liberty against a state representative and/or a trained lawyer.[46] In addition, every federal circuit

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[45] "[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.*, 134 Ga. App. at 954, 216 S.E.2d at 900, 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, it may do so only to the degree necessary to determine whether class certification requirements have been met. *See id.*

[46] *See, e.g., Pasqua* v. *Council*, 892 A.2d 663, 666, 674 (N.J. 2006) (state and federal due process clauses mandate the appointment of counsel to assist parents found to be indigent and facing incarceration at child support enforcement hearings brought by state probation division); *Black* v. *Div. of Child Supp. Enforcement*, 686 A.2d 164, 166-68 (Del. 1996) (finding due process requires appointment of counsel to indigent parents who face incarceration in civil child support contempt proceedings initiated by the state, where state was represented by lawyer from Attorney General's office); *Peters-Riemers v. Riemers,* 663 N.W.2d 657, 664-665 (N.D. 2003) (finding right to counsel where custodial parent seeking contempt was represented by private lawyer); *Mead* v. *Batchlor*, 460 N.W.2d 493, 503 (Mich. 1990) ("[S]ince the state's representative at such a hearing is well versed in the laws relating to child support, fundamental fairness requires that the indigent who faces incarceration should also have qualified representation."); *Cox v. Slama*, 355 N.W.2d 401, 403 (Minn. 1984) (holding that counsel must be appointed for indigent defendants facing incarceration for civil contempt for child support debt regardless of whether the complaining party is represented by private or state-funded counsel); *McNabb* v. *Osmundson*, 315 N.W.2d 9, 10 (Iowa 1982) (finding right to counsel for indigent defendant in child support contempt hearing in state-initiated case brought by County Attorney); *Rutherford v. Rutherford,* 464 A.2d 228, 234-237 (Md. 1983) (finding right to counsel under state and federal law where custodial parent was represented by private counsel, but alleged contemnor had no lawyer); *Ferris* v. *State ex rel. Maass*, 249 N.W.2d 789, 791 (Wis. 1977) ("[W]here the state in the exercise of its police power brings its power to bear on an individual through the use of civil contempt as here and liberty is threatened, we hold that such a person is entitled to counsel."); *Tetro* v. *Tetro*, 544 P.2d 17, 19 (Wash. 1975) (finding right to

court of appeals to have considered the question – including the Second, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits – held that an indigent defendant facing incarceration in a civil contempt proceeding has a right to counsel where the entity seeking incarceration is represented by a lawyer.[47] Plaintiffs assert that, following *Turner*, the foregoing cases still support their argument in favor of the right to counsel, since both parties to the *Turner* contempt hearing were *pro se*.[48] Defendants disagree. Thus, the question of whether Plaintiffs are entitled to counsel in civil contempt proceedings where the State is represented by counsel is a common question, the

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counsel where child support debtor was incarcerated in civil contempt hearing brought by county prosecutor).

[47] *See In re Di Bella*, 518 F.2d 955, 957, 959 (2d Cir. 1975) (stating that right to counsel must be extended to a contempt proceeding, be it civil or criminal, where the defendant is faced with the prospect of imprisonment); *In re Kilgo*, 484 F.2d 1215, 1221 (4th Cir. 1973) ("There can be no doubt that Kilgo was entitled to counsel at the civil contempt hearing."); *Ridgway* v. *Baker*, 720 F.2d 1409, 1411 (5th Cir. 1983) (finding right to counsel in child support contempt proceeding in which litigant may be deprived of his right to liberty); *Sevier* v. *Turner*, 742 F.2d 262, 265 (6th Cir. 1984) (finding that since defendant was incarcerated for sixteen days as a result of the child support contempt hearing, he was entitled to the assistance of counsel at the proceeding); *United States* v. *Anderson*, 553 F.2d 1154, 1156 (8th Cir. 1977) ("Deprivation of liberty has the same effect on the confined person regardless of whether the proceeding is civil or criminal in nature. We . . . hold that the Constitution requires that counsel be appointed for indigent persons who may be confined pursuant to a finding of civil contempt."); *In re Grand Jury Proceedings*, 468 F.2d 1368, 1368 (9th Cir. 1972) (finding that indigent person is entitled to counsel in civil contempt proceeding); *Henkel v. Bradshaw,* 483 F.2d 1386 (9th Cir.1973) ("[W]e share the District Court's view that [indigent father], absent the representation of counsel, could not be sentenced to jail in the [child support] contempt proceedings."); *Walker v. McClain*, 768 F.2d 1181 (10th Cir. 1985) (indigent child support debtor threatened with incarceration for civil contempt must be appointed counsel). *See also United States v. McAnlis*, 721 F.2d 334 (11th Cir. 1983) (not disputing that a right to counsel exists at civil contempt proceedings where imprisonment is possible, but finding a waiver of that right).

