No. 03-1397

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARK SHOOK, DENNIS JONES, SHIRLEN MOSBY and JAMES VAUGHAN,

Plaintiffs-Appellants,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EL PASO and TERRY MAKETA, in his official capacity as Sheriff of El Paso County,

Defendants-Appellees.

Appeal from the United States District Court for the District of Colorado
Civil Action No. 02-M-651
The Honorable Richard P. Matsch

BRIEF OF PLAINTIFFS-APPELLANTS MARK SHOOK, DENNIS JONES, SHIRLEN MOSBY AND JAMES VAUGHAN

ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

There are no prior or related appeals in this Court.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction of this action pursuant to 28 U.S.C. § 1331 because this action arises under the Constitution and laws of the United States, and pursuant to 28 U.S.C. § 1343(a)(3) because this action seeks to redress the deprivation, under color of state law, of plaintiffs' constitutional rights. This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. The district court's final order dismissing this action was signed on August 22 and entered on August 26, 2003; the notice of appeal was filed on September 5, 2003.

ISSUES PRESENTED FOR REVIEW

1. In considering a motion to certify a class under Fed. R. Civ. P. 23(b)(2), a court must analyze and determine whether the factors required by Rule 23(a) and 23(b)(2) are present. Did the district court commit reversible error by ignoring the factors set forth in the Rule, and applying instead an unprecedented five-part test that has no basis in law?
2. In ruling on a motion for class certification, a court is not to conduct a preliminary inquiry into the merits of the case. Did the district court err by denying class certification based upon its view that the

plaintiffs' claims, if proven, would not entitle them to injunctive relief?

3. Did the district court err by denying class certification on the ground that the Prison Litigation Reform Act precluded it from granting all the relief it believed plaintiffs were seeking?

4. Where plaintiffs established the existence of all factors required by Rule 23(a) and 23(b)(2) for class certification, and the district court did not find otherwise, did the district court err in denying the motion to certify the plaintiff class?

5. A prisoner's individual claim for injunctive relief from allegedly unconstitutional conditions becomes moot when the prisoner leaves the jail. Once a class is certified, however, the departure of the original class representative does not moot the claims of the prisoner class. As a result, because of the fluid nature of jail populations, the claims of jail prisoners for prospective relief will almost inevitably be dismissed as moot unless a class is certified. When the requirements of Rule 23(a) and 23(b)(2) are otherwise satisfied, as in this case, does a district court abuse its discretion when it denies class certification and, as a result, prevents the prisoners' claims from being adjudicated on the merits?

STATEMENT OF THE CASE

This is a putative class action challenge to constitutionally inadequate mental health care and failure to protect suicidal persons confined in the El Paso County Jail in Colorado Springs, Colorado. Plaintiffs Mark Shook and Dennis Jones, prisoners in the Jail with serious mental health needs, filed this action on April 2, 2002, pursuant to 42 U.S.C. § 1983. Aplt. App. at 10-34.[1] They alleged that defendants' deliberate indifference to their serious mental health needs, and those of other Jail prisoners, violated the Eighth Amendment's prohibition on cruel and unusual punishment of convicted prisoners, and the Fourteenth Amendment's prohibition on punishment of pretrial detainees. On the same date, plaintiffs filed a motion seeking certification, pursuant to Fed. R. Civ. P. 23(b)(2), of a class comprising "[a]ll persons with serious mental health needs who are now, or in the future will be, confined in the El Paso County Jail." Aplt. App. at 35.

The action sought only injunctive and declaratory relief; no money damages were sought. Defendants moved to dismiss the action on the ground that plaintiffs had allegedly failed to exhaust administrative remedies as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a).

On July 26, 2002, Shirlen Mosby and James Vaughan, prisoners in the Jail with serious mental health needs, filed a motion for leave to intervene and to join

[1] The Appendix in this case is referred to as "Aplt. App."

the pending motion for class certification, along with a complaint in intervention, Aplt. App. at 64-75. The district court granted this motion for the limited purpose of determining the class certification question, Docket entry #45, of 01/15/03, Aplt. App. at 6.

On January 15, 2003, the district court held oral argument on pending motions. On July 29, 2003, nearly 16 months after the class certification motion had been filed, the district court denied defendants' motion to dismiss, and denied plaintiffs' motion for class certification. Aplt. App. at 131-39. The court stated that "plaintiffs and intervenors have 30 days to file an amended complaint for individual remedies."[2] Aplt. App. at 139.

On August 21, 2003, plaintiffs and intervenors (hereinafter collectively "plaintiffs") informed the district court that they would not file an amended complaint, Docket entry #57, of 08/24/03, Aplt. App. at 7, explaining that, because none of the plaintiffs were currently incarcerated in the Jail, they lacked standing to seek injunctive and declaratory relief. On August 22, 2003, the district court dismissed this action. Aplt. App. at 140-41. Plaintiffs filed their notice of appeal on September 5, 2003. Defendants have not cross-appealed.

[2] The district court's opinion and order is published. *Shook v. Board of County Commissioners*, 216 F.R.D. 644 (D. Colo. 2003).

STATEMENT OF FACTS

Facts Alleged in the Complaint

The plaintiffs in this case, and the class they seek to represent, have suffered and are at risk of suffering serious harm as a result of systemic deficiencies in the defendants' treatment of prisoners with serious mental health needs. These deficiencies include the lack of sufficient mental health staff with adequate training; inadequate provision for emergency psychiatric evaluation of prisoners; the lack of an adequate system for administering and monitoring psychotropic medications; the inability to care properly for prisoners who need inpatient psychiatric care; and the lack of adequate protection for prisoners at risk of self-harm or suicide. Complaint, ¶¶ 17, 66, Aplt. App. at 14, 22.[3]

The individual plaintiffs each have diagnoses of serious mental illnesses that require psychiatric care. Mr. Shook suffers from Asperberger's Syndrome, a form of autism, as well as bipolar disorder. Complaint, ¶ 58, Aplt. App. at 29. Mr. Jones has bipolar disorder, suffers from depression and anxiety, and has been suicidal. Complaint, ¶ 63, Aplt. App. at 21. Ms. Mosby has bipolar disorder and has suffered numerous attacks of anxiety, depression, feelings of hopelessness, and suicidal ideation. While in the Jail, she has been placed in special detention cells

[3] It is undisputed that defendants have an affirmative constitutional duty to provide necessary mental health care to prisoners in their custody. *See Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996).

and been told by staff that her condition is a "joke." She has attempted suicide three times while a prisoner in the Jail. Class Action Complaint in Intervention, ¶ 12, Aplt. App. at 72. Mr. Vaughan also has bipolar disorder and has had nearly continuous conditions of depression, anxiety, and racing thoughts. He was deprived of medication when he arrived at the Jail, and when he received his medication, he did not receive the blood tests that are necessary for adequate monitoring. Class Action Complaint in Intervention, ¶ 13, Aplt. App. at 73.

The medically necessary treatment for the plaintiffs' conditions includes psychotherapy and regular doses of appropriate medication with periodic monitoring of therapeutic effect and side effects. Declaration of Michael H. Gendel, M.D., ¶ 6, Aplt. App. at 49. The plaintiffs' bipolar condition can require inpatient psychiatric care. Depending on their symptoms, they may be subjected to use of restraints. Declaration of Michael H. Gendel, M.D., ¶¶ 4-6, Aplt. App. at 48-49.

Plaintiffs face a significant risk, however, that they will not receive appropriate medication, Complaint, ¶¶ 36-42, Aplt. App. at 21-23, and a significant risk that they will not receive other necessary mental health care, thus posing a risk of increasing severity of their mental illness, including increased risk of self-harm and psychiatric breakdown that would require in-patient psychiatric care. Declaration of Michael H. Gendel, M.D., ¶¶ 5-7, Aplt. App. at 48-49. Moreover,

because the Jail is unable to provide adequate protection, plaintiffs and other prisoners who become suicidal face a significant risk of serious physical harm and even death.

The Complaint recounts the death of pre-trial detainee Michael Lewis, who died while strapped face-down to the Jail's restraint board on May 7, 1998. For at least five days he had been hallucinating and psychotic, the probable result of the Jail medical provider's decision to change his medications, a decision made without consulting with the therapist who had prescribed Mr. Lewis's former medications. Two days after security staff noted his decompensation, the Jail's counselor placed him on the waiting list to see the psychiatrist, who visited only one morning every other week. Mr. Lewis did not live long enough to see the psychiatrist; he died while struggling against his restraints. Complaint, ¶ 1, Aplt. App. at 10.

