No. 06-1454

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARK SHOOK and DENNIS JONES, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellants,* and JAMES VAUGHAN, SHIRLEN MOSBY, THOMAS REINIG, and LOTTIE ELLIOTT, *Intervenor-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-CV-0651-RPM-MJW
The Honorable Richard P. Matsch

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INTRODUCTION

Defendants' brief fails to cite a single case, from *any* court, denying class certification in a case, like this one, where prisoners seek only injunctive and declaratory relief. Defendants ask this court to affirm what no other court has ever affirmed, on the ground that denial of class certification was a permissible exercise of discretion. It was not.

According to defendants, the district court's ruling is insulated by the abuse of discretion standard of review simply because the district court, this time around, discussed the factors identified in Fed. R. Civ. P. 23. Defendants overlook, however, a key requirement of the insulation they seek: a district court's decision is not entitled to deference when it is based on errors of law. The "established rule" is that "a district court necessarily abuses its discretion when it commits an error of law." *Mendelsohn v. Sprint/United Management Co*., 466 F.3d 1223, 1230 n.4 (10th Cir. 2006) (internal quotation marks omitted). *See also Floyd v. Ortiz*, 300 F.3d 1223, 1227 (10th Cir. 2002) (same). Whether the district court committed an error of law is reviewed *de novo*. *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 750 (10th Cir. 2005) ("any

error of law is presumptively an abuse of discretion and questions of law are reviewed de novo").[1]

Thus, whether characterized as application of an incorrect legal standard or an abuse of discretion, the result is the same: the district court's legal conclusions are reviewed *de novo*, and a class certification ruling premised on an error of law cannot stand. This is especially true in this case, where the ruling is premised upon *multiple* errors of law. Accordingly, the district court's denial of class certification must be reversed.

ARGUMENT

I. DEFENDANTS DO NOT REFUTE PLAINTIFFS' ARGUMENT THAT THE DISTRICT COURT ERRONEOUSLY BELIEVED THAT THIS CASE WOULD REQUIRE AN UNMANAGEABLE SERIES OF MINI-TRIALS ABOUT DISCRETE HISTORICAL INCIDENTS.

As explained in plaintiffs' opening brief, one of the fundamental legal errors permeating the district court's ruling is the erroneous and oft-repeated view that the class claims and defenses are highly individual, and would require the court to conduct a series of mini-trials about the circumstances of numerous past incidents and the mental states of the jail officials who played a role in each of those

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[1] Put another way, when a district court acts pursuant to an error of law, it fails to exercise its discretion. *See Yaffe v. Powers,* 454 F.2d 1362, 1365-66 (1st Cir. 1972) (reversing denial of class certification; "because of several fundamental legal misconceptions which significantly affected the [district] court's receptiveness to plaintiff's application, much of the available discretion was not exercised").

incidents. *See* Pl.Br. at 35-41. The district court's legal error led it to conclude, erroneously, that it could not adjudicate the factual and legal issues "in a manageable way." Aplt.App. at 482. Defendants entirely fail to respond to plaintiffs' argument.

Contrary to the view of the district court, this action for prospective injunctive relief would not require it to conduct the numerous mini-trials it feared. In a class action seeking only injunctive relief under the Eighth Amendment, the issue is whether defendants' policies and practices pose a substantial risk of future harm to the class. The threatened harm need never materialize; it is the *risk itself* that violates the Eighth Amendment and entitles the plaintiffs to injunctive relief. "It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing had yet happened to them." *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

Thus, as this Court has recognized:

> In class actions challenging the entire system of health care, deliberate indifference to inmates' health needs may be shown … by proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care.

Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980). Similarly, adjudication of the present class action would require consideration, through expert testimony and other evidence, of defendants' current mental health staffing, availability of

psychotropic medications, and other policies, and whether those policies pose a risk of future harm to the class.

Thus, for example, if defendants, acting with deliberate indifference, failed to employ sufficient mental health staff to provide for prisoners' serious mental health needs, that would constitute an Eighth Amendment violation as to the entire class and entitle the class to injunctive relief. There would be no need to adjudicate past incidents in which this deficient staffing had arguably harmed individual class members. Indeed, such a focus on past incidents would be erroneous; in an Eighth Amendment injunctive challenge, "deliberate indifference[] should be determined in light of the prison authorities' *current* attitudes and conduct, which may have changed considerably…" *Helling*, 509 U.S. at 36 (emphasis added).

Defendants cite *Thiessen v. General Electric Capital Corp*., 267 F.3d 1095 (10th Cir. 2001), but fail to understand that this Court's ruling in *Thiessen* requires reversal here. *Thiessen* demonstrates that a district court abuses its discretion where, as here, its denial of class certification is based on a misunderstanding of the class claims.

