IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VONDELL WILBOURN, individually and for others similarly situated,	)	
Plaintiff,	)	
	)	Case No. 23-cv-1782
-vs-	)	
	)	Honorable Manish S. Shah
SHERIFF OF COOK COUNTY and COOK COUNTY, ILLINOIS,	)	Magistrate Judge Young B. Kim
Defendants.	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Defendants, SHERIFF OF COOK COUNTY and COOK COUNTY, ILLINOIS, by their attorney, EILEEN O'NEILL BURKE, State's Attorney of Cook County, through her Special Assistant State's Attorneys, JOHNSON & BELL, LTD., submit the following response in opposition to Plaintiff's motion for class certification:

Table of Contents

Table of Cases

U.S. Supreme Court

Seventh Circuit

INTRODUCTION

This case cannot be resolved as a class action. Plaintiff's putative class claims depend exclusively on individual issues, so liability cannot be determined on a classwide basis.

Plaintiff alleges two Fourth Amendment claims on behalf of a putative class of electronic monitoring (EM) participants: (1) unlawful seizure (reincarceration); and (2) unlawful entry into a residence. (Pl.'s Am. Compl. ¶ 29, ECF No. 19; Pl.'s Mot. for Class Cert. at 1, ECF No. 57.)

To prevail on an unlawful seizure claim, an EM participant must prove lack of probable cause. *Gonzalez v. Village of W. Milwaukee*, 671 F.3d 649, 655 (7th Cir. 2012). This is a highly

individualized assessment because courts must "look at the totality of the circumstances surrounding each arrest" to determine whether probable cause exists. *Hudson v. City of Chicago*, 242 F.R.D. 496, 507 (N.D. Ill. 2007). For an unlawful entry claim, an EM participant bears the burden of establishing lack of consent, once asserted by the defendant. *Martinez v. City of Chicago*, 900 F.3d 838, 846 (7th Cir. 2018). Consent is also a highly individualized assessment because it "is a question of fact to be determined under the totality of the circumstances." *United States v. Sabo*, 724 F.3d 891, 893 (7th Cir. 2013).

Plaintiff cannot show predominance due to the significant individual issues involved in this case that are specific to each EM participant's circumstances. Plaintiff also cannot meet the other requirements of Federal Rule of Civil Procedure 23, including commonality, typicality, adequacy of representation, and superiority. Plaintiff has not identified any common question that will drive resolution of this case. The highly individualized inquiries involving probable cause and consent foreclose any argument that Plaintiff's claims are "typical" of any other EM participant's claim. Plaintiff is not an adequate representative because he cannot recover damages for the time he spent in custody after his reincarceration. Further, because liability can be determined only after reviewing the specific facts of each EM participant's circumstances, the class action device is not the superior method of resolving this case.

ARGUMENT

"The burden rests on the party seeking certification to show by a preponderance of the evidence that certification is proper." *Lacy v. Cook County*, 897 F.3d 847, 863 (7th Cir. 2018) (citation omitted). "A class may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites for class certification have been met." *Id.*

I. Plaintiff's Fourth Amendment Search and Seizure Claims Depend Entirely on Individual Questions.

"The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). To determine whether a search or seizure is reasonable under the Fourth Amendment requires a careful examination of the "totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). In applying this test, the Supreme Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Id.*

Fourth Amendment unlawful home entry and seizure claims are highly individualized because they depend on the specific facts and circumstances surrounding each arrest, particularly the existence of probable cause and consent. *See Gower v. Vercler*, 377 F.3d 661, 667–69 (7th Cir. 2004). Probable cause and consent are determined based on the facts and information available to the investigator at the time of reincarceration, making it a fact-specific inquiry that varies from one individual to another. *See id.* Probable cause "does not require certainty"; instead, it is "a fluid concept" that involves the "common-sense judgment of the officers" after considering "the totality of the circumstances." *Petersen v. Pedersen*, __ F.4th __, 2025 U.S. App. LEXIS 14199, at *9 (7th Cir. June 10, 2025) (citation omitted). This individualized nature precludes the predominance of common questions necessary for class certification. *See Hudson*, 242 F.R.D. at 504–05 (denying class certification on Fourth Amendment unlawful arrest claims because the court would need to look at the individual circumstances surrounding each arrest to determine liability).

