IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-cv-01405-WYD-MJW

CLARENCE VANDEHEY,
WILLIAM LANGLEY,
SAMUEL LINCOLN, and
JARED HOGUE,

Plaintiffs, on behalf of themselves and all others similarly situated,

v.

LOU VALLARIO, Sheriff of Garfield County Colorado, in his official capacity; and
SCOTT DAWSON, a Commander in the Garfield County Sheriff's Department, in his official capacity;

Defendants.

PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING PLAINTIFFS' AMENDED MOTION TO CERTIFY CLASS

Plaintiffs, through undersigned counsel, hereby submit Plaintiffs' Supplemental Brief Regarding Plaintiffs' Amended Motion to Certify Class as allowed by the Court on February 14, 2008, and in support hereof state as follows:

I.
PLAINTIFFS CHALLENGE THE LEGALITY OF SIX GENERAL POLICIES OR PRACTICES AT THE GARFIELD COUNTY JAIL.

A 23(b)(2) class action seeking injunctive or declaratory relief is "intended to reach situations where a party has taken action or refused to take action with respect to a class" – even where that action or inaction "has taken effect or *is threatened* only as to one or a few members of the class" – so long as the action is based on grounds that apply generally to the class. Fed. R. Civ. P. 23(b)(2), Adv. Comm. Notes to 1966 Amendment (West. ed. 2007) (emphasis added). Plaintiffs challenge the legality of, and seek relief from, six general policies or practices of the Detention Division of the Garfield County Sheriff's Office, which correspond to the six claims for relief:

- First, a policy authorizing Jail deputies to apply physical force, including the use of various "compliance devices," without meaningful guidance or supervision, in a manner that poses an unjustifiable risk of serious harm;
- Second, a policy requiring prisoners[1] to wear an electroshock belt to court, in addition to handcuffs, belly chain, and leg shackles, without guidance to Jail deputies and with no individualized determination that the prisoner poses a special risk of escape, assault, or disruption;

[1] Unless otherwise noted, in this brief, the term "prisoner" refers to both pre-trial detainees and post-conviction prisoners at the Garfield County Jail.

- Third, a policy authorizing Jail deputies to use the restraint chair far too often, without adequate cause, for too long, without adequate monitoring or involvement of medical staff, and in a manner that poses an unjustifiable risk of serious harm;
- Fourth, a policy of denying confidential visits with attorneys if prisoners fail to provide the "correct" answer to a "trick question";
- Fifth, denying legally required mental health care; and
- Finally, a policy of imposing severe punishments for alleged violations of Jail rules, without due process of law.

The existence or nonexistence of these general policies or practices are common questions of fact. Common questions of law include the legality of these policies and whether they pose an unjustifiable risk of harm. A trial on the merits will not be an aggregation of individualized and unconnected anecdotes, but rather a review of whether Defendants' wrongful policies and practices pose an unjustifiable risk of harm to prisoners' health and safety and to their constitutional and statutory rights. Class certification is the only way that these claims for prospective relief can be heard.

II.
CHANGES IN PLAINTIFFS' STATUS SINCE FILING SUIT DO NOT AFFECT CLASS CERTIFICATION.

Plaintiffs filed their Amended Motion to Certify Class (hereafter "Motion") when they filed the First Amended Complaint (hereafter "Complaint"). As the Supreme Court has explained, the relation-back doctrine "is properly invoked" in a case such as this, where the individual claims "are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest

expires." *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991). Thus, the departure from the Jail of the four named plaintiffs does not suggest mootness in this matter.[2]

Further, contrary to Defendants' representation in their supplemental brief, Plaintiff Hogue remains available to participate in this litigation during his stay in the treatment program. *See* Exhibit 1 (Hogue Declaration) and Exhibit 2 (Gaipa Declaration). And even if Mr. Hogue were temporarily unavailable, which is not the case, he nevertheless remains an adequate class representative: he has no conflicts with absent class members, he has already been deposed by Defendants in this litigation, and he has retained competent attorneys who will vigorously represent the absent class members. Thus, Mr. Hogue continues to meet the established criteria for adequacy of representation. *See Rutter & Willbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187-88 (10th Cir. 2002).