Thiessen involved a putative class action under the Age Discrimination in Employment Act (ADEA). The district court initially certified the class, but then granted defendants' motion for decertification based on its conclusion that the

class members were not "similarly situated," as required for class certification under the ADEA. The district court based this conclusion in part on the fact that defendants had come forward with "highly individualized" defenses with regard to each of the adverse employment actions alleged by plaintiffs. *Id*. at 1104. The district court also relied on what it characterized as the "absence of any workable trial management plan" for the class action. *Id*. at 1104-05.

This Court reversed, holding that the district court had abused its discretion in decertifying the class. Specifically, the district court failed to recognize that plaintiffs were asserting a pattern-or-practice claim, rather than merely aggregating individual claims of discrimination. *Id*. at 1105. This Court explained:

> Pattern-or-practice cases differ significantly from the far more common cases involving one or more claims of individualized discrimination. In a case involving individual claims of discrimination, the focus is on the reason(s) for the particular employment decisions at issue. In contrast, the initial focus in a pattern-or-practice case is not on individual employment decisions, but on a pattern of discriminatory decisionmaking. Thus, the order and allocation of proof, as well as the overall nature of the trial proceedings, in a pattern-or-practice case differ dramatically from a case involving only individual claims of discrimination.

Id. at 1106 (internal quotation marks, citations omitted). This Court concluded that the district court's misapprehension of the nature of the class claim fatally infected its determination whether class members were similarly situated, leading it to give undue weight to the "highly individualized" defenses asserted to each alleged

instance of discrimination. *Id.* at 1107. "The district court's consideration of … trial management concerns was also adversely affected by its failure to recognize the pattern-or-practice nature of plaintiffs' claim." *Id.* This Court concluded that "[t]aking into consideration the 'pattern or practice' nature of plaintiffs' lawsuit, as discussed above, plaintiffs were, in fact, 'similarly situated'" for class action purposes. *Id*. at 1107-08.

Thiessen is controlling here. As explained above, the district court fundamentally misapprehended the nature of the class claims in this case, which seeks only prospective injunctive relief. The district court instead analyzed the requirements of Rule 23 as if plaintiffs sought to bring a class action to recover damages for individual class members for discrete incidents of past harm, erroneously believing that it would be required to "examin[e] the unique circumstances surrounding each incident alleged to constitute a constitutional deprivation." Aplt.App. at 489.

As in *Thiessen*, the district court's misapprehension of the nature of plaintiffs' claims fatally infected its analysis of the requirements for class certification. For example, the trial court concluded that the requirements of Rule 23(b)(2) were not met based on what it perceived as "unique factual circumstances relevant to each incident alleged by the plaintiffs" and "[t]he individual nature of the asserted claims and the individual nature of the defenses to

those claims." Aplt.App. at 492. But where, as here, the claim is that "systemic and gross deficiencies in staffing, facilities, equipment, or procedures" (*Ramos*, 639 F.2d at 575) pose a substantial risk of future harm to the entire class, the claims and defenses are not "individual," and the court is not required to delve into the "unique factual circumstances" of past incidents involving individual class members.[2]

Defendants entirely fail to respond to this argument. Rather, they simply assert that plaintiffs' claims are "highly individualistic" (Def.Br. at 16, 24), without ever explaining *why* that is so in a case seeking increased mental health staffing, an improved medication system, and other classwide remedies.

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[2] The district court's error is demonstrated by its repeated reference to the individual incidents recited in the Complaint as plaintiffs' "claims." *See, e.g.,* Aplt.App. 489, 492. In this case, all plaintiffs make the same claim: that defendants, acting with deliberate indifference, subject them to an unreasonable risk of future harm in violation of the Eighth Amendment by, *inter alia*, failing to provide sufficient mental health staffing or an adequate system for distribution of psychotropic medications. *See* Aplt.App. 017-018, 020. The individual incidents recited in the Complaint are not "claims;" they are merely illustrative examples of cases in which the threatened harm has come to pass.

Under the notice pleading standards of Fed. R. Civ. P. 8(a), plaintiffs were required to do no more than allege that inadequate staffing, deficient medication distribution, and other conditions at the Jail pose a substantial risk of serious harm to class members in violation of the Eighth Amendment. Plaintiffs went well beyond these minimal pleading requirements and cited incidents in which the threatened harm has already materialized. However, this does not require the district court to adjudicate the merits of each of these incidents, and it does not change the fact that the issue in this injunctive case is risk of future harm. It was error for the district court to deny class certification simply because plaintiffs' Complaint contained more detail than required.