Between the time of Mr. Lewis's death and the filing of this lawsuit in April, 2002, eight additional prisoners died in the Jail, four of them in 2001. In almost every case, the deceased prisoner was suicidal, seriously mentally ill, or displaying symptoms of psychosis from overdose or withdrawal. Complaint, ¶ 2, Aplt. App. at 11. Two months after suit was filed, yet another prisoner died by suicide. Class Action Complaint in Intervention, ¶ 4, Aplt. App. at 72.

After a suicide in November, 2001, the ACLU of Colorado wrote to the defendant Board of County Commissioners and asked it to investigate the alarming pattern of prisoner suicides and other deaths, and consider whether the Jail was staffed with a sufficient number of competent medical, mental health, and security personnel who were adequately trained to recognize and respond appropriately to the needs of the Jail's population. Complaint, ¶ 3, Aplt. App. at 11. The Board declined to investigate. Complaint, ¶ 4, Aplt. App. at 11.

The defendants do not provide the Jail with sufficient resources to provide for the plaintiffs and similarly situated prisoners with serious mental health needs. The Complaint quotes the American Correctional Association assessment that the Jail is "extremely overcrowded," with a population that regularly exceeds 1000 and has reached as high as 1139. Complaint, ¶ 20, Aplt. App. at 15. By the time Ms. Mosby and Mr. Vaughan intervened the crowding had become worse, with the defendants themselves describing it as critical. Class Action Complaint in Intervention, ¶ 3, Aplt. App. at 72. Approximately twenty per cent of the Jail's prisoners have serious mental health needs. Complaint, ¶ 16, Aplt. App. at 13. Between ten and twenty per cent receive psychotropic drugs, and the Jail's unlicensed "mental health professional" sees 50 to 75 prisoners each month who are "acutely psychotic." Complaint, ¶ 23, Aplt. App. at 16.

Defendants' contract with the Jail's private, for-profit medical provider provides for psychiatric services of only two hours per week, which represents approximately 36 seconds per mentally ill prisoner per week. Complaint, ¶ 30, Aplt. App. at 17-18. There are no psychiatric nurses, and the two additional mental health employees have no licenses and lack sufficient background and training. Complaint, ¶ 30, Aplt. App. at 17-18. The contractor that provided medical services until 2002 requested additional funding to improve mental health staffing at the Jail, but the defendants repeatedly rejected such requests. Complaint, ¶ 67, Aplt. App. at 31.

Compounding the contract's deficiencies is the fact that defendants have failed to ensure that the contractor actually provides even the minimal services specified in the contract. For example, defendants have failed to ensure that the medical provider conducts full mental health evaluations within 14 days; that it furnishes the contractually required clinical supervision; that it has mental health staff available 24 hours a day; that it provides for prisoners who need inpatient psychiatric care; and that it fulfills the medication monitoring standards specified in the contract. Complaint, ¶ 27, Aplt. App. at 17.

Prisoners exhibiting signs of mental illness are frequently placed in "special detention" cells, which have no window, no bed, no toilet, and no sink. Mentally

ill prisoners, including prisoners at risk of self-harm, are frequently left in these cells unobserved by staff. Complaint, ¶¶ 24-25, Aplt. App. at 16.

Prisoners who need inpatient psychiatric care do not receive it. The Jail's former medical director states that the Jail is "full of individuals that belong in the state hospital," but the state hospital accepts only a small portion of the prisoners who need inpatient care. Complaint, ¶ 31, Aplt. App. at 18.

The Complaint provides specific examples of how the Bedlam-like conditions in the Jail have already resulted in significant harm and even death to prisoners with serious mental health needs:

- A recently-raped and suicidal female prisoner, stripped naked and strapped into a restraint chair for five hours, screams in terror for hours while the Jail's mental health worker fails to respond to the deputies' repeated attempts to page her. Complaint, ¶ 45, Aplt. App. at 23-24.
- Deputies respond to a recently-admitted prisoner enduring delirium and psychosis from alcohol withdrawal as though he presents a disciplinary problem; they move him from the infirmary to a special detention cell and then pepper spray him when he is unable to respond to their commands. The prisoner dies shortly afterwards. Complaint, ¶ 46, Aplt. App. at 24-25.
- After briefly interviewing a recently-arrived prisoner with a history of suicide attempts, whom intake staff had flagged for full suicide precautions,

the Jail's unlicensed "mental health professional" terminates the suicide watch and transfers him to general population, where he hangs himself the next day. Complaint, ¶ 47, Aplt. App. at 25.

- A schizophrenic prisoner awaiting transfer to the state hospital for inpatient psychiatric care is not sent to the Jail's infirmary for medical supervision but is instead confined in a disciplinary isolation cell, where he succeeds in hanging himself. Complaint, ¶ 48, Aplt. App. at 25-26.
- A prisoner on "suicide watch" in the mental health cellblock is able to make a cutting tool, sharpen it, cut his wrists, climb stairs, and then jump off head first, resulting in serious physical injuries. Complaint, ¶ 49, Aplt. App. at 26.
- The Jail's mental health workers fail to respond to calls about a suicidal prisoner who is hearing voices and smearing feces on the wall of a toiletless special detention cell where he is confined while deputies wait for instructions. Complaint, ¶ 50, Aplt. App. at 50-51.
- A female prisoner needing inpatient psychiatric care is confined not in the infirmary but in the women's cellblock, where a guard finds her "lying on the floor, naked, covered in food and making engine noises." Complaint, ¶¶ 52-57, Aplt. App. at 27-28.

Plaintiffs allege that they and the class they represent have been harmed in the past and face a substantial risk of future harm as a result of the practices and deficiencies described in the Complaint. They seek appropriate injunctive relief as well as a declaration that the conditions they describe violate the Constitution.

Motion for class certification

Simultaneously with the filing of the Complaint on April 2, 2002, plaintiffs moved to certify pursuant to Rule 23(b)(2) a class comprising "all persons with serious mental health needs who are now, or in the future will be, confined in the El Paso County Jail." Aplt. App. at 35. In their reply brief, Plaintiffs also suggested an alternative class definition, comprising all current and future prisoners in the Jail. Aplt. App. at 47.

Subsequent Proceedings

After briefing on the class certification motion was completed, the district court issued a minute order noting that the parties had not discussed "that provision of the Prison Litigation Reform Act which is presently codified in 18 U.S.C. § 3626 restricting remedies with respect to prison conditions." The Court ordered supplemental briefs "regarding the applicability of those provisions to the question of class certification for prospective relief." Aplt. App. at 62-63. Both parties filed briefs in compliance with the court's order.

On January 15, 2003, the district court held oral argument on the pending motions. At that time, the court asked the plaintiffs to submit a supplemental brief addressing the requirements of the Eighth and Fourteenth Amendments as they apply to the facts alleged in plaintiffs' Complaint. *See* Docket entry #45, of 01/15/03, Aplt. App. at 6; Transcript, p. 25, lines 22-24, Aplt. App. at 100. The brief, filed January 24, 2003, provided citations to case law holding that specific deficiencies cited in the Complaint violate prisoners' constitutional rights.

The District Court's Order

In an order dated July 29, 2003, the district court denied the plaintiffs' motion for class certification. Aplt. App. at 131-39.

The court determined that the allegations of the named plaintiffs and intervenors stated a claim that they have been diagnosed as having serious mental health needs that, as a result of deliberate indifference, were not met while they were prisoners in the El Paso County Jail. Aplt. App. at 132. The court further noted additional allegations of affirmative actions by the defendants that the court summarized as being claims of excessive force. Aplt. App. at 132. The court concluded that the plaintiffs and intervenors had stated actionable claims and noted that they sought only prospective relief, and not damages.

Before discussing the issue of class certification, the court stated that its ability to order prospective relief had been limited by the Prison Litigation Reform

Act (PLRA), and that such relief shall "extend no further than necessary to correct the violation" of federal rights, and shall be accompanied by a finding that the relief is narrowly drawn, extends no further than necessary, and is the least intrusive means necessary to correct the violation," quoting 18 U.S.C. § 3626(a)(1)(A); Aplt. App. at 133.

