UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

JAMES HOLMAN, on behalf of himself and all others similarly situated, Plaintiff vs **MACON COUNTY, TENNESSEE,** Defendant	Case No. 2:10-0036 Hon. Brown/Campbell

BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

INTRODUCTION

Plaintiff brought this action against the defendant to redress violations of his rights under the Eighth and Fourteenth Amendments to the United States Constitution.

As the proposed class representative, Plaintiff had his bail set arbitrarily and thus his injury is typical of the type of injury suffered by others who encounter the Macon County bail setting system.

BACKGROUND

Plaintiff James Holman was arrested on April 12, 2009 on charges of Driving on a Revoked License, Driving Under the Influence, and Habitual Offender. (A___, 04-12-2009 Booking Sheet). His bail was set at $12,500 on the Driving on a Revoked License charge and zero on the other two charges. *Id.* The mittimus showing the bond amount and the charges was signed by the judicial commissioner at the time by the name of Ralph Meeks. (A___).

On May 11, 2010, Plaintiff was arrested again on a charge of Violation of Probation. (A___) This time, his bail was set at zero or "none" and his mittimus was signed by the new judicial commissioner by the name of Ray Spears, Jr. (A____)

It is alleged that the plaintiff's bail was set without an individualized assessment of his particular likelihood to flee or was set or denied arbitrarily.

I. PLAINTIFF'S PROPOSED CLASS MEETS ALL FOUR OF THE PREREQUISITES FOR A CLASS ACTION SET BY FRCP 23(a).

Federal Rule of Civil Procedure 23(a) sets the following four prerequisites for class certification:

> (1) the class is so numerous that joinder of all members is impracticable,
>
> (2) there are questions of law or fact 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.

FRCP 23(a). As demonstrated by the following discussion, Plaintiff's proposed class meets the numerosity, commonality, typicality and adequacy of representation prerequisites for a class action set by FRCP 23(a).

Note that Rule 23(a) does not require an analysis of the merits of the claim. It is well settled that the named plaintiff need not demonstrate a probability of success on the merits or show in advance that he or she suffered damages in order to serve as the class representative. *Eisen v Carlisle and Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140 (1974) ("The question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Id.*, at 180. Thus, the merits of the claim should not be considered at this stage of the case.

A. Numerosity

In cases such as the instant one which involve civil rights claims the numerosity requirement of FRCP 23(a) "is usually satisfied by the showing of a colorable claim by the named plaintiff who is a member of the larger class having potentially similar claims." *Weathers v. Peters Realty Corporation,* 499 F.2d 1197, 1200 (6th Cir. 1974). *See also, Gore v. Turner,* 563 F.2d 159, 166 (5th Cir. 1977); *Williams v. Matthews Company*, 499 F.2d 819, 829 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974); *Newbern v. Lake Lorelei, Inc.*, 308 F. Supp. 407, 416 (S.D. Ohio 1968). Accordingly, it is unnecessary for plaintiffs to identify other potential class members or

state their exact number in order to satisfy the numerosity requirement of FRCP 23(a). The plaintiff need not prove the exact number or identity of class members, but only that the class is so numerous that joinder of all members is impracticable. See Newberg & Conte, 2 *Newberg on Class Action Dilemmas,* §7.22; *Pederson v Louisiana State Univ.*, 213 F.3d 858, 868 & n.11 (5th Cir. 2000). While numbers alone do not determine the practicability of joinder, "[g]enerally, the numerosity is satisfied where the class exceeds 100 members." *Kromnick v State Farm Ins. co.*, 112 F.R.D. 124126 (E.D. Pa. 1986).

Courts have even considered the lower limit of 30 to 50 class members. In *Sabala v Western Gillette, Inc.*, 362 F.Supp. 1142 (S.D. Tex. 1973), *aff'd on other grounds*, 516 F.2d 1251 (5th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977), the court approved a class of 26 truck drivers. In *Allen v Isaac*, 99 F.R.D. 45 (N.D. Ill. 1983), the court certified a class of black assistant bank examiners employed with the FDIC throughout the nation even though there were only 17. In *Morgan v United Parcel Service of America, Inc.*, 169 F.R.D. 349 (E.D. Mo. 1996), the court certified a nationwide class of black center managers who had at least five years of experience, a group that had only 19 members.