Defendants' confusion is exemplified by their reliance upon *Trevizo v. Adams*, 455 F.3d 1155 (10th Cir. 2006). Def.Br. at 45-46. *Trevizo* involved an action to recover damages for alleged police misconduct during execution of a search warrant. The district court recognized that to assess damages it would be required to determine whether police conduct was reasonable with regard to each plaintiff, and that this would require factfinding specific to each plaintiff, including how long the plaintiff was detained and the amount of force used. Accordingly, "the jury may award damages to some of the plaintiffs but find that others are not entitled to damages." 455 F.3d at 1163. For these reasons, the district court held, and this Court affirmed, that the commonality requirement was not met. *Id*. These considerations simply have no application where, as here, plaintiffs do not seek damages for past incidents, but instead allege that defendants' policies pose a substantial risk of future harm to the entire plaintiff class, and seek remedies, such as increased staffing, that "do not depend on the individual facts of each case, but apply equally to all cases pending within the class." *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988).

II. THE DISTRICT COURT'S DENIAL OF CLASS CERTIFICATION WAS PREMISED UPON ADDITIONAL ERRORS OF LAW THAT REQUIRE REVERSAL.

A. The District Court Erroneously Relied Upon the PLRA as Grounds for Denying Class Certification.

Defendants state that "the district court did not … import the PLRA into the class certification analysis." Def.Br. at 32. This bald assertion simply ignores the district court's explicit reliance, in denying class certification, upon "the inability of the court to fashion the remedy requested, given the requirements of Rule 65(d) and the jurisdictional limitations imposed by the Prison Litigation Reform Act ('PLRA') in 18 U.S.C. § 3626." Aplt.App. at 482. Immediately after citing "the PLRA's limitations on broad prospective relief," the court concluded, "[i]f this court does not have the authority to grant the injunctive relief requested, the purpose of proceeding as a class action is defeated." Aplt.App. at 494.

This Court reversed the first denial of class certification in this case, holding that the district court had "prematurely focused on whether the court could ultimately fashion a remedy that satisfied the strictures of" the PLRA. *Shook v. El Paso County*, 386 F.3d 963, 972 (10th Cir. 2004). On remand, the district court committed exactly the same error. Given this Court's holding that "Congress did not intend the PLRA to alter class certification requirements" and that

"§ 3626(a)(1) does not bear on a court's class certification analysis" (*id*. at 970, 971), reversal is required.[3]

B. The District Court's Denial of Class Certification Was Based Upon its Improper, and Substantively Erroneous, Consideration of the Merits of Plaintiffs' Constitutional Claims.

Defendants concede that the district court considered the merits of plaintiffs' Eighth Amendment claims in ruling on the motion for class certification. Def.Br. at 40-43. However, despite this Court's admonition that a district court is not to "conduct a preliminary inquiry into the merits of a suit" in deciding class certification (*Shook*, 386 F.3d at 971), they assert that this consideration was entirely proper. Defendants are wrong. But even if such consideration had been proper, the district court made rulings on the central issues in this case – the scope of Eighth Amendment protection – that are both premature and plainly erroneous.

The district court stated that the Constitution does not "affirmatively create[] a right to mental health services or treatment." Aplt.App. at 483. The trial court

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[3] Although prisoners' injunctive challenge to inadequate mental health care was litigated on a class-wide basis in *Ramos*, the district court did not consider itself bound by *Ramos,* stating that "the orders entered in that case are well beyond the limitations of the PLRA and no equivalent remedy could now be provided." Aplt.App. at 494. This unsupported statement is incorrect. The PLRA requires only that the scope of judicial relief be tied to the scope of the violation of federal rights; if a systemwide violation is shown, systemwide relief may be entered consistent with the PLRA. *See* 18 U.S.C. § 3626(a)(1)(A); *Armstrong v. Davis*, 275 F.3d 849, 870-73 (9th Cir. 2001). In any event, in once again denying class certification based on the PLRA's limitations on prospective relief, the district court clearly disregarded this Court's holding in *Shook.*

also assumed that the Eighth Amendment does not protect prisoners against risk of future harm, stating that "[t]o proceed with the plaintiff's [sic] claims in this case would require an expansion of this well established law to interpret the Eighth Amendment as mandating prison officials to take affirmative action to prevent or protect against the possibility of an occurrence of a violation in the future." *Id*. at 484. Finally, the district court held that it was without power to remedy class-wide deficiencies in mental health staffing and medication distribution, regardless of what the evidence might show: "This court is not the appropriate decision maker to determine what constitutes 'adequate' training for Jail staff, or what medications should be on the Jail's list of approved medications, or how many employees are needed for 'sufficient' Jail staffing." *Id*. at 493. As demonstrated in plaintiffs' brief (at 31-35), all of these statements are plainly wrong as a matter of law; defendants make no attempt to argue otherwise.[4]