Turning to the question of class certification, the court said that it depends on finding the four prerequisites of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. Aplt. App. at 134. After briefly identifying the Rule 23(a) factors, however, the court did not analyze or discuss them any further. Nor did the court mention or discuss the requirements of Rule 23(b)(2). Instead, the court announced a five-factor test that it said "control[s] the motion for class certification:"

1) " whether the named plaintiffs and interveners have standing to assert the claims made on behalf of the putative class"
2) "whether the members of the class can be identified"
3) "whether the class allegations are broader than the constitutional claim"
4) "whether the putative class is manageable"
5) and "whether the court has the authority to order the prospective remedy requested"

Aplt. App. at 134. The court did not provide any authority in support of this five-factor test.

In a full page of bulleted paragraphs, the district court quoted ten of the common questions of fact that plaintiffs enumerated in their briefing on the class

certification motion. The court also pointed out that plaintiffs had provided an opinion from a professor at Yale Medical School "about requirements for the humane treatment of persons with serious mental health needs." Aplt. App. at 135-36. The court then characterized the lawsuit as "an effort to reform jail practices rather than to redress past constitutional torts and prevent their reoccurrence." Aplt. App. at 136.

The court said that "the initial problem" is identifying the members of the class. Aplt. App. at 136. The court stated that identification of the class members "would require an intake diagnostic procedure to determine persons having serious mental health needs." Aplt. App. at 137. The court stated that "[t]here is nothing in the Constitution that requires the Sheriff of El Paso County to hire a competent professional staff to screen all persons coming to the jail to determine their mental and emotional status." Aplt. App. at 137. The court further stated that it was "not aware of any case that imposes liability for suicide or any other injury to an inmate because the jailers did not provide a mental health evaluation by a competent professional to determine mental health needs in advance of incarceration." Aplt. App. at 137.

The district court summarized its analysis of the class certification motion as follows:

> The objective of this proposed class action is to have this court prescribe jail practices for humane treatment of prisoners. That is beyond the competence

> and the jurisdiction of this court. The questions sought to be addressed and answered are policy determinations to be made by the political branches of local and state government. The evident purpose of the PLRA was to emphasize the functional difference between the judiciary and the agencies of representative government. The limitations on remedy established by the PLRA would preclude this court from replicating *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980).

Aplt. App. at 138.

According to the court, the common questions of fact quoted in the order "illustrate the failure to demonstrate the feasibility of class relief in this case." Aplt. App. at 138. The court further stated that "the breadth of the relief sought" in this case "makes the proposed class action not manageable with this court's limited jurisdiction." Aplt. App. at 138.

STANDARD OF REVIEW

The threshold question whether the district court applied the correct legal standard to plaintiffs' motion for class certification is reviewed *de novo*. *Thiessen v. General Electric Capital Corp*., 267 F.3d 1095, 1105 (10th Cir. 2001), *cert*. *denied*, 536 U.S. 934 (2002); *Beard v. Teska*, 31 F.3d 942, 955 (10th Cir. 1994); *MidAmerica Federal S&L v. Shearson/American Exp*., 886 F.2d 1249, 1253 (10th Cir. 1989). If the district court has applied the correct legal standard, a decision to grant or deny class certification is reviewed for abuse of discretion. *Adamson v. Bowen*, 855 F.2d 668, 675 (10th Cir. 1988). An abuse of discretion occurs if the district court fails to consider the applicable legal standard upon

which its discretionary judgment is based, *United States v. Messner*, 107 F.3d 1448, 1455 (10th Cir. 1997), or bases its ruling on an erroneous conclusion of law. *Ashby v. McKenna*, 331 F.3d 1148, 1149 (10th Cir. 2003). If the district court did not apply the correct legal standard, its order must be reversed. *Adamson*, 855 F.2d at 675-76; *Paton v. New Mexico Highlands University*, 275 F.3d 1274, 1280 (10th Cir. 2002).

SUMMARY OF ARGUMENT

1. The district court erred by denying class certification on the basis of factors that are not found in Rule 23, Fed. R. Civ. P. (hereafter "Rule 23"). Instead of analyzing the factors of Rule 23(a) and 23(b)(2), the district court applied a novel five-part test of its own creation. Under Circuit precedent, this alone requires reversal. The district court also improperly considered the merits by denying class certification based on its belief that plaintiffs' allegations, if proven, would not entitle them to injunctive relief. The district court also improperly applied Rule 23(b)(3) standards of identifiability and manageability when plaintiffs seek class certification pursuant to Rule 23(b)(2).

2. The district court further erred in denying class certification based upon the provisions of the Prison Litigation Reform Act (PLRA) limiting prospective relief in prison and jail conditions litigation. The district court was incorrect in its conclusion that the PLRA *sub silentio* abolished class action

injunctive challenges to prison and jail conditions. In fact, nothing in the language or legislative history of the PLRA indicates a Congressional intent to abolish class actions, or in any way change the law governing class certification in prison and jail cases.

3. The district court was also incorrect in denying class certification because of its view that the PLRA would bar the relief it believed plaintiffs sought in their Complaint. Under the PLRA, as under pre-existing law, federal courts have the power and duty to order an effective remedy for constitutional violations that are proven at trial, whether those violations are individual or class-wide in nature. It was error for the district court to conclude, before hearing any evidence, that the PLRA would bar a remedy in this case, and to deny class certification on that basis.

4. Because of the short length of stay in a county jail, no single prisoner seeking prospective relief is likely to remain in the jail long enough to litigate a challenge to conditions of confinement from filing through final judgment and appeal. Because class certification is necessary to prevent claims for prospective relief from being dismissed as moot, the district court's ruling deprives the plaintiffs and the class they represent of any opportunity to have their claims heard on the merits. Where the requisite showing of the Rule 23 factors was made, the district court erred in denying certification when that denial had the effect of

ending the litigation and making it impossible for plaintiffs and others similarly situated to present their constitutional claims to the federal courts.

5. Because plaintiffs amply demonstrated that the proposed class satisfies all requirements of Rule 23(a) and (b)(2), the judgment of the district court should be reversed and the case remanded with directions to certify the class.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY DENIED CLASS CERTIFICATION BASED ON FACTORS THAT ARE NOT FOUND IN FED. R. CIV. P. 23(a) AND (b)(2).

In considering plaintiffs' motion for class certification, the district court erred by: *first*, applying an unprecedented five-part test of its own creation rather than the factors set forth in Rule 23(a) and (b)(2); *second*, denying class certification based on the court's evaluation of plaintiffs' constitutional claims on the merits; and *third*, applying the identifiability and manageability requirements of Rule 23(b)(3) to a Rule 23(b)(2) class.

A. Instead of applying the requirements of Fed. R. Civ. P. 23, the district court erroneously applied a novel five-part test that has no basis in law.

In ruling on a motion for class certification, "the district court must determine whether the four threshold requirements of Rule 23(a) are met. If the court determines that they are, it must then examine whether the action falls within

one of three categories of suits set forth in Rule 23(b)." *Adamson v. Bowen*, 855 F.2d 668, 675 (10th Cir. 1988) (footnote omitted).[4]

Class certification is solely a procedural issue, and the court's inquiry is limited to determining whether the proposed class satisfies the requirements of Rule 23. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974); *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982). In ruling on the motion for class certification, the court must take the substantive allegations of the complaint as true. *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1290 n. 7 (10th Cir. 1999). If the court has some doubt, it should err in favor of class certification. *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968).

Here, the district court failed to perform the required analysis. Although the court briefly identified the factors set forth in Rule 23(a), Aplt. App. at 134, it did not discuss or analyze them at all. It made no findings on the presence or absence of any of the Rule 23(a) factors. Nor did it discuss Rule 23(b)(2), or find that the

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[4] The requirements of Rule 23(a) are:

> (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.

Amendments to Fed. R. Civ. P. 23 took effect on December 1, 2003. However, the portions of the Rule cited in this brief are unaffected.

class was an improper (b)(2) class. The district court erred in failing to consider the factors set forth in Rule 23(a) and (b)(2), and in failing to recognize that each of these factors was established in this case.[5]

Rather than analyzing the factors set forth in Rule 23, the district court announced an unprecedented five-part test that it said was "controlling" in the class certification decision:

> [T]he considerations controlling the motion for class certification are [1] whether the named plaintiffs and interveners have standing to assert the claims made on behalf of the putative class, [2] whether the members of the class can be identified, [3] whether the class allegations are broader than the constitutional claim, [4] whether the putative class is manageable and, [5] whether the court has the authority to order the prospective remedy requested.