No formal rules govern class definitions. Classes have been upheld as properly defined, with definitions ranging from the simple formula of "on behalf of others similarly situated" (see *Bing v Roadway Exp. Inc*., 485 F.2d 441 (5th Cir. 1973) (employment discrimination)) to definitions of class members of "present and future generations, be they born or yet unborn." See, for example, *Dameron v Sinai Hosp. of Baltimore, Inc*., 626 F.Supp. 1012 (D. Md. 1986), judgment *aff'd* in part, *rev'd* in part, 815 F.2d 975 (4th Cir. 1987) (ERISA claim) (Class of retirees challenging a private pension plan's method of calculating benefits could properly include future as well as current retirees when no conflict existed between the current and future retirees.) See also, *Dixon v Bowen*, 673 F.Supp. 123 (S.D. N.Y. 1987) (government benefits claim) (Future applicants for disability benefits were properly included). The words of the First Circuit Court of Appeals are instructive here:

> The most basic error committed by the district court was in applying the criteria set out in subdivision (b) of Rule 23 cumulatively rather than alternatively. In holding that a class should not be certified because its members had not been sufficiently identified, for example, the court applied standards applicable to a

> subdivision (b)(3) class rather than to a subdivision (b)(2) class. Although notice to and therefore precise definition of the members of the suggested class are important to certification of a subdivision (b)(3) class, notice to the members of a (b)(2) class is not required and the actual membership of the class need not therefore be precisely delimited. In fact, the conduct complained of is the benchmark for determining whether a subdivision (b)(2) class exists, making it uniquely suited to civil rights actions in which the members of the class are often "incapable of specific enumeration."

Yaffe v Powers, 454 F.2d 1362, 1366 (1st Cir. 1972) (emphasis added).

In *Rice v City of Philadelphia*, 66 F.R.D. 17 (E.D. Pa. 1974), the plaintiff alleged the existence of a pattern or practice resulting in illegal detention of persons charged with a crime because of delays in holding preliminary arraignments and filed a motion for class designation under (b)(2). After describing specific instances of this abuse as it related to the named plaintiff, the complaint went on to charge that this practice was "fairly typical of the treatment accorded a large percentage of persons arrested in Philadelphia." *Id.*, at 19. The alleged reason for the delay, as proposed by the plaintiffs, was attributable to the police who detained arrestees for the purpose of "securing confessions", "for holding line-ups", and "for the purpose of humiliation and intimidation of prisoners, especially those involved in confrontations with police officers". *Id*. The proposed class was "all persons who are, who have been, or who will be illegally detained by the Police Department of the City of Philadelphia between arrest and preliminary arraignment, and who are denied a prompt preliminary arraignment by defendants." *Id*. In granting class status, the district court explained as follows:

> The provisions of Rule 23(b)(2) are designed to cover cases in which the primary concern is the grant of injunctive or declaratory relief. In such cases, there is no requirement that notice be given to all of the class members, and there is no opportunity for putative class members to "opt out." Moreover, the precise definition of the class is relatively unimportant. If relief is granted to the plaintiff class, the defendants are legally obligated to comply, and it is usually unnecessary to define with precision the persons entitled to enforce compliance, since presumably at least the representative plaintiffs would be available to seek, and interested on obtaining, follow-up relief if necessary.... Defining a class as consisting of all persons who have been or will be affected by the conduct charged to the defendants is entirely appropriate where only injunctive or declaratory relief is sought. Indeed, the principal beneficiaries of an injunctive decree would seem likely to be those class members whose rights have not yet been violated.

Id., at 19-20 (emphasis added). Ultimately, the district court defined the class as "all persons who, within two years last past, have been, or who are being, or who will in the future be illegally detained by the Police Department of the City of Philadelphia by reason of unreasonable or otherwise unlawful delay of their preliminary arraignment." *Id*., at 21. The court certified the class without identifying a single person in the record who was illegally detained as alleged nor by defining the class beyond the broad terms described.

The need for a definable class has been almost universally rejected by other courts considering (b)(2) actions. See, for example, *Doe v Charleston Area Medical Center, Inc*., 529 F.2d 638 (4th Cir. 1975) (speculation and conclusory representations as to class size suffice for declaratory and injunctive relief), *Handschu v. Special Services Div.*, 605 F.Supp. 1384 (S.D. N.Y. 1985), *aff'd*, 787 F.2d 828 (2nd Cir. 1986) (a class must be defined broadly in scope and time when the violation of broad constitutional rights is involved), *Midwest Community Council, Inc. v Chicago Park Dist*., 87 F.R.D. 457 (N.D. Ill. 1980) (where the defendant's alleged policies "shape the contours of the class", attacks on class definiteness are not given weighty consideration if all other certification requirements are met), *Taylor v White*, 132 F.R.D. 636 (E.D. Pa. 1990) (plaintiffs need not identify all class members by name).