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[4] Defendants cite the district court's unsupported assertion that "the use of pepper spray and tasers[] cannot be addressed prospectively on a class-wide basis." Aplt.App. at 493. This is incorrect. *See Coleman v. Wilson*, 912 F. Supp. 1282, 1321-23 (E.D. Cal. 1995) (finding that use of tasers violated Eighth Amendment rights of statewide class of prisoners with "serious mental disorders" and ordering relief). The district court also stated that adjudication of a claim involving tasers would require it to determine "whether force was applied … maliciously or sadistically to cause harm" in each incident. Aplt.App. at 489. This too is incorrect; when prisoners, rather than seeking compensation for a particular past application of force, bring an injunctive challenge to a use-of-force policy or practice, the inquiry is whether prison officials have acted with deliberate indifference to an unreasonable risk of harm. *Coleman*, 912 F. Supp. at 1322-23; *Madrid v. Gomez*, 889 F. Supp. 1146, 1249-50 (N.D. Cal. 1995).

Plaintiffs' claim is that inadequate mental health services at the Jail expose them to a substantial risk of future harm in violation of the Eighth Amendment, and entitle them to injunctive relief including, *inter alia*, enhanced staffing. Accordingly, in making these errors of law, the district court prematurely and erroneously ruled against plaintiffs on the merits of their substantive claims. Because "a district court necessarily abuses its discretion when it commits an error of law," *Mendelsohn,* 466 F.3d at 1230 n.4, the judgment must be reversed.[5]

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[5] Arguing that the district court's consideration of the merits was proper, defendants rely on this Court's citation in *Shook*, 386 F.3d at 974, of the following language from *Adamson:*

> Additionally, the merits may become intertwined with proper consideration of other issues germane to whether the case should be certified as a class action; for example, whether an injunction would be a more efficient and equally effective remedy. *See* [Wright, Miller & Kane, *Federal Practice & Procedure*] § 1785.2.

Adamson, 855 F.2d at 677 n.12. The cited section of *Federal Practice and Procedure* discusses a court's power to consider whether, under the circumstances of a given case, there is another equally effective means of adjudicating plaintiffs' claims that does not require class certification – for example, when a successful test case brought by a single plaintiff would result in relief that benefits the entire putative class. The treatise recognizes that "in cases in which the mootness of the plaintiff's claim before the action is terminated is highly likely, class status may be vital to the continuation of the suit and thus certification is proper." Wright, Miller & Kane, § 1785.2 (footnote omitted). In any event, considering the merits in this limited fashion is a far cry from ruling against the plaintiffs on their substantive constitutional claims, as the district court did here.

C. The District Court Erred In Rejecting Both of Plaintiffs' Proposed Class Definitions.

1. A class comprising all Jail prisoners is proper.

Plaintiffs proposed a class comprising "all persons who are now, or in the future will be, confined in the El Paso County Jail." Aplt.App. at 487. The district court rejected this class definition on the ground that "[t]here are no allegations that the defendants' actions or inactions violate the Eighth Amendment rights of every Jail inmate." *Id.* As explained in plaintiffs' opening brief, this reasoning is foreclosed by *Ramos*, in which claims of inadequate mental health care were litigated on behalf of a class comprising all current and future prisoners at the Colorado State Penitentiary, notwithstanding an explicit finding that only a minority of those prisoners suffered from mental illness. Pl.Br. at 30 n.6. What is critical is that all the prisoners in *Ramos* were *subject* to the deficient conditions, just as all prisoners in the El Paso County Jail are subject to the policies and conditions challenged here. *See also Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982) (affirming class certification in challenge to institutional conditions where, "[r]egardless of … their individual disability or behavioral problems, all of the boys at the school were in danger of being subjected to" the challenged conditions). Neither the district court nor defendants cite any authority

in support of the district court's summary rejection of a class comprising all prisoners in the Jail.[6]

2. A class comprising all prisoners with serious mental health needs is proper.

The district court also rejected plaintiffs' proposed 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," on the ground that "the term 'serious mental health needs' is vague," and a class thus defined is "too amorphous." Aplt.App. at 486, 487. As plaintiffs have pointed out – and defendants do not dispute – the term is, in fact, routinely used by federal courts in cases involving prison or jail mental health care. Pl.Br. at 29 n.5. Moreover, neither the district court nor defendants distinguish, or even acknowledge, the many cases in which classes have been certified in terms virtually identical to the class proposed here. Pl.Br. at 28-29; *see also Coleman*, 912 F. Supp. at 1300-01 (rejecting prison officials' argument that class of prisoners with "serious mental disorders" is too vague to allow determination of who is a member of the class); *Jones'El v. Berge*,

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[6] Indeed, *Ramos* is far from the only case in which the courts of this Circuit have adjudicated claims of inadequate mental health care on behalf of a class comprising all prisoners in a given facility. *See, e.g., Ginest v. Bd. of County Commissioners,* 333 F.Supp.2d 1190, 1193 (D. Wyo. 2004) (adequacy of jail mental health system litigated on behalf of a class of "all present and future inmates"); *Duran v. Carruthers*, 678 F. Supp. 839, 841 nn.2, 4 (D.N.M. 1988) (numerous conditions of confinement, including mental health care, litigated on behalf of class comprising all current and future prisoners at state penitentiary), *aff'd*, 885 F.2d 1485 (10th Cir. 1989).