Aplt. App. at 134 (bracketed numerals added). The district court provided no authority for this statement, and it is an incorrect statement of the factors governing class certification under Fed. R. Civ. P. 23. The district court's failure to apply the appropriate legal standard requires reversal. *See Adamson*, 855 F.2d at 675-76.

B. The district court improperly considered the merits by denying class certification based upon its belief that plaintiffs' allegations, if proven, would not entitle them to injunctive relief.

It is well established that a motion for class certification is not the equivalent of a motion for summary judgment or a motion to dismiss for failure to state a

[5] In section III, *infra*, plaintiffs demonstrate that the proposed class amply satisfies the requirements of Rule 23(a) and (b)(2).

claim – motions that address the merits of the case. The court must determine whether plaintiffs have met the requirements of Rule 23, not whether plaintiffs will ultimately prevail in the litigation and obtain the relief they seek. "Nothing in either the language or history of Rule 23 ... gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)). "In determining the propriety of a class action, 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." *Anderson*, 690 F.2d at 799, quoting *Eisen*, 417 U.S. at 178; *see also Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988) (district court, in making class certification decision, must avoid focusing on the merits of the underlying claims).

In evaluating plaintiffs' motion for class certification, the district court strayed from these well-established principles. Rather than considering whether the proposed class met the requirements of Rule 23, the district court repeatedly made clear its focus on whether plaintiffs' allegations, if proven, would entitle them to injunctive relief. After briefing on the class certification motion was completed, the court directed the parties to submit supplemental briefs "discuss[ing] that provision of the Prison Litigation Reform Act which is presently

codified in 18 U.S.C. § 3626 restricting remedies with respect to prison conditions." *See* Docket entry #23, of 06/21/02, Aplt. App. at 5. Following this briefing, it concluded that the relief supposedly sought "is beyond the competence and the jurisdiction of this court," Aplt. App. at 138.

During oral argument on the motion on January 15, 2003, the court engaged plaintiffs' counsel in a lengthy colloquy about whether particular mental health services are constitutionally required, and concluded that "as I interpret your complaint, you've gone way beyond anything that any court has ever said is required under the Eighth Amendment." *See* Transcript, p. 23, line 4 - p. 26, line 18, Aplt. App. at 98-101. The district court further directed plaintiffs to submit a brief demonstrating that the relief they seek is required by the Eighth Amendment. Transcript, p. 26, lines 3-18, Aplt. App. at 101.

After raising these issues, in its order denying class certification the court focused not on the requirements of Rule 23, but on whether plaintiffs had identified constitutional violations and whether they could succeed in obtaining the relief it believed they were seeking. Indeed, the court made substantive rulings, adverse to plaintiffs, on the requirements of the Eighth and Fourteenth Amendments. For example, the court stated "[t]here is nothing in the Constitution that requires the Sheriff of El Paso County to hire a competent professional staff to screen all persons coming to the jail to determine their mental and emotional

status," and "[t]he court is not aware of any case that imposes liability for suicide or any other injury to an inmate because the jailers did not provide a mental health evaluation by a competent professional to determine mental health needs in advance of incarceration." Aplt. App. at 137. [6]

To the extent that the district court's denial of class certification was influenced by its view of the scope of the Eighth and Fourteenth Amendments, or by its view that plaintiffs would not be entitled to the full injunctive relief it believed they were seeking, it clearly erred. *See Anderson*, 690 F.2d at 799.

C. The district court erred in applying Rule 23(b)(3) standards of identifiability and manageability to a Rule 23(b)(2) class.

In denying class certification, the district court emphasized the difficulty it perceived in identifying members of the plaintiff class. Aplt. App. at 136-37. The court also stated that the proposed class action was "not manageable with this

[5] Plaintiffs submit that the district court's evaluation of the merits of plaintiffs' claims was substantively wrong as well as procedurally improper. For example, to the extent that the district court concluded that defendants have no obligation to screen prisoners in their custody for mental illness, it was incorrect. *See Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1319-20 (10th Cir. 2002) (although jail staff did perform some mental health screening, county may have violated the constitution by failing to train staff to recognize prisoners suffering from obsessive-compulsive disorder); *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1188-93 & n. 15 (9th Cir. 2002) (evidence that county jail "knew of the need to screen incoming detainees for mental illness and chose to ignore it" may establish constitutional violation), *cert. denied*, 537 U.S. 1106 (2003); *Coleman v. Wilson*, 912 F. Supp. 1282, 1298 & n. 10 (E.D. Cal. 1995) (identifying "a systematic program for screening and evaluating inmates to identify those in need of mental health care" as one of the "basic, essentially common sense, components of a minimally adequate prison mental health care delivery system").

court's limited jurisdiction." Aplt. App. at 138. While these may be proper factors to consider in certifying a class under Rule 23(b)(3), they are not proper considerations in this case, where plaintiffs seek only prospective relief on behalf of a Rule 23(b)(2) class. Contrary to the view of the district court, it is not necessary to identify with precision every member of a (b)(2) class, and the proposed class in this case is adequately defined for purposes of Rule 23(b)(2). In addition, the district court erred in denying class certification because of vague concerns about "manageability."

1. The class was adequately defined for purposes of Rule 23(b)(2).

The district court erred in denying class certification based on the difficulty it foresaw in identifying members of the plaintiff class. In *Yaffe v. Powers*, 454 F.2d 1362 (1st Cir. 1972), the district court had denied class certification because of perceived problems in identifying class members, and the Court of Appeals reversed:

> 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". Committee's Notes

> to Revised Rule 23, 3B Moore's Federal Practice ¶ 23.01 [10-2] (2d ed. 1969).

Yaffe, 454 F.2d at 1366. In short, the district court had erroneously applied to a (b)(2) class action a requirement that applies only to (b)(3) class actions. *Id*; *see also Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988) (citing *Yaffe* with approval); *Horn v. Associated Wholesale Grocers, Inc*., 555 F.2d 270, 276 (10th Cir. 1977) ("where, as here, the class is composed of a substantial number, no great need is present to identify each and every one"); *Penn v. San Juan Hospital, Inc*., 528 F.2d 1181, 1188 (10th Cir. 1975) (noting that in a 23(b)(2) class action, "there are not difficult notice problems nor does it present administrative complications involved in collecting and distributing funds such as are encountered in Rule 23(b)(3) damage actions"); *Doe v. Charleston Area Medical Center, Inc*., 529 F.2d 638, 645 (4th Cir. 1975) ("[w]here the plaintiff has demonstrated that the class of persons he or she wishes to represent exists, that they are not specifically identifiable supports rather than bars the bringing of a class action, because joinder is impracticable").

The proposed class in this case was adequately defined for purposes of Rule 23(b)(2), and courts have routinely certified prisoner classes in terms indistinguishable from the class proposed here. *See*, *e.g.*, *Coleman v. Wilson*, 912 F. Supp. 1282, 1293 (E.D. Cal. 1995) ("all inmates with serious mental disorders who are now or who will in the future be confined within the California

Department of Corrections"); *Bradley v. Harrelson*, 151 F.R.D. 422, 423 (M.D. Ala. 1993) ("all acutely and severely mentally ill inmates"); *Anderson v. Coughlin*, 119 F.R.D. 1, 2, 3 (N.D.N.Y. 1988) ("all inmates ... who suffer from a mental illness"). In *Anderson*, the court specifically rejected defendants' argument that such a class is "overbroad and ill-defined," noting that plaintiffs sought certification under Rule 23(b)(2), "and as such precise definition is not as important as it may be under other class certification rules," since notice to class members is not required and the actual membership of the class need not be precisely delimited. 119 F.R.D. at 3.[7]

2. "Manageability" is not a requirement for class certification under Rule 23(b)(2).