III.
PLAINTIFFS' MENTAL HEALTH CLAIM REMAINS VIABLE AND SUPPORTS CLASS CERTIFICATION.

After this case was filed, Defendants added some mental health services to their contract with their medical provider, and now argue that "the alleged infirmity . . . no longer exists." Defs' Supp. Br. at 16. This post-Complaint change does not alter Plaintiffs' ability to meet the requirements of commonality and typicality. The relation-back doctrine that is properly invoked here, *see County of Riverside*, 500 U.S. at 51-52, requires that this Court determine whether Plaintiffs satisfied Rule 23 at the time the Complaint and the Motion were filed. Any other approach allows Defendants to defeat class certification – and thus defeat Jail prisoners' claims for prospective relief – simply by modifying some challenged practices before the class certification motion can be heard.

[2] During oral argument, Defendants' counsel reminded the Court that Plaintiff Lincoln is set to return to the Jail in a few weeks.

On closer inspection, Defendants' argument, misleadingly cast as a challenge to typicality and commonality, is really an indirect suggestion that the mental health claim is factually moot. It is "well-settled," however, that a defendant's unilateral decision to modify a challenged practice moots a claim *only* if the defendant meets a very "heavy burden of persuasion" to make "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000). Defendants have not even asserted, much less tried to prove, that they meet this standard.

Equally important, Plaintiffs have not had sufficient opportunity to discover whether the promised changes in mental health services have actually been implemented,[3] and whether they are legally sufficient. Plaintiffs also have not yet been able to take the discovery necessary to learn the contours of the current mental health services vis-à-vis other inmates at the Jail.[4]

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[3] Even with limited discovery, it appears that the Jail and its medical provider, Correctional Healthcare Management (CHM), have not fully implemented or even followed critical written policies. For example, Diane Crowdis of CHM testified that in actual practice the Jail does not currently follow CHM's written "continuous quality improvement" system policy, *see* Exhibit 3 (CHM Policy J-A-06 Continuous Quality Improvement); Exhibit 4 (Crowdis Dep., 50:17-20, 51:1 to 52:13), CHM's written policy requiring that jail staff communicate with medical staff prior to the imposition of disciplinary measures on prisoners with mental illnesses, *see* Exhibit 5 (CHM Policy J-A-08 Communication on Special Needs Patients); Exhibit 4 (Crowdis Dep., 52:14-18, 58:17 to 59:22), or CHM's written policy for the tracking of prisoners with mental illness. *See* Exhibit 6 (CHM Chronically Mentally Ill Log); Exhibit 4 (Crowdis Dep., 120:16-24).

[4] For example, although Plaintiff Langley was at risk of suicide while he was in the jail, discovery limitations have prevented Plaintiffs from asking questions about protection of suicidal prisoners under the new contract, including what happened in June, 2007, to Timothy Schilz (*see* Exhibit 7 (Garfield County Sheriff's Office Press Release), Exhibit 8 (June 13, 2007 Post-Independent newspaper article), and Exhibit 9 (June 15, 2007 Post-Independent newspaper article)), a mentally ill prisoner who – based on information obtained from a Colorado Open Records Law request – had been in the restraint chair at least three times, on suicide watch at least six times, and on behavior watch at least four times, but nevertheless succeeded in committing suicide in his cell. This strongly suggests that the new contract with CHM does not cure the problems noted in the Complaint, and that Defendants still fail to provide legally adequate mental health care and continue to expose seriously mentally ill prisoners to an unreasonable risk of harm.

IV.
DEFENDANTS' WRITTEN USE-OF-FORCE POLICY DOES NOT AFFECT PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

When the Complaint was filed, Defendants had no written use-of-force policy that applied to the Detention Division. There was no written policy governing use of the restraint chair, the pepperball gun, tasers, or the electroshock belt. *See* Compl. ¶¶ 176-84. A written policy on pepper spray failed to provide deputies with adequate guidance and was violated in actual practice. *Id*. ¶¶ 43-44. "In order to properly supervise and train, an administrator normally must issue clear written policies and then teach subordinates how to implement them." *Ginest v. Bd. Cty. Comm'rs*, 333 F.Supp. 2d 1190, 1202 (D. Wyo. 2004).