[48] In asking the Supreme Court to deny certiorari, the respondent in *Turner* similarly distinguished *Turner* from the many state and federal cases finding a right to counsel, on the ground that both parents in *Turner* were *pro se*. *See* Br. of Resp'ts in Opp. to Pet. for Writ of Cert., Case No. 10-10, 2010 WL 5855419, *12-17 (Sept. 24, 2010).

answer to which will not vary with each class member.[49] *See Fulton County Bd. of Tax Assessors*, 299 Ga. App. at 585, 683 S.E.2d at 139 (commonality satisfied where trial court identified a "procedural question common to all class members.").

This Court further finds that it can best resolve the common questions presented in the Plaintiffs' Complaint in a single case because all DHS-initiated child support contempt proceedings across Georgia are similar in the following respects:

1. DHS is a real party in interest in all DHS-initiated child support contempt actions.[50]
2. DHS is always represented by counsel at DHS-initiated child support contempt hearings.[51]
3. The SAAGs who represent DHS in child support contempt proceedings are skilled, specially trained, and experienced attorneys, many of whom have litigated hundreds or thousands of child support contempt actions.[52]

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[49] *Cf. Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552-55 (2011). In *Wal-Mart*, the Supreme Court of the United States held that the certification of a proposed class of roughly one and a half million female Wal-Mart employees raising various gender discrimination claims was improper under Federal Rule of Civil Procedure 23(a) because there was no common thread or policy tying together the disparate discrimination claims suffered by putative class members. *Id.* at 2556-57. The proposed class at issue in this case is distinguishable from *Wal-Mart*. Plaintiffs allege that each putative class member has suffered the same injury for the same reason – incarceration or the threat of incarceration, without the benefit of state-funded counsel, in civil contempt proceedings in which the State seeking incarceration is represented by a lawyer. Unlike in *Wal-Mart*, there is a common thread supporting a finding of commonality under O.C.G.A. § 9-11-23(a)(2) in this case.

[50] *See supra,* n. 11.

[51] *See* Defs' Resp. to Pls' First Req. for Admis., No. 4 at 4 (Ex. 12 to Pls' Reply Br.) (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 . . .").

[52] *See* Defs' Interrog. Resp., No. 4 at 6-8 (listing the approximate number of child support contempt proceedings each SAAG litigated over the past two years; stating that SAAG John

4. Indigent parents facing incarceration for child support debt in DHS-prosecuted contempt hearings are not provided with state-funded counsel.[53]

5. DHS states that it uses standardized forms and proposed orders, statewide, in connection with its prosecution of child support contempt proceedings.[54]

Defendants next argue that commonality fails because due process claims cannot be adjudicated on a class-wide basis. *See* Defs' Resp. Br. at 14. In support of this assertion, Defendants cite to *Brownlee v. Williams*, 233 Ga. 548, 212 S.E.2d 359 (1975), but *Brownlee* did not discuss class certification; rather, it was an appeal pertaining to an individual termination decision by a local civil service board. *See id.* at 548, 212 S.E.2d at 361. Moreover, numerous

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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). SAAGs are also required to attend CLE trainings, further increasing their expertise in the prosecution of child support contempt cases. *See* Defs' Interrog. Resp., No. 7, at 11.