164 F.Supp.2d 1096, 1107-08 (W.D. Wis. 2001) (citing definition of "serious mental illness").[7]

Contrary to defendants' argument (Def.Br. at 34), a class of prisoners with "serious mental health needs" does not pose manageability problems that justify denying certification under Rule 23(b)(2). Even if the district court were correct that such a class is "vague" and "amorphous" -- and it is not -- "[i]t is now settled law that amorphous, vague, and indeterminate classes are implicitly authorized under new Rule 23," so that "having an amorphous class definition does not justify denial of class certification." 1 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 2:3 (4th ed. 2002). In particular, "less precision is required in defining a class in actions seeking relief under Rule 23(b)(2) than in actions seeking damages under Rule 23(b)(3);" because "the defendant is obligated to comply with any orders granting injunctive or declaratory relief and the representative plaintiffs may enforce compliance, the court may not need to identify each individual who might be entitled to relief." 5 *Moore's Federal Practice* § 23.21[5].[8]

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[7] The defendants boldly assert that it is "not … surprising" that the parties "can each muster decisions by district courts that appear . . . to have granted and denied class certifications in somewhat similar circumstances." Def.Br. at 48. On the contrary, the defendants have cited *no* cases denying class certification to prisoners seeking only injunctive and declaratory relief.

[8] Defendants contend that the district court's "detailed analysis" of the subtypes of bipolar disorder was intended to demonstrate that plaintiffs'

3. This Court has already held that perceived difficulty in identifying class members cannot support denial of certification of a (b)(2) class.

Most importantly, the district court's rejection of the proposed (b)(2) class based on "the inherent complexities in determining what persons present a need for treatment of mental disorders while confined" (Aplt.App. at 482) is inconsistent with this Court's prior holding in this case:

> Regarding identifiability, the district court's order specifically states that "[t]he initial problem in this case is the identification of members of the class." *Shook,* 216 F.R.D. at 647-48. However, while the lack of identifiability is a factor that may defeat Rule 23(b)(3) class certification, such is not the case with respect to class certification under Rule 23(b)(2). *See Yaffe v. Powers,* 454 F.2d 1362, 1366 (1st Cir. 1972) ("[N]otice 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, many courts have found Rule 23(b)(2) well suited for cases where the composition of a class is not readily ascertainable; for instance, in a case where the plaintiffs attempt to bring suit on behalf of a shifting prison population. *Id.* at 1366; *see also Adamson,* 855 F.2d at 676 (citing *Yaffe* with approval).

Shook, 386 F.3d at 972. Defendants inexplicably argue that, despite this holding, the district court on remand was free once again to deny class certification based upon its belief that "the class was inadequately defined." Def.Br. at 49.

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terminology differed from that of the DSM IV. Def.Br. at 36. Defendants fail to explain, however, how any such difference could have affected the class certification analysis in any legitimate way. Prisoners suffering from *any* type of bipolar disorder have mental health needs that are "serious," and all are members of the proposed class. *See* Aplt.App. at 041 (declaration of psychiatrist Michael H. Gendel, M.D.) ("Bipolar disorder … is considered by psychiatrists to be a serious biologically based mental illness").

Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972), quoted with approval by this Court on this point, makes clear that certification of a (b)(2) class may not be denied because of concerns that the class is "inadequately defined." In *Yaffe,* plaintiffs sought to certify a class comprising "all other individuals who wish to … engage, in the City of Fall River, in peaceful political discussion … without surveillance and photographing by defendants … without becoming the subject of dossiers, reports and files maintained by the defendants, and without any publication by defendants to other persons of the contents of any such dossiers …" *Id*. at 1364. The district court denied class certification on the ground that the class "had not been adequately defined." *Id*. at 1365. The First Circuit rejected this argument and reversed the denial of class certification; at the page quoted by this Court, it said the following:

> In holding that a class should not be certified because its members had not been sufficiently identified, for example, the court applied standards applicable to a subdivision (b)(3) class rather than to a subdivision (b)(2) class. Although notice to and therefore precise definition of the members of the suggested class are important to certification of a subdivision (b)(3) class, notice to the members of a (b)(2) class is not required and the actual membership of the class need not therefore be precisely delimited. In fact, the conduct complained of is the benchmark for determining whether a subdivision (b)(2) class exists, making it uniquely suited to civil rights actions in which the members of the class are often "incapable of specific enumeration." Committee's Notes to Revised Rule 23[.]