The Seventh Circuit addressed the issue of class certification in Fourth Amendment cases in *Portis v. City of Chicago*, 613 F.3d 702, 705 (7th Cir. 2010), where the court reversed the certification of a Rule 23(b)(3) class. The plaintiffs in *Portis* alleged that the Chicago Police Department unreasonably detained individuals arrested for non-jailable offenses. *Id.* at 703. The

Seventh Circuit found that the individualized nature of the claims, including the reasonableness of the detention and the circumstances of each arrest, made class certification inappropriate. *Id.* at 704–05. The Seventh Circuit emphasized that the need to evaluate each class member's claim on a case-by-case basis defeated the predominance of common issues. *Id.* at 705 ("Because reasonableness is a standard rather than a rule, and because one detainee's circumstances differ from another's, common questions do not predominate and class certification is inappropriate.").

Likewise, in *Willoughby v. Village of Fox Lake*, No. 17 CV 2800, 2018 U.S. Dist. LEXIS 94955, at *16 (N.D. Ill. June 6, 2018), the district court denied the plaintiff's motion for class certification based on Fourth Amendment unlawful search and seizure claims. The court found that commonality and predominance was lacking "because individual determinations would need to be made for each class member as to whether their seizure . . . was reasonable, and the circumstances are different for each class member." *Id.* at *14. Class certification is inappropriate for unlawful search and seizure claims because "[t]he existence of probable cause" depends on "the totality of the facts and circumstances known to the arresting officer or officers." *Id.* at *15.

The Seventh Circuit has held that probable cause is an absolute defense to a Fourth Amendment unlawful seizure claim. *Pryor v. Corrigan*, 124 F.4th 475, 486 (7th Cir. 2024). The existence of probable cause for any offense, even one not identified by the arresting officers, defeats such claims. *Abbott v. Sangamon County*, 705 F.3d 706, 715 (7th Cir. 2013). This further underscores the individualized nature of unlawful seizure claims, as the determination of probable cause requires an analysis of the specific facts and circumstances of each arrest. *See Gower*, 377 F.3d at 668. Given the individualized inquiries required to resolve Fourth Amendment claims, such claims are not suitable for class treatment under Rule 23.

Plaintiff's putative class claims hinge on whether it was reasonable for an investigator with the Sheriff's EM Unit to enter a participant's residence and return the participant to the Cook County Department of Corrections (CCDOC) for violating a condition of the EM program. (Pl.'s Mot. at 1.) Yet, the resolution of these claims requires answering several individualized questions for each class member. While Plaintiff attempts to frame the issues as common to the putative class members, resolution of the Fourth Amendment claims requires fact-specific inquiries into the circumstances of each alleged program violation, the voluntariness and scope of consent for entry into the residence, and the information available to investigators at the time of reincarceration. These individual questions, some of which are outlined below, outweigh any common issues, making class certification inappropriate.

A. Whether the participant, host, or someone with apparent authority consented to entry into the residence.

Individuals on electronic monitoring (and their hosts) consent to warrantless entry into their residences as a condition of their release. (Ex. A, EM Participant Agreement; Ex. B, EM Residential Consent.) Courts uphold prospective waivers of constitutional rights. *See United States v. Hagenow*, 423 F.3d 638, 642–43 (7th Cir. 2005); *United States v. Barnett*, 415 F.3d 690, 692 (7th Cir. 2005). In exchange for consent to enter the residence, a participant is "released from jail and allowed to stay home on electronic monitoring pending his trial." *People v. Garcia*, 220 N.E.3d 309, 316–17 (Ill. App. Ct. 2021) (finding that the EM participant "gave prospective consent to search his home" "when he voluntarily signed the 'Cook County Sheriff's Office Participant Contract' and received the benefit of staying home on electronic monitoring pending his trial").

Plaintiff, however, "disagrees" and contends that the consent was not voluntary or that the investigators exceeded the scope of the consent. (Pl.'s Mot. at 4.) Yet, the voluntariness and scope of a participant's consent must be evaluated on a case-by-case basis. *See Gower*, 377 F.3d at 667

(stating that the "existence of voluntary consent to a warrantless entry of a residence 'is a question of fact to be determined by the totality of the circumstances'" (citation omitted)). Determining whether each putative class member voluntarily consented to a warrantless entry and whether the investigators exceeded the scope of that consent requires individualized inquiries into the terms of the electronic monitoring program, the communications between the Sheriff's Office and the participant, and the specific circumstances of each entry.