A plaintiff need not show an exact number in the class and when the question is a close one, it is better to certify the class. *Evans v U.S. Pipe & Foundry Co.*, 696 F.2d 925, 930 (11th Cir. 1983). Similarly, where the exact size of the class is unknown but it is general knowledge or common sense that it is large, the court can take judicial notice of this fact and can assume that joinder is impracticable. *Bartelson v Dean Witter & Co.*, 86 F.R.D. 657, 676 (E.D. Pa. 1980). Doubts as to impracticability of joinder should be resolved in favor of upholding the class. *Evans*, at 930. The fact that the class is indefinite in number does not make it indefinite in membership; anyone who has certain qualities is a member. *Glover v Johnson*, 85 F.R.D. 1 (E.D. Mich. 1977).

Finally, the burden shifts to the defendant to show insufficient size of the class or practicability of joinder when the plaintiff has made a prima facie showing of joinder impracticality in its complaint. *Hughes v Jim Walter Resources, Inc.*, 94 F.R.D. 17 (N.D. Ala. 1981); *Doe v Charleston Area Medical Center, Inc.,* 529 F.2d 638 (4th Cir. 1975) (class denial

reversed when uncontradicted testimony showed 70 women per month were affected by defendant's policy).

Although the exact number of potential class members is uncertain, such number would easily exceed the historical number.

In this case, the proposed class consists of all former, current, and future individuals who have the right to be admitted to bail but were denied bail arbitrarily or had bail set in an arbitrary fashion. Although the exact number of potential class members is uncertain, such number would easily exceed **1400** for the year 2009 and **700** for 2010 to date alone. A review of mittimuses at the Macon County Sheriff's Department revealed over 374 individuals arrested for the months of October through December 2009 who were considered for bail. By extrapolation, this number extended for all four quarters of 2009 would result in approximately 1496 individuals being arrested and considered for bail in Macon County in 2009 alone.

1. Plaintiff States a Colorable Claim

The Eight Amendment provides that excessive bail shall not be required. [1] Bail is excessive when it is set at a figure higher than an amount reasonably calculated to fulfill the purpose of assuring the defendant's presence at trial. See *Stack v. Boyle*, 342 U.S. 1, 5, 96 L. Ed. 3, 72 S. Ct. 1 (1951). "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Id.* In *Stack*, "bail was fixed for each petitioner in the widely varying amounts of $2,500, $ 7,500, $ 75,000 and $ 100,000.... [A]fter several intermediate procedural steps not material to the issues presented here, bail was fixed in the District Court for the Southern District of California in the uniform amount of $ 50,000 for each petitioner. Petitioners moved to reduce bail on the ground that bail as fixed was excessive under the Eighth Amendment. In support of their motion, petitioners submitted statements as to their financial resources, family relationships, health, prior criminal records, and other information. The only evidence offered by the Government was a certified record showing that four persons previously convicted under the

[1] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Smith Act in the Southern District of New York had forfeited bail. No evidence was produced relating those four persons to the petitioners in this case." *Stack,* at 3. The Court concluded that bail had not been fixed in the proper manner stating that to "infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act. Such conduct would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute under which petitioners have been indicted." *Stack*, at 6.

"The utilization of bail for **any punitive purpose**, accordingly, is impermissible." *Atkins v. Michigan*, 488 F. Supp. 402, 408 (D. Mich. 1980), *aff'd in part, reversed in part*, 644 F.2d 543 (6th Cir. 1981) (emphasis added). In *Mastrian v. Hedman*, 326 F.2d 708, 711 (8th Cir. 1964), *cert. denied* 376 U.S. 965, 84 S. Ct. 1128, 11 L. Ed. 2d 982, the court wrote that "as to . . . offenses . . . for which a state has provided a right of bail it may not, any more than as to other substantive or procedural benefits under its criminal law system, engage in such administration as arbitrarily or discriminatorily to effect denial or deprivation of the right to a particular accused."