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

[54] *See* Defs' Resp. Br., Ex. A; *see also* Defs' Resp. Br., 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 ("[T]he attorney general's office and the Division of Child Support Services would like us to use the same types of forms statewide . . . ."). DHS's use of standardized forms in contempt proceedings is relevant because *Turner* held that such forms may advance fundamental fairness in contempt proceedings in which both parties are *pro se*. *See Turner*, 131 S. Ct. at 2519 (listing procedural safeguards, including "(1) notice to the defendant that his 'ability to pay' is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay."). Plaintiffs allege that such forms, on their own, do not satisfy due process where DHS seeks incarceration and is represented by counsel. *See* Pls' Reply Br. at 17.

courts have certified classes in cases in which plaintiffs seek adjudication of a due process claim.[55]

Finally, the Court finds that any varying factual circumstances among class members have little to no bearing on the principal issues in this action – which are whether or not Plaintiffs have been provided counsel and whether the State has a duty to provide such counsel. *See Lake*, 580 F. Supp. at 1333 ("This Court perceives no commonality problem with respect to relevant questions of law and fact as the claim of each similarly situated person is essentially identical, *i.e.*, that he or she is entitled to appointed counsel if incarceration is a potential result of the civil contempt proceeding."). Accordingly, the Court finds that members of the proposed class share common issues of law and fact and have satisfied the commonality requirement.

**3. Typicality**

Plaintiffs must also demonstrate typicality to qualify for class certification. Typicality is fulfilled if "[t]he claims or defenses of the representative parties are typical of the claims or defenses of the class." O.C.G.A. § 9-11-23(a)(3).

The named Plaintiffs' claims all arise from the same sequence of events – the threat of incarceration, without counsel, at a civil child support contempt hearing at which the State seeking incarceration 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 SAAG represents

[55] *See Wilkinson v. Austin*, 545 U.S. 209, 220-30 (2005) (examining the procedural due process claims of a certified class of current and former state prisoners who challenged notice and hearing procedures for placement in supermax facility); *Lynch v. Baxley*, 744 F.2d 1452, 1461-62 (11th Cir. 1982) (analyzing procedural due process claims of certified class of jailed mentally ill individuals challenging involuntary commitment hearing procedures); *Ingraham v. Wright*, 525 F.2d 909, 917-19 (11th Cir. 1976) (evaluating the procedural due process claims of a certified class of students challenging notice and hearing procedures accompanying the use of corporal punishment); *Nicholson v. Williams*, 203 F. Supp.2d 153, 236-41 (E.D.N.Y. 2002) (finding procedural due process violation in the denial of counsel in parental termination proceedings for certified class of indigent domestic violence victims).

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. Br. at 18. The Court finds, however, that Plaintiffs have been repeatedly jailed, without counsel, in civil contempt proceedings in which DHS is represented by counsel. Plaintiff Wooten has been incarcerated for child support debt on four occasions, including once after this lawsuit was filed.[56] Plaintiff Davis has been incarcerated for child support debt three times, including once after this lawsuit was filed.[57] Plaintiff Hunter has been incarcerated three times, including once after this lawsuit was filed.[58] The fact that three named Plaintiffs were re-incarcerated after this case was filed amply demonstrates that Plaintiffs face a continued risk of incarceration. Moreover, all named Plaintiffs submitted affidavits stating they are indigent, still have child support arrears, and still face the threat of contempt proceedings in which they will be unrepresented by counsel.[59]

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[56] *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).

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

[58] *See* Hunter Aff. ¶ 5, 6(n) (stating that he was jailed multiple times since 2009, most recently in July 2011 and September 2011).

[59] *See* Davis Aff. ¶ 15 (stating that he faces the "imminent threat of re-incarceration for child support debt" without counsel because of his indigence and disabilities); Miller Depo. at 25-26 (stating he does not know how long his temporary job will last); Hunter Aff. ¶ 10 (stating that he faces an "immediate threat of re-incarceration" without an attorney because his indigence prevents him from making complete child support payments."); Hendrix Aff. ¶ 22 (stating that he

Just as named Plaintiffs face a risk of re-incarceration, so too do other members of the putative plaintiff class, such as Nathan Lewis, who was jailed for child support debt for over a year in Ware County, Charles Smith, who was twice jailed for child support debt in Cook County, and Lashandra Harris, who was jailed for two months in Troup County.[60] All of these persons and others face a threat of future incarceration without counsel. Plaintiffs' claims are typical of those of the rest of the proposed class.