A warrant is not required in all cases to enter a residence. For example, the Fourth Amendment allows a warrantless entry when "exigent circumstances exist, the resident consents to entry, or the officers conduct a knock-and-talk." *United States v. Banks*, 60 F.4th 386, 389 (7th Cir. 2023). A warrant is not required "where a party consents to a search, where a third party with common control over the searched premises consents, or where an individual with apparent authority to consent does so." *United States v. Melgar*, 227 F.3d 1038, 1041 (7th Cir. 2000). "Consent may be given either verbally or nonverbally." *Dakhlallah v. Zima*, 42 F. Supp. 3d 901, 914 (N.D. Ill. 2014). "The voluntariness of the consent is a factual assessment that depends upon the totality of the circumstances." *Id.*

Thus, for example, if an investigator arrives at a participant's residence, and the host or someone with apparent authority consents to entry into the residence, there is no Fourth Amendment violation. *See id.* This would be the case even if the consent was implied. *See id.* at 916. Plaintiff assumes, without factual support, that every participant answers the door to the residence and refuses entry; he ignores that the host, whose residence the participant is staying at, may also answer the door to the residence and consent to entry. (*See, e.g.*, Ex. C, EM Incident Reports at 18 (EM-2021-22587), 30 (EM-2022-20646), 33 (EM-2022-24299).)

Investigator Richard Pasquel testified that he has never entered a residence without consent:

> Q. [I]n any of those instances where you've entered a participant's residence, have you ever used forced entry to enter the residence?
>
> A. Never.
>
> Q. And why not?
>
> A. Because we are given consent by the host and participant to enter those locations.

(Pl.'s Mot., Ex. 2, Pasquel Dep. 21:23–22:6.)

Plaintiff may disagree that each putative class members' consent was voluntary or that the scope of the consent was not exceeded, but these are factual disputes that can only be answered by examining the specific facts related to the entry into each putative class member's residence.

B. Whether the participant consented to being returned to CCDOC.

A person may voluntarily waive his Fourth Amendment rights. *See United States v. Ahmad*, 21 F.4th 475, 478 (7th Cir. 2021). The Seventh Circuit enforces blanket waivers of Fourth Amendment rights, including waivers of "any and all rights as to search and seizure." *Hagenow*, 423 F.3d at 642–43.

A waiver of Fourth Amendment rights is akin to a contract. *See Barnett*, 415 F.3d at 692. Fourth Amendment waivers, "like other contracts," are "presumed to make both parties better off and do no harm to third parties, and so they are enforceable and enforced." *Id.* "Nothing in the Fourth Amendment's language, background, or purpose" would justify forcing someone to remain confined at CCDOC "rather than to experience the lesser restraint of [electronic monitoring]." *Id.* "Often a big part of the value of a right is what one can get in exchange for giving it up." *Id.* It is therefore advantageous for individuals to agree to a blanket waiver of their Fourth Amendment rights in exchange for greater freedom. *Id.* at 691.

Individuals "prefer home confinement to confinement in a jail or prison even if the home confinement involves [a tradeoff]," *see id.*, such as consenting to reincarceration for failing to abide by the EM contract. Again, Plaintiff may disagree that each putative class members' consent was voluntary or that the scope of the consent was not exceeded, but these are disputes that can only be answered individually. *See United States v. Risner*, 593 F.3d 692, 694 (7th Cir. 2010).