"The Sixth Circuit has ruled that pre-trial denial of bail without a statement of reasons is a violation of the Fourteenth Amendment." *Puertas v. Michigan Dep't of Corrections*, 88 F. Supp. 2d 775, 780 (D. Mich. 2000) (citing *Atkins v Michigan*, 644 F.2d 543, 550 (6th Cir. 1981)). "According to the Sixth Circuit, the right to bail pending trial is a 'fundamental' and 'important' liberty interest protected by the Due Process clause of the Fourteenth Amendment that may not be taken away arbitrarily. *Atkins*, at 550." *Puertas,* at 781. "The Sixth Circuit in *Atkins* appears to have adopted the rule ... that a denial of bail pending trial without a statement of reasons is arbitrary per se." *Puertas,* at 783. [2]

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[2] The Sixth Circuit in *Atkins* also held that the "lack of reasoning, the total silence of the Court of Appeals appears to constitute a violation of the Michigan Court Rules [citation omitted]. It also constitutes an arbitrary denial of Atkins' fundamental interest in liberty pending trial and therefore violated his right to due process of law. Bail may not be denied arbitrarily. *Mastrian v. Hedman*, 326 F.2d 708 (8th Cir. 1964). Here bond was twice cancelled in cursory orders supplying no reasons. This renders any meaningful review impossible and violates the basic norms of judicial decision making, which require that decisions generally be reached through reasoned argument, not by fiat. The fourteenth amendment does not permit such an important interest as that of liberty pending trial to be curtailed in so arbitrary a fashion. Reasons very well might exist to deny Atkins his freedom on bail while he awaits trial. We do not address this question. We state only that if his liberty is to be denied, it must be done

In Tennessee, the right to bail is set by the state Constitution. "That all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great." Article I, §15. See also, T.C.A. 40-11-102. When a defendant is arrested, he or she is "entitled to be admitted to bail by the committing magistrate..." T.C.A. 40-11-105. [3] Thus magistrates, or judicial commissioners, may not defer or pass off the duty to admit one to bail. Nor can any denial of bail be based on a mandate from some other judge. Judicial Commissioners have a "duty" of setting and approving bonds and releasing defendants on their own recognizance and General Sessions judges have no general supervisory authority over them or their job duties. Tennessee Attorney General Opinion 00-126 at 4. (**A____**) (citing statutes).

No person can be committed to jail "for any criminal matter until examination thereof is first had before some magistrate." T.C.A. 40-5-103. The examination must be reduced to writing.

> The magistrate is **required to reduce the examination of the accused to writing**, if the accused submits to an examination, and also all the evidence adduced on both sides, and is authorized to discharge, bail, or commit the accused and to take all necessary recognizances to enforce the appearance of the defendant, the prosecutor or witnesses at the proper court.

T.C.A. 40-5-105 (emphasis added). [4]

> Bail, when not given in open court, is given by a **written undertaking**, containing the conditions of release, the agreement of the defendant to appear in the court having jurisdiction of the offense as directed by the court and/or an amount to be paid for nonappearance, **signed by the defendant**, and if made under § 40-11-122(2), signed also by court-approved and sufficient surety or sureties. The written undertaking must be approved by the officer taking it.

T.C.A. 40-11-114(a). A judicial commissioner has a "duty" to set "bonds and recognizance in accordance with the procedures outlined in chapters 5 and 6 of ... title [40]. T.C.A. 40-1-

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pursuant to an adjudicatory procedure that does not violate the standards for due process established by the fourteenth amendment." *Atkins*, 644 F.2d at 550.

[3] A judicial commissioner is, by definition, a magistrate. "The following are magistrates within the meaning of this part... Judicial commissioners." T.C.A. 40-5-102 (3). See also T.C.A. 40-1-106.

[4] In Tennessee, commitment of one to the custody of the local sheriff is done by "mittimus". See T.C.A. 40-5-201(b)(3) describing a duty of a judicial commissioner as the "issuance of mittimus following compliance with the procedures prescribed by § 40-5-103." See also, Puckett Dep. Vol. I at 53 "A mittimus is a document that's filled out that admits an individual into the jail."

111(d)(2)(B) . [5] Even if a General Sessions court judge issues an arrest warrant and pre-sets the bond (which would be a Constitutional violation in and of itself), a judicial commissioner must still examine the person before signing the mittimus or the committal to place the defendant in the jail and has the statutory authority to do so notwithstanding the pre-set bail set by the judge. "Any magistrate may release the defendant on the defendant's own recognizance pursuant to § 40-11-115 or § 40-11-116 or admit the defendant to bail pursuant to § 40-11-117 or § 40-11-122 at any time prior to or at the time the defendant is bound over to the grand jury." T.C.A. 40-11-104.

An out-of-county warrant should be treated the same as an in-county warrant for purposes of admitting to bail. "A defendant arrested in one county on a warrant issued in another county for the commission of an offense for which the maximum punishment is imprisonment for ten (10) years or less is entitled to be admitted to bail in the county of arrest by the same officials and in the same manner as if arrested in the county issuing the warrant." T.C.A. 40-11-147.