After this litigation was filed, Defendants adopted in February 2007 a written use-of-force policy for the Detention Division, which, as the Court requested, is attached. *See* Exhibit 10 (Use of Force Policy). Defendants do not contend that the new written policy affects the Motion, neither do they suggest that the written policy somehow moots Plaintiffs' use-of-force claims. Nor could they: the written policy fails to provide any meaningful guidance regarding the use of force, including the use of specific "compliance" devices, and Defendants still have no written policy that regulates use of the restraint chair or mitigates its risk of abuse. Indeed, Defendants continue to vigorously defend and continue to ratify the past and current unchecked use of force, and the Jail's continued unnecessary use of the various "intermediate weapons," or so-called "compliance devices," and the restraint chair, which are deployed at the subjective whim of Jail detention officers, continue to pose an unjustifiable risk of harm to prisoners, as will be shown in detail at trial.

Defendants argue that the proposed class is somehow defective because not all plaintiffs have been subjected to every specific device or use of force that is challenged. In making this argument, Defendants overlook the fact that Plaintiffs seek *prospective* relief from the threat of

future harm. The Complaint alleges that each class member is at risk of being subjected to the use of force, including the restraint chair or one or more of the "intermediate weapons" at issue. *See* Compl. ¶¶ 293-294, 298-299. And these allegations have been confirmed by the Defendants (even with the limited discovery permitted to date). For example, the Jail lumps together its intermediate weapons into a so-called "toolbox," from which each deputy is allowed unfettered discretion to choose an "intermediate weapon" of his or her choice to deploy as he or she sees fit. *See* Exhibit 11 (Vallario Dep., 229:23 to 230:12). Such unfettered discretion applies equally to the use of the restraint chair by Jail deputies. *See, e.g., id*. 200:22 to 204:4 (testifying regarding "Restraint Chair" paragraph in February 2007 use of force policy and lack of any written guidance on when restraint chair can or should be used)). In the Garfield County Jail, a prisoner whom deputies believe is failing to obey an order is at risk of being subjected to tasers, pepper spray, the pepperball gun, and/or the restraint chair by Jail detention officers who have not been given proper guidance or training in how and when to use these instruments.

A threat of being subjected to the use of force at the Jail, including one or more of the "intermediate weapons" at issue, is important and cannot be wholly dismissed as Defendants argue. When, for example, a deputy threatens to shock a prisoner in order to force compliance, that evidences the risk that a taser *will* be activated in a similar situation in the future should a prisoner not comply. *See, e.g.*, Compl. ¶ 80. Such evidence is particularly probative when the threat is described in a Jail incident report that is reviewed and ratified by the Jail's Commander (Defendant Dawson), *see* Exhibit 12 (Incident Report) (quoting deputy's threat to taser prisoner for refusing to return dinner tray: "Sir, I'm asking you to please give me the plate, if you do not, I will taser you sir"), or when Defendant Dawson issues the threat himself. *See* Exhibit 13 (Incident Report) (quoting Defendant Dawson as saying "Tase him if he does not want to

comply" to a deputy who was trying to persuade a mentally-ill and suicidal prisoner to take off his clothes and put on the Jail's "suicide gown").[5] In addition, Defendants are incorrect when they argue that unimplemented threats to use unjustified force can never violate prisoners' rights. *See Northington v. Jackson*, 973 F.2d 1518, 1524 (10th Cir. 1992).

V.
DEFENDANTS MISUNDERSTAND THE ATTORNEY-VISITATION CLAIM.

Defendants misread the Complaint, and in doing so, fail to acknowledge that Plaintiffs allege that Plaintiff Hogue and two additional detainees were denied visits because of, and pursuant to, the challenged "trick question" policy. *See* Compl. ¶ 319. The Complaint describes two versions of the "trick question." In the first, prisoners are asked "who is your attorney?" *Id.* ¶ 229. After Mr. Hogue's visit was denied, Defendant Dawson stated that he modified the "trick question." *Id.* ¶ 239. The modified "trick question" asks either the name of the prisoner's attorney "or the name of any group or attorney from whom the inmate is seeking legal representation." *Id.*