C. Whether probable cause existed for an arrest.

Probable cause is an absolute defense to a Fourth Amendment unlawful arrest claim. *See Pryor*, 124 F.4th at 486. Whether probable cause to arrest exists depends on the totality of circumstances. *See Gutierrez v. Kermon*, 722 F.3d 1003, 1008 (7th Cir. 2013). Thus, determining whether probable cause existed for each reincarceration requires an individualized assessment of the specific program violation alleged, the evidence available to the investigators, and the context of the violation. *See id.*

Before being placed on electronic monitoring, participants must agree to abide by certain rules. (Ex. D, EM Participant Contract.) One of the key requirements for a participant to be in the community on electronic monitoring instead of being confined at CCDOC is not to commit any other criminal offenses. (*Id.*) In exchange for more freedom being at home instead of CCDOC, participants must sign an "Electronic Monitoring Participant Contract" where they "agree not to commit another crime while on Electronic Monitoring." (*Id.*)

If a participant commits another crime while on electronic monitoring—thus violating one of the rules of the program—the participant may be reincarcerated at CCDOC. (*Id.*) Each participant agrees to this condition of the program when the participant signs the "Electronic Monitoring Participant Contract." (*Id.*) As such, if a putative class member was reincarcerated for a program violation that is also a criminal offense, the class member could not recover any damages because probable cause "is an absolute defense to a false arrest claim." *Pryor*, 124 F.4th at 486.

Further, "an arrest can be supported by probable cause that the arrestee committed *any crime*, regardless of the officer's belief as to which crime was at issue." *Abbott*, 705 F.3d at 715 (emphasis added). Thus, determining whether probable cause exists does not depend on the specific reasons identified for reincarcerating a participant, including any reasons included (or not included) in the "EM – Reincarceration" incident reports. (Ex. C, EM Incident Reports; Pl.'s Mot., Ex. 1, EM Apprehension Reports.)

Some clarification regarding the EM incident reports is needed. Plaintiff states that the Sheriff's Office "produced a spreadsheet identifying 73 incidents" that "were selected by the Sheriff's Office by using a word search for 'program violation.'" (Pl.'s Mot. at 4–5.) Plaintiff states that he selected 58 incidents from this spreadsheet, which he attached as Exhibit 1. (*Id.* at 5.) Plaintiff's description of how he selected the incident reports is misleading. The Sheriff's Office originally produced *228* "EM – Reincarceration" incident reports that resulted from the search term "program violation.'" (Ex. C, EM Incident Reports.) From these 228 incident reports, which were produced in a redacted format, Plaintiff hand selected 73 incident reports for the Sheriff's Office to produce in an unredacted format under a protective order. From these 73 incident reports, Plaintiff then selected 58 incident reports to submit to the Court. (Pl.'s Mot. at 5.)

This Court should not accept Plaintiff's cherry-picked data as representative of the putative class. *See Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013) (declining to consider hand selected evidence not representative of the class); *Jacks v. DirectSat USA, LLC*, No. 10-cv-1707, 2015 U.S. Dist. LEXIS 28881, at *10 (N.D. Ill. Mar. 10, 2015) (decertifying class because variance in class members would not allow extrapolation from the plaintiff to the class); *Elizarri v. Sheriff of Cook Cty.*, No. 17-cv-8120, 2022 U.S. Dist. LEXIS 44470, at *31 (N.D. Ill.

Mar. 14, 2022) (stating that cherry-picking data matters when a plaintiff "intend[s] to use the sample to create an inference about people not in the sample, meaning the broader group").

Substantively, the specific facts included in the "EM – Reincarceration" incident reports are not dispositive of probable cause because *any* facts "known to the officer at the time of the arrest" can establish probable cause. *Abbott*, 705 F.3d at 714; *see also Farnik v. City of Chicago*, 1 F.4th 535, 545 (7th Cir. 2021) (stating that the relevant question is "whether [the officer] had probable cause for 'an' offense, not probable cause for the specific offense that was ultimately charged").

Offenses supported by probable cause could include criminal damage to property (such as electronic monitoring devices), *People v. McLennon*, 957 N.E.2d 1241, 1246 (Ill. App. Ct. 2011), disorderly conduct, *id.* at 1249; *Golatte v. City of Chicago*, No. 17 C 00929, 2020 U.S. Dist. LEXIS 138100, at *26 (N.D. Ill. Aug. 3, 2020), obstruction of a peace officer, *Golatte*, 2020 U.S. Dist. LEXIS 138100, at *14–15, obstruction of justice, *Ludovicus v. Idleburg*, No. 21-cv-1332, 2025 U.S. Dist. LEXIS 56191, at *12 (N.D. Ill. Mar. 26, 2025), resisting arrest, *Pryor*, 124 F.4th at 487, drug offenses, *United States v. Davis*, No. 06-C-215, 2007 U.S. Dist. LEXIS 57854, at *31 (E.D. Wis. Apr. 16, 2007), unlawful gun possession, *People v. Thomas*, 129 N.E.3d 584, 599 (Ill. App. Ct. 2019), assault and battery, *Richardson v. Village of Dolton*, No. 20 C 4254, 2022 U.S. Dist. LEXIS 178818, at *15, 20 (N.D. Ill. Sep. 30, 2022), or any other criminal activity.