**4. Adequate Representation**

Under Rule 23(a)(4), plaintiffs seeking to represent a class must be able to "fairly and adequately protect the interests" of all class members. O.C.G.A. § 9-11-23(a)(4). 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 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 violated their child support orders 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). For the following reasons, however, the Court finds that adequacy is satisfied.

First, the fact that Plaintiffs were held in contempt does not foreclose their constitutional claims. In *Turner* itself, the Court found the petitioner's constitutional rights were violated even though a state court judge had found Mr. Turner in contempt. *See Turner*, 131 S. Ct. at 2520.

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faces imminent incarceration without counsel because his income places him below the poverty line); Wooten Aff. ¶ 21 (stating that he faces the "imminent threat of further incarceration" without an attorney because he cannot find work).

[60] *See* Lewis Aff. ¶ 8; Smith Aff. ¶ 7; Harris Aff. ¶ 12, 19.

Plaintiffs here do not seek to re-litigate their contempt adjudications, but rather to obtain prospective, injunctive relief to vindicate their right to counsel.

Second, *Adkins* is arguably not controlling of Plaintiffs' right to counsel claim.[61] Over thirty years ago, before *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981) and *Turner*, 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 Ga. at 249, 248 S.E.2d at 646. The contempt proceeding in *Adkins* stemmed from a private divorce case in which the State was not a party. Here, by contrast, Plaintiffs ask the Court to examine a different set of facts in which the State is a party and had counsel to represent its interests at Plaintiffs' contempt hearings. As Plaintiffs point out, if Adkins were held in contempt today, he would not be a member of the proposed plaintiff class.

The Defendants have not challenged the adequacy of Plaintiffs' counsel, and the Court notes that counsel have experience litigating the types of claims for injunctive relief raised in this case.[62] As such, the Court is satisfied that class counsel will adequately represent the proposed class. For the foregoing reasons, the Court finds that named Plaintiffs and their counsel have satisfied the adequacy-of-representation requirement.

**B. The Class is Certified Pursuant to Section 9-11-23(b)(2).**

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

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[61]The Court notes that 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. Yet the Court addresses it here since Defendants raise it in the "adequacy" portion of their brief.

[62] *See* Pls' Mem. of Law in Supp. of Mot. for Class Cert., Apr. 27, 2011, at 17, n.8 (listing cases in which Plaintiffs' counsel represented plaintiffs in civil rights class actions).

appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The State's practice of depriving indigent child support debtors of their liberty in hearings in which the State is represented by counsel while the parent must plead for his own liberty applies equally to all members of the class. As such, the Court finds that the constitutional questions raised by this practice are best addressed in a class action certified under O.C.G.A. § 9-11-23(b)(2).

Defendants argue that Plaintiffs do not satisfy subsection (b)(2). Citing *DeKalb County v. Adams*, 272 Ga. 401, 529 S.E.2d 610 (2000), and related cases, Defendants state that there is no Georgia statute providing for the appointment of counsel in civil cases and, thus, no way for Defendants to grant Plaintiffs the relief they seek.[63] (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' first argument does not affect the propriety of class certification, but rather addresses the nature of the remedy available to the class, a question that is not now before the Court. This Court observes, however, that while appellate courts have found that counsel could not be appointed in certain civil contexts, in so doing, they have noted that a different result may be required where fundamental fairness and/or constitutional authority so dictates.[64] The Court

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[63] In their Complaint, Plaintiffs seek declaratory and injunctive relief requiring the State to provide them counsel. *See* Compl. at 61, ¶ C; 62, ¶ E. In addition, or in the alternative, Plaintiffs ask that DHS be enjoined from seeking incarceration as a remedy in civil contempt proceedings in which they are without appointed counsel. *See* Compl. at 61, ¶ B (asking this 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").