Plaintiffs challenge the "policy" and "trick question" in either form. Although Defendant Dawson described a "revised" version of the "trick question," that does not mean, as Defendants would like the Court to assume, that the Jail's deputies actually and faithfully pose the revised question. For example, a year after Defendant Dawson announced the "revised" question, Plaintiffs learned of another prisoner who was denied an attorney visit because he flunked the "trick question" test. The "trick question" posed that time was the first version, the same question posed to Plaintiff Hogue: "who is your attorney?"[6] Thus, contrary to Defendants'

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[5] Due to discovery limitations, Plaintiffs have been unable to ask Defendants or the Jail's deputies about the specific incidents described in Exhibits 12 and 13.

[6] *See* Exhibit 14 (Hammond Dep., pages 278:11 to 279:13)

argument, Mr. Hogue does not challenge a "misapplication" of the policy,[7] and additional prisoners risk the same injury regardless of which version of the "trick question" is posed.

Defendants also misunderstand the law applicable to Plaintiffs' attorney visitation claim. The case Defendants cite makes clear that "numerous courts" have issued injunctions to enforce prospectively the right of prisoners and attorneys to confer privately. *See People v. Dehmer*, 931 P.2d 460, 463 (Colo. App. 1996); *see also Mann v. Reynolds*, 46 F.3d 1055, 1061 (10th Cir. 1995) (physical restrictions on access "will not be upheld if they unnecessarily abridge the defendant's meaningful access to his attorney or the courts"). In addition, the Colorado statute Plaintiffs invoke is broader than the Sixth Amendment in two respects that were not at issue and were not discussed in *Dehmer*. First, the statute applies to any person in custody, even if charges have not been filed. *See* Colo. Rev. Stat. § 16-3-403. In contrast, the Sixth Amendment right to counsel does not apply until criminal prosecution has formally begun. *See Moran v. Burbine*, 475 U.S. 412, 428-31 (1986). Second, the Colorado statute applies even when an attorney-client relationship has not yet been established. A prisoner or detainee must be permitted to consult in private with any "attorney-at-law of this state whom such person desires to see or consult." Colo. Rev. Stat. § 16-3-404.[8] Thus, the state statute protects the right to confidential face-to-face communications with attorneys even when the Sixth Amendment does not. Compliance with the

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[7] Defendants stated, incorrectly, that "[h]ad the policy been properly followed, Mr. Hogue and the other inmates would have been told that ACLU attorneys were in the Jail and wanted to meet with them." Defs' Supp. Br. at 11. Defendants have acknowledged in discovery that the challenged policy requires that deputies *conceal* from the prisoner the fact that an attorney is present and requesting a meeting. *See* Exhibit 15 (Mitchell Dep., 161:2 to 162:8) and Exhibit 16 (Hauser Dep., 105:17 to 106:22)**.**

[8] A corresponding criminal statute provides that a detainee's custodian commits a class 2 misdemeanor when he denies a detainee a "reasonable opportunity to consult in private with a licensed attorney-at-law, if there is no danger of imminent escape and the person in custody expresses a desire to consult with such attorney." Colo. Rev. Stat. § 18-8-403(b).

state statute requires Defendants to inform prisoners when an attorney is present and requesting a meeting.

Plaintiffs also rely on the First Amendment. "First Amendment rights of association and free speech extend to the right to retain and consult with an attorney." *Poole v. County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001); *see also DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) (explaining that "[t]he right to retain and consult with an attorney . . . implicates not only the Sixth Amendment but also clearly established First Amendment rights of association and free speech"). Plaintiffs need not prove "prejudice" to a prisoner's legal case, and even a brief interference with First Amendment rights is presumed to constitute irreparable injury that justifies prospective relief. *See Community Communications Co., Inc. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981); *Million Man March v. Cook*, 922 F. Supp. 1494, 1500 (D. Colo. 1996).