The facts included in the incident reports show the existence of probable cause for many of these criminal offenses, although facts not included in the incident reports (which could be elicited through officer testimony, reviewing body camera video, or other means) could also establish probable cause. Some of these facts are summarized below:

Incident Report	Facts	Page Number
EM-2021-5382	Assaulted victim by hitting her in the face and body.	4
EM-2021-6973	Failed to register as a gun offender.	6
EM-2021-7329	Damaged electronic monitoring device.	6
EM-2021-11176	Failing to comply with verbal commands to stop.	9
EM-2021-11583	Stabbed victim in the shoulder.	10
EM-2021-22587	Calling, harassing, and threatening victim.	18
EM-2022-1717	Criminal trespass to land.	20
EM-2022-1797	Damaged electronic monitoring device.	20
EM-2022-8025	Damaged electronic monitoring device.	22
EM-2022-16716	Involved in a fight in connection with a shooting.	26
EM-2022-17721	Intoxicated and verbally abusive toward victim.	26
EM-2022-18808	Assaulted victim to the point he needed medical attention.	27
EM-2022-19246	Traced in close proximity to shooting.	27
EM-2022-19544	Threatened people with a gun.	28
EM-2022-20387	Obstructed identification police report.	29
EM-2022-22720	Selling drugs out of home with kids at host site.	31
EM-2022-23215	Breaking into residence and damaging property.	33
EM-2022-23216	Involved in argument that turned physical.	33
EM-2022-24198	Displayed a gun in the residence and made holes in the wall.	33
EM-2022-25366	Driving on suspended license and operating uninsured vehicle.	34
EM-2023-86	Started verbal altercation that became physical with a closed fist strike to the victim's face, arms, and knees causing bruising.	35
EM-2023-297	Threatened victim who obtained an order of protection.	36
EM-2023-480	Possession of suspected cannabis with a digital scale.	37
EM-2023-1570	Damaged electronic monitoring device.	38
EM-2023-2191	Damaged electronic monitoring device.	38
EM-2023-4810	Possession of many types of illicit drugs.	41
EM-2023-7547	Possession of heroin.	42
EM-2023-7724	Possession of gun and cannabis.	43
EM-2023-8392	Damaged electronic monitoring device.	45

EM-2023-11947	Verbal threats and altercation with victim.	47
EM-2023-13200	Urinated in public.	49
EM-2023-13999	Possession of heroin, cocaine, and gun.	49
EM-2023-14012	Possession of many types of illicit drugs.	50
EM-2023-18411	Sexual assault of minor.	53
EM-2023-20003	Possession of gun.	54
EM-2023-20907	Drug use and being disrespectful and disruptive.	55

Plaintiff, and each putative class member, has the "burden of pleading and proving that the Sheriff's officers lacked probable cause for his arrest." (Order at 12, ECF No. 26.) Factual disputes over probable cause must be resolved by a jury. *See Farnik*, 1 F.4th at 545. Determining the existence of probable cause is "fact-intensive" and "turns on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *United States v. Garcia Parra*, 402 F.3d 752, 764 (7th Cir. 2005) (citation omitted).

D. Whether the participant has standing to sue for an alleged Fourth Amendment violation.

Plaintiff must demonstrate that each class member suffered harm as a result of the alleged Fourth Amendment violation. This requires individualized inquiries into the consequences of each reincarceration, including the duration of detention, the impact on the individual's legal proceedings, and any other damages suffered.