Moreover, the district court erred in denying class certification on the ground that, in its view, the proposed class action was "not manageable with this court's limited jurisdiction." Aplt. App. at 138. "Manageability" is a proper consideration only when certification is sought under Rule 23(b)(3); it is not a consideration where, as here, certification is sought under Rule 23(b)(2) in a case

[7] In any event, both in briefing and at oral argument, plaintiffs specifically proposed to the district court the alternative of certifying a class comprising all current and future prisoners in the Jail. Transcript, p. 44, line 9 - p. 45, line 13, Aplt. App. at 119-20. *See Anderson*, 119 F.R.D. at 3 n. 1 (in challenge to treatment of mentally ill prisoners, plaintiffs could have sought certification of class including entire prison population). Such a class definition would have obviated any problems (if any there were) with identifying members of the class. Indeed, the district court stated at oral argument that such a class "may be more manageable." Transcript., p. 45, line 10, Aplt. App. at 120.

seeking only injunctive and declaratory relief. *See Forbush v. J.C. Penney Co., Inc*., 994 F.2d 1101, 1105 (5th Cir. 1993) ("questions of manageability and judicial economy are … irrelevant to 23(b)(2) class actions"); *Johnson v. American Credit Co*., 581 F.2d 526, 531 n. 9 (5th Cir. 1978) ("The defendants argue that the class is unmanageable because it is too large and too diversified. This argument would be relevant only if [plaintiff] had sought class certification under Rule 23(b)(3)"); *Elliott v. Weinberger*, 564 F.2d 1219, 1229 (9th Cir. 1977) ("by its terms, Rule 23 makes manageability an issue important only in determining the propriety of certifying an action as a (b)(3), not a (b)(2), class action"), *aff'd in pertinent part sub nom*. *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). *See also Yaffe*, 454 F.2d at 1365 ("for a court to refuse to certify a class … because of vaguely-perceived management problems is counter to the policy which originally led to [Rule 23]"). The district court's imposition of this extra hurdle requires reversal. *See Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988) (reversing denial of class certification where district court erroneously applied requirement of Rule 23(b)(3) to motion for class certification under Rule 23(b)(2); "[t]he district court placed upon the class a burden that the rule does not authorize").

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE PLRA PRECLUDED IT FROM GRANTING RELIEF, AND DENYING CLASS CERTIFICATION ON THAT BASIS.

After the parties completed their briefing on the class certification motion, the district court *sua sponte* requested supplemental briefs on whether the restrictions on remedies set forth in the Prison Litigation Reform Act, 18 U.S.C. § 3626(a), affected the decision whether to certify a class in this case. Docket entry #23, of 06/21/02, Aplt. App. at 5. In its order denying class certification, the court quoted 18 U.S.C. § 3626(a)(1)(A) and stated that the PLRA's restrictions on prospective relief functioned as a "limitation on jurisdiction." Aplt. App. at 133. After some discussion, the court explained its denial of class certification as follows:

> The objective of this proposed class action is to have this court prescribe jail practices for humane treatment of prisoners. That is beyond the competence and the jurisdiction of this court. The questions sought to be addressed and answered are policy determinations to be made by the political branches of local and state government. The evident purpose of the PLRA was to emphasize the functional difference between the judiciary and the agencies of representative government. The limitations on remedy established by the PLRA would preclude this court from replicating *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980). . . .

Aplt. App. at 133. In short, the district court denied class certification based on an erroneous belief that the PLRA would prevent the court from granting the relief that it believed the plaintiffs were ultimately seeking.

This ruling was wrong in three critical respects, any one of which requires reversal. *First*, the PLRA in no way affects the law of class certification in prison and jail cases. *Second*, the PLRA does not preclude class-wide relief when class-wide constitutional violations are shown. *Finally*, even assuming *arguendo* that plaintiffs were not entitled to relief in the precise form they requested in their Complaint, they – and the class – would still be entitled to appropriate relief if constitutional violations were shown.

A. Contrary to the view of the district court, the PLRA in no way affects the law of class certification in prison and jail cases.

1. The court's view conflicts with the case law.

Although the district court correctly acknowledged that the PLRA "does not prohibit the procedural device of class certification," Aplt. App. at 133, the court apparently concluded that the PLRA *sub silentio* abolished class actions for prospective injunctive relief with regard to unconstitutional prison and jail conditions. *See* Aplt. App. at 136 ("It is apparent from the plaintiffs' papers that this civil action is an effort to reform jail practices rather than to redress past constitutional torts and prevent their reoccurrence"); Aplt. App. at 138 (suggesting that problem of jail suicide can be addressed only retrospectively, through individual damages actions; "[w]hether an Eighth Amendment violation has occurred is a question for a jury after a trial on historical evidence"); Aplt. App. at 138 ("[t]he limitations on remedy established by the PLRA would preclude this

court from replicating *Ramos v. Lamm*"). Moreover, at oral argument, the district court clearly stated its belief that the PLRA *de facto* abolished class action challenges to prison and jail conditions:

> [A]lthough the plaintiffs have correctly cited cases that say well, where the relief – it's a 23(b)(2) class, and the relief is injunctive and declaratory, you can still have a class action under the statute. The statute didn't prohibit it. *But, the reason that I asked for supplemental briefs, it seems to me that as a practical matter, it has*.

Transcript, p. 19, lines 2-8; Aplt. App. at 94 (emphasis added).

No other court has reached this conclusion. On the contrary, courts have reaffirmed the continuing viability of class actions by certifying classes in numerous prison and jail cases since the enactment of PLRA in 1996. *See*, *e.g.*, *Russell v. Johnson*, 2003 WL 22208029, *1 (N.D. Miss. 2003); *Skinner v. Uphoff*, 209 F.R.D. 484, 489 (D. Wyo. 2002); *Jones'El v. Berge*, 172 F.Supp.2d 1128, 1133 (W.D. Wis. 2001); *Hawker v. Consovoy*, 198 F.R.D. 619, 627 (D.N.J. 2001); *Heit v. Van Ochten*, 126 F.Supp.2d 487, 488 (W.D. Mich. 2001); *Maynor v. Morgan County, Alabama*, 147 F.Supp.2d 1185, 1185-86 (N.D. Ala. 2001); *Aiello v. Litscher*, 104 F.Supp.2d 1068, 1070 (W.D. Wis. 2000).

In *Anderson v. Garner*, 22 F.Supp.2d 1379 (N.D. Ga. 1997), for example, the defendants argued that in enacting the PLRA, Congress had "unmistakably sen[t] a message that the time of overbroad prisoner class actions has passed." *Id*. at 1383. The court rejected this argument, noting that the PLRA "addresses only

the *type* of relief courts may use to redress constitutional violations, and says nothing about the nature of the proceedings underlying the remedy ordered by the court." *Id*. (emphasis in original). The court correctly concluded that PLRA did not "in any way affect[]" its consideration of a class certification motion, and applied "the existing law governing class certification." *Id*.

2. The court's view conflicts with the statutory scheme.

In addition to being without support in the case law, the district court's unprecedented view finds no support in the PLRA itself. As the court acknowledged, the text of the PLRA does not purport to affect the law of class certification. Nor does the legislative history of the PLRA provide any support for the district court's unprecedented view. Indeed, basic principles of statutory construction compel the conclusion that PLRA has no effect on the law of class certification.

Congress is presumed to legislate against the background of existing law, and when it legislates in an area but does not address a particular subject, it indicates its intention to leave the law on that subject undisturbed. *See Dept. of Housing and Urban Develop. v. Rucker*, 535 U.S. 125, 133 n. 4 (2002); *Edelman v. Lynchburg College*, 535 U.S. 106, 117-18 (2002). In enacting the PLRA, Congress was obviously aware of the existence of class action injunctive challenges to prison conditions. However, nothing in the PLRA purports to

abolish such actions; in fact, many of the statute's provisions clearly assume that such actions will continue to be brought. *See*, *e.g.*, 18 U.S.C. § 3626(a)(3) (limits on prisoner release orders as a remedy for overcrowding); 18 U.S.C. § 3626(f) (restrictions on the appointment of special masters). Prisoner release orders are not entered, and special masters are not appointed, in cases brought by individual prisoners; rather, these remedial tools are hallmarks of class action litigation. *See*, *e.g.*, *Facteau v. Sullivan*, 843 F.2d 1318, 1319 (10th Cir. 1988) (describing appointment of special master in prison class action).

Here, Congress legislated comprehensively in the area of prison conditions litigation, but in no way indicated an intention to abolish class action injunctive challenges to such conditions. Thus, it is not surprising that in the nearly eight years since the PLRA's enactment, no other court has cited the PLRA's limitations on prospective relief as grounds for denying certification of a class of prisoners seeking injunctive relief from unconstitutional prison conditions.

B. The PLRA does not abolish the power and duty of the federal courts to order a remedy commensurate with proven constitutional violations.

The district court's ruling on class certification -- based upon its interpretation that the PLRA so circumscribed its jurisdiction that it was powerless to redress even serious abuses of constitutional rights -- effectively ends the

plaintiffs' efforts to obtain any relief for the class. This holding seriously misconstrues the PLRA, and flies in the face of current case law.