Thus, a person is "entitled to bail as a matter of right..." *State v Wallace*, 193 Tenn. 182, 186, 245 S.W.2d 192, 193 (1952). Even if the arrest is pursuant to a violation of a condition of bail (such as a "failure to appear" warrant or capias). *Id.* (holding that the right to bail is "mandatory" and that even one who forfeited a prior bond and is "trifling with the court [and] otherwise contemptuous of its authority to bring him to trial" is entitled to bail **again**. The court's remedy is to set new conditions, not to deny bail.) See also Tennessee Attorney General Opinion 05-018 (**A____**), holding that one is "entitled to an individual determination of bond whether the arrest is a warrantless arrest, arrest pursuant to a warrant, or an arrest pursuant to a capias or attachment and holding that a "**pre-set bond schedule**" is specifically prohibited. [6]

Bail should be determined by taking into consideration those conditions which may

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[5] A "duty" is an "obligation[] of performance, care, or observance which rest[s] upon a person in an official or fiduciary capacity." Black's Law Dictionary, 6th Edition.

[6] A "capias" is the general name for a "several species of writs, the common characteristic of which is that they require the officer to take a named defendant into custody. In English practice, the process on an indictment when the person charged is not in custody, and in cases not otherwise provided for by statute." Black's Law Dictionary, 6th Edition. In other words, a capias is an arrest warrant issued for someone indicted by a grand jury or a bench warrant issued by a judge for someone who failed to appear in court. (Tennessee Courts have been quite slow to drop the use of antiquated old common law Latin.)

reasonably answer the question of whether an individual will appear "as required..." T.C.A. 40-11-115. The ***default*** is release on one's own recognizance and bail may be required ***only*** **"absent a showing** that conditions on a release on recognizance will reasonably assure the appearance of the defendant as required..." T.C.A. 40-11-117 (emphasis added).

These conditions include employment status and history, financial condition, family ties and relationships, reputation, character and mental condition, prior criminal record including prior releases on recognizance or bail, the identity of responsible members of the community who will vouch for the defendant's reliability, the nature of the offense, probability of conviction and likely sentence (insofar as these factors are relevant to the risk of nonappearance) and, finally, any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear. *Id.*

If an individual is not eligible for release upon recognizance ***after*** consideration of these factors, the bail set must be the "least onerous .... reasonably likely to assure the defendant's appearance in court" T.C.A. 40-11-116(a) and the same considerations must be taken into account as those used to determine release on recognizance. T.C.A. 40-11-118(b).

The Courts, and by extension, magistrates, have no authority under Tennessee law to require a particular type of bond, such as a cash bond, as a condition of pretrial release. *Lewis Bail Bond Company v General Sessions Court of Madison County*, 1997 Tenn. App. Lexis 784 at *4 (1997) (**A____**) ("This statute sets out the various factors that a court is to consider in making a determination as to the amount of the bail bond. Nothing indicates any authority for the judge to order the form of the bond.")

In sum, under Tennessee law:

1. All arrestees are entitled to bail, even those arrested for violations of conditions of bail previously set (Failure to Appear or capias warrants);
2. Persons arrested on out-of-county warrants are entitled to bail in the county of arrest in the same manner as anyone else arrested in that county;
3. No one can be committed to the jail until an examination for the purpose of determining the need for bail is done by a magistrate;
4. Bail cannot be restricted in form, such as cash bond or other type;

5. The 12-hour "hold" on domestic assault arrests may only be implemented ***after*** a determination that the alleged victim is in danger. It is not a *per se* or "uniform" rule.

6. There is no statutory authority for a judge to tell a judicial commissioner how to do his job or set other conditions or rules for setting bail;

7. A judicial commissioner must set bail. This is a non-delegable duty and the determination of bail cannot be denied, deferred, or delayed;

8. The reasons for bail must be reduced to writing;

9. The default release is release on recognizance (ROR). Only after a determination that ROR is insufficient to ensure the arrestee's appearance may a magistrate go to the next step of considering what conditions of release would address a likelihood to not appear;

10. A pre-set bond schedule is specifically prohibited.

Since the State of Tennessee has determined that individuals have the above rights, under federal law, none of these statutory rights can be denied in an arbitrary or discriminatory fashion or else they violate due process.

a. The Arbitrary Nature of Bail Set in Macon County

In reviewing the data available from mittimus sheets, one can see a clear pattern. [7] For the period of October through December 2009, a summary of mittimus data sorted for those that showed some sort of "hold" under the section stating "Bond is set at _____" shows 63 individuals who had "hold for court", "hold", "hold for hearing", or "hold for investigation" and were therefore essentially denied bail at the judicial commissioner phase of their criminal case. (A____) Sorting for DUI during this same three month period shows 13 individuals who all had exactly $1000 set for their bail (with the exception of one who had no bail set at all). (A___) There are at least four instances of individuals being denied bail as a "hold for" another county. (A___) Looking at January 2009, November 2009, and March 2009, we find at least ten