[64] *See, e.g., DeKalb County*, 272 Ga. at 402-03, 529 S.E.2d at 611-12 (denying appointed counsel in a jail conditions case, but recognizing that a different result would be required where there is a constitutional right to counsel); *Saleem v. Snow*, 217 Ga. App. 883, 888, 460 S.E.2d 104, 109 (1995) (no right to counsel for prisoner in section 1983 case where there is "no indication that

further notes that the pronouncements expressed by the Supreme Court in cases like *Turner v. Rogers* and *Gideon v. Wainwright*, 372 U.S. 335 (1963) are directed at the state and its obligation to provide fundamental fairness, rather than at any individual judge or state employee. *Cf.* Defs' Resp. Br. at 23-24 (denying that the Defendants are responsible for failure to provide counsel).[65]

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, did not know they could ask for or receive counsel, and no one advised them of their right to counsel.[66] *See 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

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denial of representation resulted in fundamental unfairness in these proceedings or that circumstances made counsel necessary in this case . . ."); *Brown v. Diaz*, 184 Ga. App. 409, 410, 361 S.E.2d 490, 492 (1987) ("The appointment of counsel to represent an indigent prisoner in a civil rights case is not necessary unless it is shown that the denial of proper representation will result in fundamental unfairness impinging upon the inmate's due process rights, or that circumstances of the case may make the presence of counsel necessary.").

[65] Defendants' argument that they are powerless to address the alleged constitutional violations is undermined by case law holding that a state official sued in his official capacity is an appropriate party when plaintiffs seek prospective, injunctive relief pertaining to a statewide law or policy. *See, e.g., Statewide Detective Agency v. Miller*, 115 F.3d 904 (11th Cir. 1997) (upholding the district court's grant of a preliminary injunction against governor and attorney general in an action challenging the constitutionality of a state criminal statute); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 475, n.16 (6th Cir. 2008) (rejecting argument that governor was not a proper party to suit seeking injunctive relief as to statute that allegedly impaired right to vote); *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999) (governor was a proper defendant in challenge to state statute).

[66] *See* Davis Depo. at 119 (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 (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 (stating that he did not ask the court to appoint counsel because he "didn't know it was available"); Hendrix Depo. at 68 (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 (stating he did not ask the judge to appoint a lawyer because he "didn't know [he] had the option.").

hearing that results in his incarceration.") Accordingly, the Court finds that this civil action should be certified under § 9-11-23(b)(2).

In addition to satisfying the specific elements of O.C.G.A. § 9-11-23(b)(2), this Court finds several interests that would be served by certifying a class under the particular facts of this case. First, class certification is realistically the only avenue to vindicate an indigent defendant's right to counsel, since the other recourse for the proposed class members would be to bring presumably *pro se* individual appeals or civil actions for injunctive relief. Such an alternative is unlikely and infeasible given that the proposed class members are indigent and unrepresented by counsel; nor would it advance judicial efficiency to require a flood of individual actions for injunctive relief. Second, should this Court later decide to grant relief to Plaintiffs, certifying a class will enable the Court to craft relief to address the lack of representation for the entire class, which conserves judicial resources and avoids the possibility of inconsistent judgments.

In sum, Plaintiffs have established the prerequisites for certifying a class: The class is so numerous as to make it impracticable to bring all members before the Court; there are common questions of law and fact shared by all members of the proposed class; the representatives' claims are typical of the claims of the class; and the representatives, through counsel, are able to fairly and adequately protect the interests of the class. O.C.G.A. § 9-11-23(a). Further, the class alleges that Defendants have acted or refused to act on grounds generally applicable to the class. The Court finds a class action is the best means by which to fairly and efficiently resolve these claims. O.C.G.A. § 9-11-23(b)(2). The Court further notes that its class certification order may be "altered or amended before the decision on the merits" should circumstances so warrant. O.C.G.A. § 9-11-23(c)(1).

## CONCLUSION

For the reasons stated above, the Court **GRANTS** Plaintiffs' Amended Motion for Class Certification. Pursuant to O.C.G.A. §§ 9-11-23(a) and (b)(2), the Court hereby certifies 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) is represented by state-funded counsel.[67]

SO ORDERED this 30 day of January, 20__.

**HONORABLE JERRY W. BAXTER**
**FULTON COUNTY SUPERIOR COURT**
**ATLANTA JUDICIAL CIRCUIT**

[67] The Court has revised Plaintiffs' proposed class definition to eliminate the phrase "and/or the custodial parent" based upon the Defendants' assertion that it does not represent the custodial parent in contempt matters. *See* Defs' Resp. Br. at 6; Defs' Surreply at 3-4.

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