Yaffe, 454 F.2d at 1366. Accordingly, for the district court to deny class certification on the ground that the class was inadequately defined was reversible error.[9]

Moreover, the district court's ruling on this point was premised upon a fundamental error of law. The court's view of what it characterized as "the inherent complexities in determining what persons present a need for treatment of mental disorders while confined" was premised upon its unsupported statement that "[t]he Constitution does not require that each Jail inmate receive an extensive mental health evaluation by a physician or mental health professional at the time of intake." Aplt.App. at 482, 487. As demonstrated in plaintiffs' opening brief – and undisputed by defendants – this was error. It is well settled that jail officials have a constitutional duty to assess incoming prisoners for mental health needs. Pl.Br. at 34-35. Because "an abuse of discretion occurs when the district court bases its ruling on an erroneous conclusion of law," *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1165 (10th Cir. 1998), reversal is required.

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[9] The proposed class here is no more "inadequately defined" than other classes approved by this Court. *See, e.g., Gurule v. Wilson*, 635 F.2d 782, 790 n.3 (10th Cir. 1980) ("(a)ll present and future inmates of the Colorado State Penitentiary who have been or will be transferred within the prison where such transfer represents a major change in the conditions of confinement and is a result of regressive classification of such inmates"); *Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1183 (10th Cir. 1975) ("all persons of Navajo Indian descent who live in or near the City of Farmington, New Mexico or frequent that city such as that might be expected to seek emergency care in San Juan Hospital").

Finally, any contention that the term "serious mental health needs" is vague, or that it is impossible to determine which prisoners have such needs, is belied by defendants' own written policies. Those policies require "[i]ntake screening of all inmates to identify mental health … needs," as well as a "Mental Health Evaluation within 3 to 5 calendar days of intake." Aplt.App. at 316. Defendants' policies further provide that "[i]nmates identified as having severe mental health needs, are referred immediately to the Mental Health department." *Id*. at 352. Thus, even if it were necessary in a (b)(2) class action to identify which individual prisoners have "serious mental health needs" – and as explained above, it is not – it is apparent that defendants themselves identify those prisoners pursuant to their mental health policies.

D. Vague Concerns About "Manageability" Cannot Defeat Class Certification When There is No Other Way to Adjudicate Plaintiffs' Constitutional Claims.

1. No valid reason is given why this case is not readily manageable.

Defendants assert that "the district court placed great emphasis on the manageability problems posed by the proposed class." Def.Br. at 46. In fact, the district court referenced manageability in only two conclusory sentences. Enumerating what it characterized as "three flaws in the class approach," the court cited, without elaboration, "the limitations on this court's ability to adjudicate the factual and legal issues in a manageable way." Aplt.App. at 482. Later, the court

stated that "[t]he individual nature of the asserted claims and the individual nature of the defenses to those claims renders this action unmanageable as a class action." Aplt.App. at 492. Thus, the district court's conclusion that this class action is "unmanageable" rests entirely upon a fundamental error that pervades its entire analysis: the erroneous belief that it would be required to adjudicate a number of "individual … claims," each subject to "individual … defenses." Neither the district court nor the defendants identify any other reason why this class action would be "unmanageable." Nor do they explain what distinguishes this action from the numerous cases in which the courts of this Circuit have successfully managed injunctive class action challenges to inadequate mental health care by prisoners and other institutionalized persons. *See, e.g., Ramos,* 639 F.2d at 577; *Ginest*, 333 F.Supp.2d at 1206-07; *Neiberger v. Hawkins*, 208 F.R.D. 301, 318-19 (D. Colo. 2002).

Indeed, merely to recite the numerous issues litigated on a class basis in *Ramos* and *Milonas* is to refute any argument that the present, far more modest class action is unmanageable. *Ramos* involved class-wide challenges to inadequate shelter, sanitation, and food; risk of assault; restrictions on visitation and mail; inadequate access to the courts; and deficient medical and mental health care. All these issues were litigated to final judgment in the district court, and then on appeal. *Ramos*, 639 F.2d at 567-85. *Milonas* was a class-wide challenge to

thirteen policies and practices at a juvenile detention facility. That case, too, was litigated to final judgment on a class basis, with the district court granting, and this Court affirming, class-wide relief on four of the thirteen issues, including two (use of isolation facilities and use of physical force) that are also present in this case. *Milonas*, 691 F.2d at 935, 941. These complex, multi-issue class actions were by definition manageable, as both trial and appellate courts were able to manage them. *A fortiori,* then, this more limited and focused class action is also manageable. "[F]or 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], … and also to discount too much the power of the court to deal with a class suit flexibly, in response to difficulties as they arise." *Yaffe*, 454 F.2d at 1365.