VI.
CLASS DEFINITION AND NUMEROSITY SUPPORT CLASS CERTIFICATION.

Plaintiffs propose a class of all current and future prisoners, and there can be no doubt that this proposed class meets the numerosity requirement. All prisoners are subject to each of the generally-applicable policies that Plaintiffs challenge. The critical issue is whether the challenged policies are generally applicable to prisoners *as prisoners*, not whether every member of the class will actually wind up suffering the threatened harm. *See* Fed. R. Civ. P. 23(b) Adv. Comm. Notes (certification is appropriate if the complained-of action or inaction "has taken effect or is threatened only as to one or a few members of the class"). Defendants' argument that the class cannot proceed because it includes members with "no justiciable claims," if accepted, requires rejecting the overwhelming weight of authority that certifies Rule 23(b)(2) classes in similar cases.

The mental health claim serves to illustrate the flaw in Defendants' argument. Many prisoners will never need mental health services. Yet numerous courts have appropriately certified "all prisoner" classes in cases that include challenges to deficient mental health care.[9] For example, in *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), the claim of deficient mental health services was litigated on behalf of an "all prisoners" class, *id*. at 562, even though only 5-10% of the class was "seriously mentally ill" and only an additional 10-25% needed treatment. *Id*. at 577.

Even if the Court were to accept Defendants' argument (and it should not), that is no reason to deny class certification. Instead of a single "all prisoner" class, this Court could define a separate class for each claim, in a manner that includes only current and future prisoners who are at risk of being subjected to physical force, or being placed in the shock belt, or being placed in the restraint chair, etc. But drafting such alternative class definitions is not necessary, and doing so would make no *practical* difference: There is no right to opt out of a Rule 23(b)(2) class; there is no need to provide notice to individual members; there is no individual relief to be distributed to absent class members; and there is no need to identify precisely who is a member of the class and who is not. The entire focus of the litigation, the remedies, and any future enforcement is entirely on the *Defendants'* policies and practices.

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[9] *See e.g.*, *Ramos v. Lamm*, 639 F.2d 559, 562, 577 (10th Cir. 1980); *Madrid v. Gomez*, 889 F. Supp. 1146, 1146 (N.D. Cal. 1995); *Christina A. v. Bloomberg*, 197 F.R.D. 664, 672 (D.S.D. 2000); *Ginest v. Bd. Cty.Comm'nrs*, 333 F. Supp. 2d 1190, 1193 (D. Wyo. 2004); *Jones 'El v. Berge*, 2001 U.S. Dist. Lexis 25625, at *2 (W.D. Wis. Aug. 14, 2001) (cited with approval in *Shook v. Bd. Cty. Comm'nrs*, 386 F.3d 963, 970 (10th Cir. 2004) (attached hereto as Exhibit 23); *Flynn v. Doyle*, 2007 U.S. Dist. Lexis 22659, at *15 (E.D. Wis. Mar. 14, 2007) (attached hereto as Exhibit 24); *see also Meisberger v. Donahue*, 245 F.R.D 627, 631 (S.D. Ind. 2007) (certifying "all prisoner" class in a challenge to a statewide prison policy forbidding receipt of publications "containing nudity," although not all prisoners will ever try to subscribe to such publications or to any publications at all).

Although all prisoners are *subject* to the challenged policies, which is sufficient to satisfy the numerosity requirement at this stage, Plaintiffs take this opportunity to elaborate with regard to specific policies that were discussed at the hearing or in Defendants' supplemental filing:

Shock Belt. Defendants admit that all so-called "supermax" prisoners must wear the shock belt when they go to court, in addition to their handcuffs, belly chain, and leg shackles. *See* Answer ¶¶ 86, 104. At the hearing, counsel for Defendants estimated the number of supermax prisoners since 2005 to be "in the three digits, but probably less than four," which means hundreds, at least. The number of times that the shock belt has actually been discharged is irrelevant. *See Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1236, 1239-1240 (9th Cir. 2001) (describing the stun belt's "chilling effects" when placed on a detainee, and noting the district court's language that "mere placement of the belt on a detainee raises 'serious questions going to the merits of the Fourth Amendment and Eighth Amendment claims.'").