[7] A mittimus is a document issued from a magistrate directed to the sheriff commanding him to convey to the jail the person named in the document and to the jailer commanding him to receive and safely keep such person until he shall be delivered by due course of law. Black's Law Dictionary, Sixth Edition.

individuals who were denied bail for the purpose of allowing the police to further "investigate" charges against them. (A____) [8] Finally, a summary of mittimuses sorted for the charge of Public Intoxication for the months of October through December 2009 reveals 33 individuals who had their bail set between the fine range of $250 to $750.

Plaintiff himself was denied bail when he was arrested and charged with violation of probation in May 2010. (A___)

Further proof will show that no statement of reasons for any particular bail determination is kept, that no record of the questions asked or the responses given was kept until after this lawsuit was filed, that when an individual is determined to be ineligible for release on his or her own recognizance that the bail is *always* expressed by a monetary value, that defendants are not told that they have the option to post the bail directly instead of using a bailbondsman, that mittimuses are signed by judicial commissioners after the fact of detention *en masse* at the request of jail personnel even in cases where the detainees were never seen or questioned by the judicial commissioners signing the mittimus, that those arrested on violation of probation, failure to appear, or other capias are seldom, if ever, seen by a judicial commissioner, that judicial commissioners routinely defer determination of bail to elected judges so that their conscience is protected from the possible guilt of releasing someone on bail if that person hurts someone while on release, and a vast array of other arbitrary acts that are not consistent with the duty to admit all persons to bail except for capital offenses.

It is this arbitrary nature **of the system**, that is, that bail is set on factors other than an *individualized* assessment of a person's likelihood to flee, that is the gravamen of the complaint. Thus, Plaintiff has stated a colorable claim that satisfies the numerosity requirement of Rule 23.

B. Commonality and Typicality

The Supreme Court has held that the commonality and typicality requirements of FRCP 23 merge to

> serve as guideposts for determining whether under the particular circumstances the maintenance of a class action is economical and whether the named Plaintiff's claim and the class claims are so interrelated that the interests of the class

[8] One mittimus in this group has a date of "3-23-08" but this may be a typo. Another mittimus in the group has no date at all.

members will be fairly and adequately protected in their absence.

General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157, n.13, 102 S. Ct. 2364, 2370, 72 L. Ed. 2d 740, 750 (1982).

In order to satisfy the commonality requirement of FRCP 23(a)(2), Plaintiff need only show that there is at least one common question or issue shared by all class members. *DeBoer v. Mellon Mortgage Corp.,* 64 F.3d 1171, 1174 (8th Cir. 1995); *Lutz v. International Association of Machinists,* 196 F.R.D. 447, 451 (E.D. Va. 2000) Accordingly, it is unnecessary for Plaintiff to demonstrate that all of the questions and issues raised by the complaint are by all class members. The commonality requirement "is not demanding." *Mullen v Treasure Chest Casino, L.L.C.*, 186 F.3d 620, 625 (5th Cir. 1999); see 1 Newberg §3.10 ("this requirement is easily met in most cases"). The test is met when the resolution of at least one issue will affect all, or substantially all, of the putative class members. *Mullen,* 186 F.3d at 625.

Similarly, in order to satisfy the typicality requirement, Plaintiff must demonstrate that his claims and the claims of the class are based on the same course of conduct and legal theories. However, it is not necessary for Plaintiff and all class members to have identical claims. *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984).

Like the commonality requirement, the test for typicality is not demanding. *Stirman v Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002). The test for typicality focuses on the similarity between the legal and remedial theories of the representative plaintiffs and those of the rest of the class. *Id.* As long as the class representative is a member of the class having the same interests and having suffered generally the same type of injury, the representative's claims need not be identical to the claims of the rest of the putative class. *General Tel. Co.*, at 156, 102 S.Ct. at 2370. See *De La Fuente v Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) (when claims arise from same event, practice, or course of conduct and are based on the same legal theory, the test may be satisfied even if there are factual distinctions between claims).

Plaintiff's claims under 42 U.S.C. 1983 raise the following questions of fact and law that are common to the class:

1. Is there a practice, pattern or policy or course of conduct within Macon County of arbitrarily setting bail without an individualized analysis of the

pretrial detainees' likelihood to flee or to be a danger to the community?

2. Is bail customarily set by an arbitrary formula that is subjectively based on the judicial commissioner's beliefs without regard to criteria mandated by law and reasonably related through an objective standard to the purpose behind setting bail?