In stating that "manageability is not categorically barred in Rule 23(b)(2) class certification decisions," *Shook*, 386 F.3d at 973, this Court did not specify the kinds of manageability concerns that might properly inform a district court's reasoning in a (b)(2) class action. However, the cases it cited on this issue are illustrative. *Id*. at 973 & n.5. In each of those cases, the plaintiffs sought monetary as well as injunctive and declaratory relief, and the manageability concerns cited in those cases related specifically to the monetary claims.[10] The reason for this is

[10] *See Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 758-59 (4th Cir. 1998), *vacated,* 527 U.S. 1031 (1999); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1002-03 (D.C. Cir. 1986); *Simer v. Rios*, 661 F.2d 655, 668 n.24 (7th Cir. 1981); *Seidel v.*

obvious; "[t]he underlying premise of the (b)(2) class – that its members suffer from a common injury properly addressed by class-wide relief – begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries." *Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 413 (5th Cir. 1998) (citations, internal quotation marks omitted). Because no damages or other forms of individual relief are sought in this case, those manageability concerns are not present here.

According to the leading treatise, manageability is to be presumed, and all doubts as to manageability are to be resolved in favor of class certification:

> Since manageability of a class action is a relative concept, i.e., all actions are manageable in one manner or another, manageability will ordinarily be presumed until a contrary showing develops. The benefit of any doubts as to manageability should be resolved in favor of upholding the class, subject to later possible reconsideration.

3 Newberg, § 7.25, at 80-81 (footnotes omitted). Indeed, even under Rule 23(b)(3), which unlike Rule 23(b)(2) explicitly directs the court to consider manageability, "[m]ost courts have … [held] that manageability difficulties cannot support a class denial ruling when no other practical litigation alternative exists." 2 Newberg, § 4.32, at 279. Thus, because a class action is the *only* practical means of litigating plaintiffs' constitutional claims, vague and unexplained concerns about manageability cannot support a denial of class certification.

GMAC, 93 F.R.D. 122, 126 (W.D. Wash. 1981); *Duncan v. State of Tenn*., 84 F.R.D. 21, 25 n.1, 37 n.19 (M.D. Tenn. 1979).

2. Denial of class certification on manageability grounds is premature.

Defendants' dire predictions of unmanageability are conspicuously unsupported by any real-world examples. In fact, the numerous class actions involving prisoners' injunctive challenges to inadequate mental health care demonstrate that such cases are easily manageable. In *Ginest*, the court granted summary judgment on plaintiffs' claim that the jail's substandard mental health care violated the Eighth Amendment, basing this ruling largely upon deposition testimony and review of mental health records. 333 F.Supp.2d at 1205-08. In *Coleman*, the court adjudicated the claims of a statewide class of "all inmates with serious mental disorders," estimated to number between 13,000 and 18,000, and found Eighth Amendment violations in seven major areas of mental health care. 912 F. Supp. at 1293, 1296-97, 1299. If these class actions could be managed, so can this case. [11]

Denial of class certification based upon hypothetical manageability concerns is particularly inappropriate at this threshold stage of the litigation. *See Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968) (if the court has some doubt, it should err in favor of class certification); Fed. R. Civ. P. 23(c)(1)(C) (an order certifying a

[11] If the district court were to find a constitutional violation, the proper course would be to give defendants the first opportunity to propose a remedy, with an opportunity for plaintiffs to provide comments and objections. *See Ginest*, 333 F.Supp.2d at 1209-10. Thus, the district court would have the input of the parties and their experts in the remedial process.

class may be altered or amended before final judgment). Federal courts manage complex cases every day, relying upon discovery, summary judgment, and other pretrial proceedings to refine the issues and adjudicate the claims in a manageable fashion. As the district court said in a different case:

> The difficulties in class management which may arise are not grounds for refusing now to certify the class. Management problems which may arise in both pre-trial and trial proceedings may be the subject of further action by the court under Rules 16, 23(d)(2), 42(b) and 56(d).

In Re Storage Technology Corp. Securities Litigation, 113 F.R.D. 113, 119-20 (D. Colo. 1986) (Matsch, J.). The district court erred in denying class certification – thus terminating the litigation – on manageability grounds before any of these management tools could be employed.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING CLASS CERTIFICATION WITHOUT CONSIDERING THE RISK OF MOOTNESS.

Plaintiffs amply satisfy the requirements of Rule 23(a) and (b)(2). *See* Pl.Br. at 41-52. As explained above, the district court's conclusion to the contrary, and defendants' arguments in defense of that conclusion, are based upon several fundamental errors of law.