Indeed, every Circuit to consider the question has held that, with respect to litigated decrees, the PLRA does not change the standards for issuance of an injunction. *See Armstrong v. Davis*, 275 F.3d 849, 872 (9th Cir. 2001), *cert. denied*, 537 U.S. 812 (2002); *Smith v. Arkansas Dept. of Correction*, 103 F.3d 637, 647 (8th Cir. 1996) ("the Act merely codifies existing law and does not change the standards for determining whether to grant an injunction"); *Williams v. Edwards*, 87 F.3d 126, 133 n. 21 (5th Cir. 1996) ("[t]he limitations codified in the Act do not depart from pre-existing law of this circuit").[8]

In their Complaint, plaintiffs ask the court to "[e]nter a judgment declaring that defendants' actions described herein are unlawful and violate plaintiffs' and the plaintiff class' constitutional rights," and "[p]ermanently enjoin defendants ... from subjecting plaintiffs and the plaintiff class to the conditions set forth in this Complaint." Aplt. App. at 33. Contrary to the view expressed by the district court, plaintiffs' request for relief does not ask the judiciary to make policy determinations that the PLRA has somehow reserved for the "political branches of local and state government." Aplt. App. at 138. Instead, it specifically calls for

[8] Although it does not change the standards for granting injunctive relief in prison and jail cases, the PLRA makes such injunctions terminable two years after entry, unless there is a "current and ongoing" constitutional violation at that time. 18 U.S.C. § 3626(b)(1), (3).

redress of unconstitutional conditions. Nothing in the PLRA strips federal courts of the power and duty to determine when prisoners' constitutional rights have been violated and to order an appropriate remedy for such violations.

In its determination that the PLRA deprived it of jurisdiction to order relief, the court relied on the limitation on prospective relief found in 18 U.S.C. § 3626(a)(1)(A).[9] But this provision did not change pre-existing law regarding the scope of injunctive relief that is available when violations of prisoners' constitutional rights are proven in court.[10]

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[9] That section provides:

> **3626. Appropriate remedies with respect to prison conditions**
> **(a) Requirements for relief.--**
> **(1) Prospective relief.--(A)** Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

[10] Nor does the PLRA change the standard for establishing a violation of the Eighth or Fourteenth Amendments. Nor could it, for Congress does not have the power to redefine the scope of constitutional rights. *See City of Boerne v. Flores*, 521 U.S.

It has always been the law that "judicial powers may be exercised only on the basis of a constitutional violation," *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971), and the nature and scope of the remedy is inextricably tied to the nature and scope of the constitutional violation established at trial. This is true under the provision of the PLRA on which the district court relied, as well as under pre-existing law. *Compare* 18 U.S.C. § 3626(a)(1)(A) (injunctive relief must "extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right") *with Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("the scope of injunctive relief is dictated by the extent of the violation established"). If a systemwide violation is shown, systemwide injunctive relief may be entered consistent with the PLRA. *Armstrong*, 275 F.3d at 870-73.

The PLRA's limitation on prospective relief did substantially change the law with regard to consent decrees, removing the ability of courts to approve a formal consent decree in which prison and jail officials agree to do more than the minimum necessary to correct an established violation of federal law.[11] *Gilmore v. People of the State of California*, 220 F.3d 987, 998-99 (9th Cir. 2000). However, with regard to the entry of *litigated* decrees, this provision merely codifies pre-

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507, 519 (1997) (Congress lacks the power to determine what constitutes a constitutional violation).

[11] Obviously, there is no consent decree at issue here.

existing law: federal courts may only issue an injunction to correct an established violation of law, and the scope of the injunction must be tailored to the scope of the violation established.

The district court read far too much into the PLRA. It erred when it concluded that the PLRA deprived it of jurisdiction to grant relief if plaintiffs proved their constitutional claims, and further erred when it relied on this incorrect conclusion as a reason to deny class certification.

C. The PLRA does not change the well-settled principle that plaintiffs are entitled to relief based on the evidence at trial, and that a broad request for relief does not preclude all relief.

In explaining its decision to deny class certification, the district court emphasized what it called the "breadth of the relief sought," Aplt. App. at 138, which it concluded it was unable to provide because of the PLRA. In doing so, the court erroneously conflated the issue of remedy with the issue of jurisdiction. *See* Aplt. App. at 138 (relief allegedly sought "is beyond the competence and the jurisdiction of this court"); *id*. ("That breadth [of the relief allegedly sought in this case] makes the proposed class action not manageable with this court's limited jurisdiction").

Moreover, the court overlooked a long-settled principle that the PLRA did not purport to change: even if a plaintiff's complaint requests more relief or different relief than he is entitled to receive, the court must nevertheless provide

the relief to which the plaintiff *is* entitled based on the evidence at trial. In this case, the district court erroneously adopted an all-or-nothing approach. After determining prematurely that plaintiffs were not entitled to *all* the relief it believed they were requesting, the court erroneously concluded that class certification must be denied, thus ending the case and depriving plaintiffs of the opportunity to prove that they were entitled to *any* prospective relief.

Fed. R. Civ. P. 54(c) provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Under that rule,

> The question is not whether plaintiff has asked for the proper remedy but whether plaintiff is entitled to any remedy. Similarly, it is not the amount claimed or the type of relief requested in the demand that determines whether the court has jurisdiction.

Wright, Miller & Kane, *Federal Practice and Procedure: Civil 3d* § 2664 (footnotes omitted). *Accord*, 10 Moore's Fed. Prac. § 54.72[1][a] (3d ed.) ("The available relief is determined by the proof, not by the pleadings, and it is the duty of the court to grant all relief to which a party is entitled on that proof."); *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 561 (1968) ("the nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy").

It has long been established that a plaintiff "may recover upon any theory legally sustainable under established facts regardless of the demand in the

pleadings." *Hamill v. Maryland Cas. Co*., 209 F.2d 338, 340 (10th Cir. 1954) (citing cases). *See*, *e.g.*, *Fitzgerald v. Sirloin Stockade, Inc*., 624 F.2d 945, 956-57 (10th Cir. 1980) (in employment discrimination case, court could consider reinstatement as a remedy although plaintiff had not sought it) (citing Rule 54(c)); *Thomas v. Pick Hotels Corp*., 224 F.2d 664, 666 (10th Cir. 1955) (plaintiff may recover damages for breach of contract although complaint alleged only a tort; "the dimensions of a lawsuit are measured by what is pleaded and proven, not what is demanded").

It follows that, even if plaintiffs' request for relief were improper in some way – and it was not – the district court was obligated to grant whatever relief was appropriate based on the proof at trial. A perceived defect in the request for relief was not a valid reason for denying class certification, particularly when that denial had the practical effect of ending the case.

III. THE PROPOSED CLASS AMPLY MEETS THE CRITERIA FOR CERTIFICATION UNDER FED. R. CIV. P. 23.

In ruling on a motion for class certification, "the district court must determine whether the four threshold requirements of Rule 23(a) are met. If the court determines that they are, it must then examine whether the action falls within one of three categories of suits set forth in Rule 23(b)." *Adamson v. Bowen*, 855 F.2d 668, 675 (10th Cir. 1988) (footnote omitted).

Plaintiffs seek certification, pursuant to Fed. R. Civ. P. 23(b)(2), of a class comprising "all persons with serious mental health needs who are now, or in the future will be, confined in the El Paso County Jail." Because this class clearly meets the requirements of Rule 23(a) and (b)(2), this Court should reverse the judgment of the district court and remand with instructions to certify the plaintiff class. *See Paton v. New Mexico Highlands University*, 275 F.3d 1274, 1280 (10th Cir. 2002).

A. Plaintiffs have satisfied all four requirements of Rule 23(a).

The district court stated that all four elements of Rule 23(a) were contested, but did not find that any were absent. Nor could the court have done so, because plaintiffs demonstrated that each is present.

1. Impracticability of Joinder – Rule 23(a)(1).

Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable." To meet this requirement, a plaintiff need only demonstrate that joinder of all class members is impractical, not impossible. *Rodriguez v. Bar-S Food Co.*, 567 F. Supp. 1241, 1247 (D. Colo. 1983). Courts do not require precise identification of class members before finding that joinder is impracticable. *Horn v. Associated Wholesale Grocers, Inc*., 555 F.2d 270, 276 (10th Cir. 1977).