Mental health. The Jail's physician estimated that about 10% of the Jail's population *at any given time* is seriously mentally ill, *see* Exhibit 17 (Neumann Dep., 151:1-12); a policy of the Jail's mental health contractor states that the numbers of "seriously mentally ill" prisoners is increasing, *see* Exhibit 18 (CHM Policy J-G-04 Mental Health Services); and records from the Jail's medical provider indicate that, between January and May, 2007 (the last statistics provided to Plaintiffs), the Jail had up to 21 prisoners receiving psychotropic drugs per month and up to 37 suicide watches per month. *See* Exhibit 19 (CHM Medical Statistical Summary).

Attorney visits. When suit was filed, the "trick question" policy was new. The policy had already injured three prisoners, and it *would* have caused both Plaintiffs Vandehey and Lincoln to miss visits *except for* the fortuity that more savvy prisoners in adjoining cells were able to coach them. *See* Compl. ¶¶ 226, 235-37. Similar injury has recurred since, *see*

Exhibit 14 (Hammond Dep., pages 278:11 to 279:13)**,** but with discovery limitations and Defendants' lack of tracking, Plaintiffs cannot quantify this with any precision. Nevertheless, continued enforcement of the "policy" clearly poses a risk of future denials. The Complaint describes situations in which prisoners will flunk either version of the "trick question." *See* Compl. ¶¶ 241-43. In addition, as the Court noted, a prisoner represented by a firm may not know the name of the associate who visits. At the hearing, Defendants' counsel conceded that *some* Jail deputies in *some cases* will informally relax the "trick question" policy by giving prisoners some hints and additional chances to come up with the "correct" answer. This concession confirms that the policy, when enforced as Defendants claim and as they have memorialized it in writing, poses a concrete risk that numerous future prisoners will be unable to answer "correctly."

Use of force and restraint chairs. Defendants do not contend that the universe of prisoners who are subjected to restraint chairs or the use of force is insufficiently numerous. Nor could they. In their limited pre-lawsuit investigation, Plaintiffs documented 23 times that prisoners were restrained in a four-month period, in a jail with a population of just over 100 prisoners. *See* Compl. ¶ 28. To put that in perspective, the Denver County Jail, with twenty times as many prisoners, resorted to its restraint chair only 17 times *in the entire year* of 2006. *See* Exhibit 20 (Pendergrass Decl. ¶¶ 3-6).

Punishment without due process. Similarly, despite their lack of tracking, Defendants do not contend that the universe of prisoners punished for alleged disciplinary infractions without due process is insufficiently numerous. Such an argument would defy common sense, given the range of conduct that violates Jail rules and for which punishment is regularly imposed. *See* Compl. ¶ 98.

VII.
COMMONALITY AND TYPICALITY EXIST FOR ALL SIX CLAIMS.

The commonality and typicality requirements are easily satisfied here. The challenged policies provide common questions of both fact and law. Plaintiffs' claims are typical because they derive from the same course of conduct (the challenged policies) as the claims of the absent class members, and the legal and remedial theories are the same. Contrary to Defendants' argument, the fact that one Plaintiff was restrained because of a suicide attempt, while another was restrained because he was viewed as a threat to Jail property, does not defeat class certification. Once a prisoner is restrained, for *any* reason, there are multiple additional common issues, such as, for example, the adequacy of medical monitoring and whether prisoners are kept in restraints long after any arguable threat or justification has passed. Similarly, Defendants fail to understand the common issues linking Plaintiff Langley's and Plaintiff Vandehey's mental health claims: Despite individual differences, both were denied access to adequately-trained mental health professionals and legally-required mental health care, because of the policies of the Defendants being challenged in this case. Defendants' arguments that individual differences defeat commonality and typicality were considered and properly rejected in *Neiberger v. Hawkins*, 208 F.R.D. 301, 315 (D. Colo. 2002) (focusing on "systemic, institutional defects" rather than on individual differences). The reasoning of *Neiberger* equally applies here.