3. Is bail used for punitive reasons, such as for being a repeat offender or for the person arresting not having "learned his lesson"?

4. Is bail sometimes denied by a judicial commissioner merely on the request of law enforcement wishing to have more time to gather evidence or to question the suspect, revealed by the annotation "hold for investigation" or denied without reason or explanation?

In addition, all of Plaintiff's claims and the claims of the class are based on the same **course of conduct** engaged in by Defendant Macon County and through its judicial commissioners or other officials and share the same legal theories. That is, both Plaintiff's claims and the claims of the class are based on allegations that Defendant Macon County has a pattern and practice or policy or course of conduct of setting bail or denying bail arbitrarily and sometimes as punishment. Also, that Defendant Macon County has a pattern and practice of not setting bail at all based on the request of law enforcement wishing to gather evidence against the suspect or to question the suspect in a custodial environment, of refusing bail to those charged in another county and to refusing bail entirely for no stated reason at all.

Accordingly, the plaintiff and the putative class satisfies the commonality requirement. The named plaintiff shares at least one question of fact or law with the grievances of the prospective class. A judicial commissioner set his bail on more than one occasion without making an individualized assessment of his likelihood to flee or his potential of danger to the community or his bail was denied for no stated reason and based only on the usual course of conduct. This is all that is required under Rule 23(a)(2).

C. Adequacy of Representation

In order to satisfy the adequacy of representation requirement set out by FRCP 23, Plaintiff need only demonstrate that the class representative and class members have common interests and that the class representative will adequately protect those interests through qualified

counsel. *See Andrews v. American Tel. & Tel. Co*., 95 F.3d 1014, 1023 (11th Cir. 1996); *Senter v. General Motors Corp.,* 532 F.2d 511, 525 (6th Cir. 1976)**,** *citing Gonzalez v. Cassidy* 474 F.2d 67, 73 (6th Cir 1973); *Lutz,* 196 F.R.D. at 453. The adequacy inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent. *Amchem v Prods, Inc. v Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 2250 (1997). The representative plaintiff is adequate if his attorney is qualified and competent and no conflicts exist between the representative's interests and those of the rest of the class. *Mullen*, 186 F.3d at 625; 1 Newberg §3.22. [9]

Because Plaintiff's claims and legal theories are the same as those of the other potential class members and, like the other class members, he seeks injunctive relief and damages that inure to the benefit of the class as a whole, the named plaintiff and class members clearly have common interests.

Courts generally presume the competency of class counsel unless counsel's competency is questioned by the opposing party or counsel's performance during the litigation indicates that he or she is unable to adequately handle the matter. *See, Rodriguez v. Swank*, 318 F. Supp. 289, 294 (N.D. Ill. 1970), *affirmed w/out op.* 91 S. Ct. 2202, 403 U.S. 901. 29 L. Ed. 2d 677 (1971); *Illinois v. Harper & Row Publishers, Inc.,* 301 F. Supp. 484, 487 (D.C. Ill. 1969); *Holden v. Heckler,* 584 F. Supp. 463, 488 (D.C. Ohio 1984); *Johnson v. Shreveport Garment Co.,* 422 F. Supp. 526, 535 (D.C. La. 1976) (counsel's conduct in matter at hand will evidence his or her capability). The Court may also take judicial notice of the class counsel's competence. *Berger v Compaq Computer Corp.*, 257 F.3d 475, 481-82 (5th Cir. 2001).

No conflicts exist between the plaintiff and the class members in this case. The named plaintiff is challenging the same unlawful conduct and seeking the same relief as the remainder of the class. The right to relief of the named plaintiff, like that of the absent class members, depends on demonstrating that Defendant Macon County maintained a policy of setting bail arbitrarily or as punishment in violation of state law and the U.S. Constitution.

Plaintiff's counsel and proposed class counsel is a graduate of Wayne State University

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[9] The defendants have the burden of proving inadequacy of representation of a plaintiff's class. *Lewis v Curtis*, 671 F.2d 779, 788 (3rd Cir. 1982).