There can be no doubt that the proposed class satisfies the requirements of Rule 23(a)(1). The Jail's population regularly exceeds 1,000, and has been as high as 1,139. Complaint, ¶ 20, Aplt. App. at 15. Of these more than 1,000 prisoners, approximately 20% have serious mental health needs. *Id*., ¶ 23, Aplt. App. at 16; *see also* declaration of Michael Gendel, M.D., ¶ 3, Aplt. App. at 48 ("[n]ational statistics indicate that approximately 20% of jail prisoners have some kind of mental illness"). Thus, based only on the current size of the class, the requirements of Rule 23(a)(1) are satisfied. "In light of prevailing precedent, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone." A. Conte & H. Newberg, *Newberg on Class Actions*, § 3.5, at 247 (4th ed. 2002) (hereinafter "*Newberg*"). *Accord*, *Rex v. Owens ex rel. State of Okl*., 585 F.2d 432, 436 (10th Cir. 1978) ("Class actions have been deemed viable in instances where as few as 17 to 20 persons are identified as the class"); *Horn v. Associated Wholesale Grocers, Inc*., 555 F.2d 270, 276 (10th Cir. 1977) (trial court erred in denying class certification on numerosity grounds where class consisted of between 41 and 46 persons).

But the proposed class includes not only persons with serious mental health needs currently in the Jail, but future Jail prisoners as well. The fluid nature of the class, and the inclusion in the class of future prisoners, whose identities obviously

cannot now be ascertained, makes joinder of all class members not just impracticable but literally impossible. *See Skinner v. Uphoff*, 209 F.R.D. 484, 488 (D. Wyo. 2002) (finding certification appropriate for class of current and future prisoners seeking injunctive relief; "[a]s members *in futuro*, they are necessarily unidentifiable, and therefore joinder is clearly impracticable").[12]

2. Commonality – Rule 23(a)(2).

Rule 23(a)(2) requires only a single issue of law *or* fact common to the class. *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999). For that reason, the commonality requirement is "easily met." *Newberg*, § 3.10, at 274. There is no requirement that each class member be identically affected by the challenged conditions or practices. In *Milonas v. Williams*, 691 F.2d 931 (10th Cir. 1982), in which two boys challenged deficiencies in conditions of confinement at a juvenile detention facility, this Court rejected the argument that the commonality requirement was not met, and held that a class was properly certified under Rule 23(b)(2). "Regardless of ... their individual disability or behavioral problems,

[12] *See also Monaco v. Stone*, 187 F.R.D. 50, 61 (E.D.N.Y. 1999) (fluidity of class of criminal defendants makes certification particularly appropriate); *Dean v. Coughlin*, 107 F.R.D. 331, 332 (S.D.N.Y. 1985) ("the fluid composition of a prison population is particularly well-suited for class status"); *Andre H. v. Ambach*, 104 F.R.D. 606, 611 (S.D.N.Y. 1985) ("The fact that the [detention center] population ... is constantly revolving establishes sufficient numerosity to make joinder of the class members impracticable"); *Green v. Johnson*, 513 F. Supp. 965, 975 (D. Mass. 1981) (certifying class of prisoners "in light of the fact that the inmate population at these facilities is constantly revolving").

all of the boys at the school were in danger of being subjected to" the challenged conditions and practices. *Id*. at 938. *See also Adamson*, 855 F.2d at 676 (where case involves "a common policy," the fact "[t]hat the claims of individual class members may differ factually should not preclude certification under Rule 23(b)(2)"). Similarly here, the members of the proposed class are all endangered by the same challenged policies and conditions outlined in the Complaint.

In this case, there are multiple common questions of fact, many of which the district court identified. Aplt. App. at 135-36. The Complaint details numerous deficiencies in the staffing, training, policies, and practices at the Jail that expose the named plaintiffs and class members alike to injuries and a continuing threat of future injury that require court intervention. Common questions of fact raised by the Complaint include:

- Whether there are a sufficient number of competent and adequately trained mental health staff at the Jail to deal with the serious mental health needs of prisoners;
- Whether the defendants have in place adequate procedures to ensure that the medical provider complies with its contract and delivers the medical and mental health services specified therein;
- Whether the Jail can safely and humanely protect prisoners who are suicidal;
- Whether the defendants ensure that all prisoners who require inpatient psychiatric care are able to receive it in a timely fashion;

- Whether there is a sufficient number of security staff adequately trained to respond appropriately to the needs of prisoners with serious mental health needs;

- Whether security staff rather than medical or mental health staff make the decision to place suicidal or mentally ill prisoners in restraints;

- Whether security staff respond with inappropriate use of force to behavior that is caused by prisoners' mental illness;

- Whether the Jail has an inadequate system for ensuring that the proper medications are delivered in the proper doses at the appropriate time to the appropriate prisoners;

- Whether the Jail has an inadequate system for monitoring the effects of psychotropic medications that are delivered to prisoners with serious mental health needs;

- Whether the Jail has an inadequate system for assuring continuity of care for prisoners with serious mental health needs who are recent arrivals or who are being released.

Aplt. App. at 14-22. Plaintiffs specifically allege that all the injuries detailed in the Complaint – both those of the plaintiffs and those of the class – stem from the challenged policies and practices. Complaint, ¶ 64, Aplt. App. at 30-31. This fact alone requires a finding of commonality. *See Skinner*, 209 F.R.D. at 488 (commonality requirement satisfied where "this case revolves around a common nucleus of operative facts, namely the policies and customs of the prison regarding inmate-on-inmate violence").

Similarly, the controlling questions of law are common to the entire class. These include (1) the scope of protection provided to prisoners under the Eighth

and Fourteenth Amendments; (2) the interpretation of the "deliberate indifference" requirement in light of defendants' acts and omissions; (3) the legal effect of standards established by various professional organizations; and (4) the standards of mental health care required in the jail setting. The commonality requirement is satisfied here. *See Milonas*, 691 F.2d at 938 ("[f]actual differences in the claims of the class members should not result in a denial of class certification where common questions of law exist").[13]

3. Typicality – Rule 23(a)(3).

According to the leading treatise,

> Typicality refers to the nature of the claim or defense of the class representative and not to the specific facts from which it arose or to the relief sought. Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.

Newberg, § 3.15, at 335. This Court has followed these well-settled principles of "typicality" for the purposes of Rule 23(a)(3) on numerous occasions. *See*

[13] The proposed class includes both pretrial detainees and convicted prisoners. Convicted prisoners are protected by the Eighth Amendment against "cruel and unusual punishments," while pretrial detainees, who are presumed to be innocent, are protected by the Due Process Clause of the Fourteenth Amendment against any conditions that constitute "punishment." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). However, this Court has held that, in the context of challenges to conditions of confinement, the Eighth and Fourteenth Amendment standards are equivalent. *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998). Therefore, the claims of all class members here are governed by the same legal standard.

Adamson v. Bowen, 855 F.2d 668, 676 (10th Cir. 1988) ("differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representatives and class members are based on the same legal or remedial theory"); *Milonas*, 691 F.2d at 938 ("every member of the class need not be in a situation identical to that of the named plaintiff"); *Anderson*, 690 F.2d at 800 (citing "the well established rule that the claims of all the class need not be identical to those of the plaintiffs" to satisfy typicality requirement); *Penn*, 528 F.2d at 1189 ("the typicality requirement is ordinarily not argued. ... It is to be recognized that there may be varying fact situations among individual members of the class and this is all right so long as the claims of the plaintiffs and the other class members are based on the same legal or remedial theory").

In this case, the claims of all plaintiffs and all class members are based on the theory that deliberate indifference to their serious mental health needs violates the Eighth and Fourteenth Amendments, and the inevitable individual factual differences between the named plaintiffs and the other class members are not legally significant.

The case of *Bradley v. Harrelson*, 151 F.R.D. 422 (M.D. Ala. 1993), is on all fours with the case at bar. There a single prisoner challenged the adequacy of mental health services in the Alabama state prison system. Among his claims was the allegation, also made in the present case, that defendants did not promptly

transfer mentally ill prisoners to an inpatient psychiatric facility when necessary. He sought to certify under Rule 23(b)(2) a class of current and future prisoners incarcerated in the system's facility for the mentally ill. The court found the commonality and typicality requirements "clearly met:"

> Though there certainly may be some factual differences between the individual class members and the nature and severity of their illness, such individual differences do not defeat certification because there is no requirement that every class member be affected by the institutional practice or condition in the same way.