For example, an EM participant lacks standing to sue if he received credit to his sentence for the time spent in custody. *See Ewell v. Toney*, 853 F.3d 911, 917 (7th Cir. 2017) ("[A] section 1983 plaintiff may not receive damages for time spent in custody, if that time was credited to a valid and lawful sentence."); *see also G&S Holdings LLC v. Cont'l Cas. Co.*, 697 F.3d 534, 540 (7th Cir. 2012) (stating that the party invoking federal jurisdiction must demonstrate an injury that is "likely to be redressed by the requested relief").

Also, pursuant to the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), "a person cannot use §1983 to collect damages on a theory irreconcilable with a conviction's validity, unless that conviction has been set aside." *Johnson v. Rogers*, 944 F.3d 966, 968 (7th Cir. 2019). An EM participant would not be entitled to damages if his "claim implies that he should not have been in custody . . . , but a valid criminal judgment says that time was part of his conviction and sentence." (Order on Mot. to Dismiss at 5.)

In ruling on Defendants' motion to dismiss, this Court applied *Ewell* and *Heck* to Plaintiff's claims because he received credit for the time he spent in custody. (*Id.*) However, in Plaintiff's particular case, the Court found that Plaintiff had standing to sue because Plaintiff alleged that "the Sheriff's officers handcuffed [Plaintiff] in front of his minor children," which "is enough to suggest an emotional injury independent of the time credited to his criminal sentence, enough to posit a concrete injury redressable by nominal damages." (*Id.*) These same individual assessments would need to be conducted for each class member to know if their claims are barred.

II. The Individual Issues that Must Be Resolved in this Case Predominate.

"Rule 23(b)(3) permits class certification only if the questions of law or fact common to class members 'predominate' over questions that are individual to members of the class." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 814 (7th Cir. 2012). While similar to the requirements for typicality and commonality, the predominance requirement is "far more demanding." *Id.* (citation omitted). The predominance requirement "calls upon courts to give careful scrutiny to the relation between common and individual questions in a case." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016).

Plaintiff completely fails to meet his burden on the predominance requirement. After citing *Messner* and *Tyson* for the general law on predominance, Plaintiff states, "In addition to satisfying the predominance prong of Rule 23(b)(3), a class action is superior . . . ." (Pl.'s Mot. at 14.)

Plaintiff, however, *did not develop any argument or apply the law to any facts* leading to that statement. He simply proclaimed that he "satisf[ied] the predominance prong." (*Id.*) Typically, when a party argues "in addition to satisfying such and such requirement," it is *after* the party put forth some argument *showing how* the party satisfied the requirement. Plaintiff did not make any showing of how he "satisfied" the predominance prong. (*Id.*)

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Eddlemon v. Bradley Univ.*, 65 F.4th 335, 338–39 (7th Cir. 2023) (citations omitted).

The Seventh Circuit has rejected the idea that such a bare bones argument could discharge a plaintiff's burden on a motion for class certification. "Mere *assertion* by class counsel that common issues predominate is not enough. That would be too facile. Certification would be virtually automatic." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014) (emphasis in original). As the Seventh Circuit has cautioned parties, "it is not the role of the court to search the record to find support for a party's assertion." *Williams v. Bd. of Educ.*, 982 F.3d 495, 510 (7th Cir. 2020). It is "counsel's responsibility" to point out facts in the record supporting an argument. *Rabin v. Flynn*, 725 F.3d 628, 634–35 (7th Cir. 2013). This Court should find that Plaintiff's mere assertion of predominance is insufficient to satisfy Rule 23.

Defendants identified, in the previous section, significant individual issues relating to probable cause, consent, and standing that can only be resolved on a case-by-case basis. To show predominance, Plaintiff must demonstrate that the elements of his claim are "capable of proof at trial through *evidence that is common to the class* rather than individual to its members." *Messner*, 669 F.3d at 818 (emphasis altered) (citation omitted). Plaintiff cannot prove a Fourth Amendment

violation for each EM participant based on evidence that is common to the class. Whether any EM participant's Fourth Amendment rights were violated depends on evidence specific to each EM participant.

Plaintiff argues that the need for individual *damages* determinations does not preclude class certification. (Pl.'s Mot. at 14–15.) In this case, however, every material question related to *liability* requires individual proof. Because reasonableness depends on the totality of circumstances, "[l]iability . . . must be determined on an individual basis." *Willoughby*, 2018 U.S. Dist. LEXIS 94955, at *15. Where "[l]iability, to say nothing of damages, would need to be determined on an individual basis . . . , common issues do not predominate over individual issues, making this case inappropriate for class disposition." *Harper*, 581 F.3d at 515.