Given that the requirements of Rule 23 are satisfied, the district court abused its discretion in denying class certification without considering the risk that, absent certification, the case will become moot. *See Johnson v. City of Opelousas*, 658 F.2d 1065, 1069-70 (5th Cir. 1981) (denial of class certification was abuse of

discretion when youth challenging juvenile curfew "had only ten months to complete successfully his judicial course past one and conceivably two appellate hurdles" before reaching age of majority). *See also Pederson v. Louisiana State University*, 213 F.3d 858, 867 n.8 (5th Cir. 2000) ("the substantial risk of mootness here created a necessity for class certification in this case"); *Dionne v. Bouley*, 757 F.2d 1344, 1356 (1st Cir. 1985) (where "there is a danger that the individual claim might be moot," denial of certification is improper); *Hoehle v. Likins,* 538 F.2d 229, 231 (8th Cir. 1976) (district court erred in denying class certification when "[t]he risk of mootness is great in this litigation and the issue raised is important"); *Greklek v. Toia*, 565 F.2d 1259, 1261 (2d Cir. 1977) ("only class certification could avert the substantial possibility of the litigation becoming moot").

Without class certification, it is virtually certain that the claims of jail prisoners bringing injunctive challenges to the conditions of their confinement will quickly become moot; indeed, during the five years this case has been pending, the claims of individual plaintiffs have repeatedly been mooted by their release or transfer from the Jail. Given that the requirements of Rule 23 were satisfied, the district court abused its discretion in denying class certification without considering the risk of mootness.[12]

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[12] It is no answer to say that individual prisoners, or their estates, can bring actions for money damages after they have already suffered injury or death. The purpose of an injunction is to prevent irreparable harm. *Fisher v. Oklahoma*

IV. THE REMAINING ARGUMENTS OF DEFENDANTS AND THEIR AMICI ARE WITHOUT MERIT.

Defendants assert that "plaintiffs here failed to identify a single policy that factually united the claims of the class members." Def.Br. at 25. This is plainly wrong. The Supplemental Complaint specifically identified *seven* policies "to which all class members are equally subject." Aplt.App. at 116-17. Thus, for example, plaintiffs allege that defendants' policy of providing insufficient mental health staffing poses an unreasonable risk of serious harm to all class members, in violation of the Eighth Amendment. Aplt.App. at 017-018, 020. This distinguishes this case from *Hart*, in which "there [was] no one statutory or constitutional claim common to all named Plaintiffs and putative class members." *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1290 (10th Cir. 1999).

Defendants' amici cite *Elizabeth M. v. Montenez*, 458 F.3d 779 (8th Cir. 2006), but that case is readily distinguishable. In *Elizabeth M.*, the Eighth Circuit reversed the district court's certification of a class including past, present and

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Health Care Auth., 335 F.3d 1175, 1180 (10th Cir. 2003). Irreparable harm is, by definition, harm that cannot be compensated by money damages. *Salt Lake Tribune Pub. Co. v. AT&T Corp.,* 320 F.3d 1081, 1105 (10th Cir. 2003). In any event, for the vast majority of injuries suffered by class members as a result of inadequate mental health care, the PLRA has abolished compensatory damages. *See Thompson v. Gibson*, 289 F.3d 1218, 1222 (10th Cir. 2002) (under 42 U.S.C. § 1997e(e), "no § 1983 action can be brought unless the plaintiff has suffered physical injury in addition to mental and emotional harms"). Thus, even a prisoner who suffers catastrophic and irreversible mental deterioration as a result of defendants' deliberate indifference will have no remedy in damages unless she also suffered a physical injury.

future residents of three mental health facilities, holding that the district court erred by including present and former residents in a single class. *Id.* at 785. The court further noted that "the complaint and class action motion papers did not identify one or more policies or practices common to all three facilities that caused [the] alleged violations." *Id*. at 787. Neither of these defects is present in this case. Moreover, while reversing the specific certification order before it, the *Elizabeth M.* court reiterated that class certification remains an available tool in institutional conditions litigation. *Id*. at 787 n.4. Thus, *Elizabeth M*. casts no doubt on the Eighth Circuit's earlier holding in *Coley v. Clinton*, 635 F.2d 1364 (8th Cir. 1980), reversing the district court's refusal to certify a (b)(2) class seeking injunctive relief from conditions of confinement in a state mental hospital. *See* Pl.Br. at 50-51.

CONCLUSION

The judgment of the district court should be reversed.

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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 7,000 words, *i.e.*, is 6,973 words.

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I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANTS** was served by first-class mail and e-mail on the 31st day of May, 2007, addressed to the following:

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s/ Konnie Ellis