151 F.R.D. at 426.

Similarly in this case, because the plaintiffs and the class all rely on "the same legal or remedial theory," *Adamson*, 855 F.2d at 676, the typicality requirement is met.

4. Adequacy of Representation – Rule 23(a)(4).

Adequacy of representation involves two inquiries: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Rutter & Wilbanks Corp. v. Shell Oil Co*., 314 F.3d 1180, 1187-88 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 2275 (2003) (quoting *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1020 (9th Cir. 1998)). These criteria are clearly satisfied in this case. There is no conflict between plaintiffs or their counsel and other class members. Plaintiffs are represented by counsel associated with the

ACLU of Colorado and the ACLU National Prison Project, who are experienced in class action, civil rights, and prison and jail conditions litigation. Plaintiffs and their counsel have vigorously pursued this case, and will continue to do so.

B. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(2).

Certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) when

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed. R. Civ. P. 23(b)(2). "It is well established that civil rights actions are the paradigmatic 23(b)(2) class suits, for they seek classwide structural relief that would clearly redound equally to the benefit of each class member." *Marcera v. Chinlund*, 595 F.2d 1231, 1240 (2d Cir.) (allowing class certification in suit seeking visitation for jail prisoners), *vacated on other grounds*, 442 U.S. 915 (1979). *See also Elliott v. Weinberger*, 564 F.2d at 1229 (action to enjoin allegedly unconstitutional government conduct is "the classic type of action envisioned by the drafters of Rule 23 to be brought under subdivision (b)(2)"). As stated in the leading treatise:

> Rule 23(b)(2) was drafted specifically to facilitate relief in civil rights suits. Most class actions in the constitutional and civil rights areas seek primarily declaratory and injunctive relief on behalf of the class and therefore readily satisfy Rule 23(b)(2) class action criteria.

Newberg, § 25.20, at 550.

In this case there can be no doubt that defendants have "acted or refused to act on grounds generally applicable to the class," and that the declaratory and injunctive relief plaintiffs seek will redound to the benefit of the entire class of Jail prisoners with serious mental health needs. *See Bradley*, 151 F.R.D. at 427 (stating that Rule 23(b)(2) is "particularly applicable to suits ... which involve conditions of confinement in a correctional institution" and noting that "here the plaintiff challenges deficiencies in the system for delivering mental health care which affect the entire class"); *Knapp v. Romer*, 909 F. Supp. 810, 812 n. 1 (D. Colo. 1995) (challenge to prison conditions is "a classic Rule 23(b)(2) civil rights action").

As explained in section I.A., *supra*, the district court entirely failed to consider whether the proposed plaintiff class satisfies the requirements of Rule 23(a) and (b)(2). Because the class clearly satisfies those requirements, this Court should reverse the judgment of the district court, and remand with directions to certify the class. *See Paton*, 275 F.3d at 1280.

IV. CLASS CERTIFICATION IS NECESSARY TO ALLOW PLAINTIFFS TO PRESENT THEIR CONSTITUTIONAL CLAIMS TO THE FEDERAL COURTS.

In this case, all four plaintiffs were in the Jail when the certification motion was filed but had left the Jail by the time the district court denied the motion for

class certification; their individual claims for injunctive and declaratory relief regarding conditions of confinement are mooted as a result. *Green v. Branson*, 108 F.3d 1296, 1300 (10th Cir. 1997). "Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted." *Gerstein v. Pugh*, 420 U.S. 103, 111 n. 11 (1975). Thus, unless a class is certified, litigation to determine the constitutionality of conditions at the Jail must begin anew, with new plaintiffs whose claims may in turn be mooted when they are released. Proceeding in this fashion would not only waste judicial resources; it would effectively immunize conditions at the Jail from judicial review. However, class certification, when granted, relates back to the time of filing of the motion, and therefore the class itself has standing to litigate claims for injunctive relief, even if the individual claims of the named plaintiffs become moot. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398-99 (1980).

Thus, when a class otherwise meets the requirements of Rule 23, it is an abuse of discretion for a court to refuse to certify a class when there is a substantial risk that, absent class certification, the case will become moot. *See Johnson v. City of Opelousas*, 658 F.2d 1065, 1069-70 (5th Cir. 1981) (risk that challenge to juvenile curfew would be mooted when named plaintiff reached the age of majority); *Hoehle v. Likins*, 538 F.2d 229, 231 (8th Cir. 1976) (challenge to

reduction in public benefits; "[t]he risk of mootness is great in this litigation and the issue raised is important not only to appellee, but others similarly situated"). *See also Penland v. Warren County Jail*, 797 F.2d 332, 334-35 (6th Cir. 1986) (reversing district court's denial of class certification under Rule 23(b)(2) in jail conditions case; "[s]ince all the named plaintiffs in this action have been released from jail, under normal procedure we must either dismiss the action as moot or certify it as a class action").

It is for this reason that injunctive challenges to conditions of confinement in prisons and jails, like the present case, proceed as class actions. In an action by deaf prisoners, challenging the failure of prison officials to accommodate their special needs, the court said the following:

> The class action device is particularly well-suited in actions brought by prisoners due to the fluid composition of the prison population. Prisoners frequently come and go from institutions for a variety of reasons. Veteran prisoners are released or transferred, while new prisoners arrive every day. Nevertheless, the underlying claims tend to remain. Class actions therefore generally tend to be the norm in actions such as this.

Clarkson v. Coughlin, 783 F. Supp. 789, 797 (S.D.N.Y. 1992) (citations, internal quotation marks omitted). *See also Hirschfeld v. Stone*, 193 F.R.D. 175, 184 (S.D.N.Y. 2000) (certifying class of criminal defendants confined to state psychiatric hospital; "this case involves a fluid class where the claims of the named plaintiffs are likely to become moot prior to the completion of this litigation");

Alston v. Coughlin, 109 F.R.D. 609, 611-12 (S.D.N.Y. 1986) ("[s]ince the plaintiffs have not sued for damages, without class certification this case would become moot if they were moved from [the prison]").[14]

Moreover, courts have recognized that prisoners, "by reason of ignorance, poverty, illness, or lack of counsel may not [be] in a position to seek [relief] on their own behalf," and that this factor militates in favor of class certification. *United States ex rel. Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976).[15] This is even more clearly true of the population at issue here: prisoners with serious mental health needs.

In this case, the district court explicitly recognized that "[j]ail populations are inherently fluid," with some prisoners being released "within hours of their detention," Aplt. App. at 136, but failed to consider the insurmountable barriers to

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[14] In this Circuit and elsewhere, injunctive challenges to prison and jail conditions proceed as class actions. *See*, *e.g.*, *Carper v. Deland*, 54 F.3d 613 (10th Cir. 1995); *Battle v. Anderson*, 970 F.2d 716, 719 n. 4 (10th Cir. 1992); *Arney v. Finney*, 967 F.2d 418 (10th Cir. 1992); *Diaz v. Romer*, 961 F.2d 1508 (10th Cir. 1992); *Duran v. Carruthers*, 885 F.2d 1485, 1486 (10th Cir. 1989); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980); *Skinner v. Uphoff*, 209 F.R.D. 484, 489 (D. Wyo. 2002); *Montez v. Romer*, 32 F.Supp.2d 1235 (D. Colo. 1999); *Marioneaux v. Colorado State Penitentiary*, 465 F. Supp. 1245 (D. Colo. 1979); *Romero v. Schauer*, 386 F. Supp. 851 (D. Colo. 1974).

[15] The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. Karl O. Haigler *et al*., U.S. Dept. of Educ., *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey* xviii, 17-19 (1994).

injunctive litigation posed by this fluidity, unless a class is certified. This was an abuse of discretion and requires reversal.

CONCLUSION

The judgment of the district court should be reversed, and the case remanded with directions to certify the plaintiff class as requested in the Motion to Certify Class and to conduct further proceedings on plaintiffs' substantive claims.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested because the district court's order denying class certification raises novel and important questions regarding the factors relevant to class certification in cases brought by jail prisoners who seek prospective relief.

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STATEMENT REGARDING ATTORNEY FEES

Plaintiffs seek their attorney fees and costs on this appeal pursuant to 42 U.S.C. § 1988.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Rule 32(a)(7) in that the word count of the word processing system used to prepare the brief is less than 14,000 words, *i.e.*, is 12,973 words.

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