III. Plaintiff's Proposed "Common" Questions Cannot Be Answered on a Classwide Basis.

Plaintiff argues that this case presents the following "three disputed questions" under the Fourth Amendment:

> 1. Whether the Fourth Amendment allows an arrest for an EM "program violations" that is not a violation of state or federal law.
>
> 2. Whether persons on electronic monitoring have consented to a warrantless entry of their dwelling for the purpose of returning the person to the Jail.
>
> 3. Whether the officers exceed the scope of the consent when they enter a dwelling to make a warrantless arrests for an EM "program violation."

(Pl.'s Mot. at 6.)

The first question does not satisfy the commonality requirement because it will not "drive the resolution of the litigation." *Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 553 (7th Cir. 2016) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (internal quotation marks

omitted)). Plaintiff ignores the prospective consent that EM participants give in exchange for more freedom being at home in the community, including agreeing that they may be reincarcerated for program violations. (Ex. A, EM Participant Agreement.) It is advantageous for individuals to agree to a blanket waiver of their Fourth Amendment rights in exchange for greater freedom. *See Barnett*, 415 F.3d at 692. However, voluntariness and scope of consent cannot be determined on a classwide basis because it depends on facts specific to each participant. *See Risner*, 593 F.3d at 694. As such, Plaintiff's first question will not drive resolution of the litigation.

The second and third questions relate directly to consent, so they also do not satisfy the commonality requirement. To demonstrate commonality, "the class members' claims must depend on a common contention that is 'capable of classwide resolution.'" *McCaster v. Darden Restaurants, Inc.*, 845 F.3d 794, 800 (7th Cir. 2017) (quoting *Wal–Mart*, 564 U.S. at 350). The questions about consent to enter a residence and the scope of the consent cannot be answered for all participants as a class. Questions about consent will not "generate common answers." *Jacks v. Directsat USA, LLC*, 118 F.4th 888, 894 (7th Cir. 2024) (quoting *Wal-Mart*, 564 U.S. at 350). The answers depend on the individual circumstances of each participant. *See Gower*, 377 F.3d at 667.

Plaintiff cites *Scott v. Dart*, 99 F.4th 1076 (7th Cir. 2024), but that case is distinguishable. In *Scott*, the Seventh Circuit found commonality because "all the class members experienced delays in receiving that treatment." *Id.* at 1091. The Seventh Circuit contrasted Scott's claim with "individualized claims of inadequate medical care that could be answered only by examining facts unique to each plaintiff," which would not satisfy commonality. *Id.* at 1090. Here, Plaintiff's unlawful home entry and seizure claims can "be answered only by examining facts unique to each plaintiff." *Id.* Therefore, *Scott* supports lack of commonality in this case.

IV. Plaintiff Is Not an Adequate Representative.

"In order to be an adequate representative, the named plaintiff must 'be part of the class and possess the same interest and suffer the same injury as the class members.'" *Conrad v. Boiron, Inc.*, 869 F.3d 536, 539 (7th Cir. 2017) (quoting *Amchem Prods. v. Windsor*, 521 U.S. 591, 625–26 (1997) (internal quotation marks and citation omitted)). "In addition, the court must be satisfied that the plaintiff will keep the interests of the entire class at the forefront." *Conrad*, 869 F.3d at 539.

If a plaintiff's "claim is atypical, he is not likely to be an adequate representative; his incentive to press issues important to the other members of the class will be impaired." *Robinson v. Sheriff of Cook Cty.*, 167 F.3d 1155, 1157 (7th Cir. 1999). If a plaintiff "is subject to an individual defense that would defeat the claims, he is not an adequate class representative." *Pruitt v. Pers. Staffing Grp., LLC*, No. 16-cv-5079, 2020 U.S. Dist. LEXIS 99774, at *28 (N.D. Ill. June 8, 2020) (citing *Cruz-Bernal v. Keefe*, 2015 U.S. Dist. LEXIS 90180, 2015 WL 4232933, at *3 (N.D. Ill. July 13, 2015) (holding that "plaintiffs would not be fair and adequate representatives to the class because their claims are *Heck*-barred"); *see also Howard v. Cook Cty. Sheriff's Off.*, 989 F.3d 587, 606 (7th Cir. 2021) ("Typicality ensures that class representatives have an 'incentive to litigate vigorously' the claims of the absent class members." (citation omitted)).