VIII.
THE CLASS IS MANAGEABLE, PARTICULARLY IN LIGHT OF RULE 23(b)(2).

Defendants' "manageability" argument misconstrues Plaintiffs' claims and the nature of the required proof under Rule 23(b)(2). This case does not seek damages for multiple past incidents. Accordingly, the Court need not determine whether a host of deputies acted on specific occasions with the requisite specific knowledge and with a particular mental state. In a

case seeking prospective relief, the inquiry into "deliberate indifference" focuses on defendants' "current attitudes and conduct" at the time of suit and during the litigation. *Helling v. McKinney*, 509 U.S. 25, 36 (1993); *see Farmer v. Brennan*, 511 U.S. 825, 845-46 (1994). In addition, the issue is not whether Defendants had specific knowledge about Plaintiff Langley's bipolar condition or about Plaintiff Vandehey's diagnosis; the issue is whether Defendants are aware that certain categories of prisoners, or prisoners in certain kinds of situations, face an objectively unreasonable risk of harm. *See Farmer*, 511 U.S. at 843-44. Moreover, in a forward-looking injunctive case, Defendants' knowledge of current and future risk can be satisfied by the proof that is introduced at trial. *See Hadix v. Johnson*, 367 F.3d 513, 526 (6th Cir. 2004) ("[W]e are concerned with future conduct to correct prison conditions. If those conditions are found to be objectively unconstitutional, then that finding would also satisfy the subjective prong because the same information that would lead to the court's conclusion was available to the prison officials.").

Defendants' dire predictions of unmanageability are conspicuously unsupported by any real-world examples. In fact, numerous cases litigating prisoner class actions under Rule 23(b)(2) demonstrate that such cases are easily manageable. Courts often receive a portion of the evidence in written form, and much of the proof relies on review of records and the testimony of experts. If the Court finds a constitutional violation, the proper course is 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 Court would have the input of the parties and their experts in the remedial process. Federal courts therefore can and do order prospective relief that satisfies Fed. R. Civ. P. 65 as well as the PLRA.[10]

[10] *See e.g. Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004); *Handberry v. Thompson*, 436 F.3d 52 (2nd Cir. 2006); *Feliciano v. Rullan*, 378 F.3d 42 (1st Cir. 2004); *Goff v. Harper*, 59 F. Supp. 2d 910 (D. Iowa

IX.
CONCLUSION

The overwhelming weight of authority demonstrates that when prisoners or residents of a closed institution seek prospective relief from that institution's policies, certification of a class under Rule 23(b)(2) is appropriate, customary, and expected. It is so customary that Defendants have been unable to cite *any* final decision of *any* court in which class certification has been denied.

The one and only case denying class certification that defendants have relied on is the district court's 2006 decision in *Shook v. Bd. Cty. Comm'nrs*, 2006 U.S. Dist. LEXIS 43882 (D. Colo. 2006) (attached hereto as Exhibit 25). That decision is not final and is being vigorously contested on appeal. Moreover, if the *Shook* decision survives appeal, it will only be on the ground that the result in *Shook* is within the range of a district court's permissible discretion. The *Shook* decision does not stand for the proposition that Judge Babcock got it wrong when he certified a Rule 23(b)(2) class in *Nieberger*. The possible affirmance of *Shook* would not undermine the validity of a decision by *this* Court in *this* case to certify a class.

In the unlikely event that a later decision by the Tenth Circuit did somehow call into question this Court's decision to certify, this Court would have the opportunity to reconsider and re-evaluate the decision to proceed as a class. A decision denying class certification, however, in light of the extremely transient nature of the Jail's population, would prevent Plaintiffs' injunctive claims from ever going to trial; the Plaintiffs as well as the class members would be denied their day in court, effectively exonerating Defendants on the merits. Class certification should be granted.

1999); *Dodge v. County of Orange*, 282 F. Supp. 2d 41 (S.D.N.Y. 2003). *See also* Exhibit 21 (*U.S. v. Dallas County, Texas et al.*, 307-cv-1559 (N.D. Texas, Nov. 6, 2007) (ordering prospective relief)) and Exhibit 22 (*U.S. v. Terrell County, Georgia et al.*, 1:04-cv-76 (M.D. Georgia, Dec. 21, 2007)(same)).

Date: February 28, 2008

Respectfully submitted,

s/ J. Gregory Whitehair

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Certificate of Service (CM/ECF)

I hereby certify that on February 28, 2008, I electronically filed the foregoing **PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING PLAINTIFFS' AMENDED MOTION TO CERTIFY CLASS** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following addresses and individuals:

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s/ J. Gregory Whitehair