School of Law and has been a practicing attorney since 1997 and is licensed in Michigan and Tennessee. He has served as local counsel in two class action cases which were settled with a benefit to the class of over $10 million. He has been lead or sole counsel in eight other class action cases, two successfully litigated to settlements of over $3 million in cash or in kind, one settled prior to class certification (also dealing with bail issues), one settled after class certification (also dealing with bail issues) and three currently pending which also deal with a system of setting arbitrary bail (the instant case, one against Henry County, Tennessee and one against Trousdale County, Tennessee.) Only two class action cases out of 10 total in which counsel has been involved have been adjudicated without some benefit to the class. Counsel is also well versed in criminal issues, including issues dealing with bail and pretrial detention. He is a member of the CJA Panel in the Middle District of Tennessee and litigates or is admitted to practice cases in both federal and state courts, including all federal courts in Tennessee, the U.S. District Court for the Eastern District of Michigan, the Tennessee Court of Appeals, Tennessee Court of Criminal Appeals, Tennessee Supreme Court and the Sixth Circuit Court of Appeals. He was also formerly a special agent with the United States Secret Service.

Proposed class counsel has been designated as class counsel and found qualified by this Court in *Adolfo Chavez vs Security Express Protective Services, LLC,* Case No. 3:02-0611 (J. Campbell), *Staley vs Wilson County*, Case No. 3:04-1127 (J. Trauger) (challenging the arbitrary system of setting bail in Wilson County), and *Tate v Trousdale County*, Case No. 3:09-0201 (J. Campbell) (challenging the arbitrary system of setting bail in Trousdale County).

This case, therefore, satisfies the adequate representation requirement of Rule 23(a)(4), just as it satisfies all of the other requirements of Rule 23(a).

II. PLAINTIFF'S PROPOSED CLASS MEETS THE REQUIREMENTS FOR MAINTENANCE OF A CLASS SET BY FRCP 23(b).

A proposed class that meets the four requirements of Rule 23(a) should be approved if it complies with any one of the three subparts of Rule 23(b). Plaintiff seeks class certification under Rule 23(b)(2).

A. The proposed class qualifies under Rule 23(b)(2).

This action is appropriately maintained as a class action under F.R.C.P. 23(b)(2) because

Defendant Macon County, through its judicial commissioners and other county officials, has acted "on grounds generally applicable to the class" and Plaintiff is seeking final injunctive or declaratory relief "with respect to the class as a whole" and compensatory damages that inure to the benefit of the class as a whole. The defendant's conduct need not have injured all class members in exactly the same way - it is enough if the defendant has adopted a **pattern of activity** that is likely to be the same for all class members. *Baby Neal v Casey*, 43 F.3d 48, 63-64 (3rd Cir. 1994). Specifically, Plaintiff seeks a permanent injunction enjoining Defendant from setting bail arbitrarily, setting bail without an individualized analysis, setting bail as punishment, refusing to set bail at the request of a law enforcement officer for the purpose of holding an individual pending further investigation, denying bail on arrest warrants issued by other counties or denying bail for no apparent reason at all other than the judicial commissioner's gut feeling. Additionally, Plaintiff seeks compensatory damages across the board for such arbitrary violation of the Constitutional rights of all class members.

It is important to note that Plaintiff does not seek to recover what he paid to a bailbondsman nor does he seek to represent such a request on behalf of the class. Indeed, such a request would necessarily entail an analysis of how much each class member had to pay a bailbondsman, how much the bail would have been had it not been set arbitrarily, and how much the person would then have had to pay a bailbondsman. Rather, the challenge is to the system as a whole and the *process* used to set bail. That is, the arbitrary nature by which bail is set without an individualized analysis and for reasons not related to likelihood to flee or be a danger to the community if released. Compensatory damages would be in the nature of a flat amount per class member which would represent the value of having one's Eighth Amendment right against excessive bail violated. An amount that is not susceptible to individualized damages analysis but rather inures to the benefit of the class as a whole.

Lawsuits such as this one are particularly well suited for 23(b)(2) treatment since the common claim is susceptible to a single proof and subject to a single injunctive remedy." *Senter v. General Motors Corp.,* 532 F.2d 511, 525 (6th Cir. 1976), *cert. denied* 429 U.S. 870 (1976). In fact, two other cases exactly like this one have already been certified. One by this Court, *Tate v Trousdale County*, Case No. 3:09-0201 and one by Judge Trauger *Staley vs Wilson County*, Case

Thus, this case should be certified as a class action under F.R.C.P. 23(b)(2).

CONCLUSION

The system of setting bail based on an arbitrary formula and without an individualized assessment of the suspect's likelihood to flee or create a danger to the community is so entrenched within the legal culture of Macon County that no one has ever questioned it before. The evidence will show that even the elected judges follow this arbitrary system.

In light of all of the above, Plaintiff respectfully asks that this Court certify this case as a class action pursuant to FRCP 23(a) and FRCP 23(b)(2).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of Electronic Filing to the following:

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This the 13th day of October, 2010.

/s/ Jerry Gonzalez