Plaintiff argues that Defendants "do not assert any unique defense against [him]." (Pl.'s Mot. at 12.) This is not true. Defendants moved to dismiss Plaintiff's claims because he received credit to his criminal sentence for the time he spent in custody. (Defs' Mot. to Dismiss at 5–7, ECF No. 20.) The Court granted the motion, in part, allowing Plaintiff to seek only nominal damages based on allegations of an emotional injury "independent of the time credited to his criminal sentence." (Order on Mot. to Dismiss at 5.) Plaintiff's alleged emotional injury is unique to him because it is based on "allegations that the Sheriff's officers handcuffed [Plaintiff] in front of his

minor children." (*Id.*) Because Plaintiff is entitled to only nominal damages based on an alleged injury unique to him, he does not "possess the same interest" and has not "suffer[ed] the same injury as the class members." *Conrad*, 869 F.3d at 539. Plaintiff is not an adequate representative of the putative class.

V. Plaintiff's Claims Are Not Typical of the Putative Class Members' Claims.

Where evaluating a plaintiff's claim requires a "highly individualized inquiry," each case is different and, therefore, "no case is typical." *McFields v. Dart*, 982 F.3d 511, 518 (7th Cir. 2020) (citation omitted). A plaintiff cannot simply assert that his claim "is based on the same 'course of conduct' that affected all members of the class." *Id.* Rather, a plaintiff must show that his claim has "the same *essential* characteristics as the claims of the class at large." *Id.* (emphasis added) (quoting *Muro v. Target Corp.*, 580 F.3d 485, 492 (7th Cir. 2009)). A plaintiff must "affirmatively demonstrate" that his claim has the same essential characteristics as the claims of the class at large. *See Wal-Mart*, 564 U.S. at 350.

Plaintiff fails to demonstrate that his claim has the same "essential characteristics" as the claims of the putative class. Plaintiff argues that a "recurring fact pattern emerges" from the incident reports. (Pl's Mot. at 8.) Plaintiff describes this "pattern" as follows: "The officers arrive at the residence of the EM subject, enter the dwelling, and return the subject to the Cook County Jail because of a suspected violation of EM rules." (*Id.*) This description says nothing about what is essential to the claims of the EM participants, and what they have the burden of proving: lack of probable cause, lack of consent, and injury (standing to sue). *See Martinez*, 900 F.3d at 846. Plaintiff has not demonstrated that his claim shares these essential characteristics, and therefore, he has not met his burden on Rule 23's typicality requirement.

VI. Plaintiff Fails to Meet His Burden on the Superiority Requirement.

A class action is not the superior way of adjudicating the controversy in this case. *See* Fed. R. Civ. P. 23(b)(3). One factor to consider in assessing the superiority requirement is "the likely difficulties in managing a class action." *Id.*

If this case were certified as a class action, the difficulties in managing the case would overwhelm the litigation. Defendants cannot be found liable for violating any EM participant's Fourth Amendment rights without a jury engaging in fact-specific inquiries relating to probable cause, consent, and standing. Individual trials would be needed to prove each EM participant's claim. The jury would need to assess the credibility of each EM participant if, for example, the participant claims he did not consent to entry into his residence or did not consent to reincarceration for program violations in exchange for more freedom being outside the confines of CCDOC.

As the Seventh Circuit has stated, "If the class certification only serves to give rise to hundreds or thousands of individual proceedings requiring individually tailored remedies, it is hard to see how common issues predominate or how a class action would be the superior means to adjudicate the claims." *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 577 (7th Cir. 2008). This case cannot be maintained as a class action because it is not the superior means of adjudicating the Fourth Amendment claims in this case.

CONCLUSION

For the foregoing reasons, Defendants Sheriff of Cook County and Cook County, Illinois respectfully request that this Honorable Court deny Plaintiff's motion for class certification and grant any other relief this Court deems equitable and just.

Respectfully submitted,

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