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

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

David C. Fathi
The National Prison Project of the ACLU Foundation, Inc.
733 15th Street NW, Suite 620
Washington, D.C. 20005
(202) 393-4930

Mark Silverstein
Legal Director
American Civil Liberties Union of Colorado
400 Corona Street
Denver, Colorado 80218
(303) 777-5482

DAVIS GRAHAM & STUBBS LLP
In cooperation with the American Civil Liberties Union Foundation of Colorado
Thomas S. Nichols
1550 Seventeenth Street, Suite 500
Denver, Colorado 80202
(303) 892-9400

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

Defendants' brief is notable for what it does not say. Defendants say they dispute plaintiffs' rendition of the facts, but they fail to offer an alternative account. Answer Brief ("Ans. Br.") at 1. In addition, entire arguments in plaintiffs' opening brief are simply unanswered by defendants, and are therefore effectively conceded. For all the reasons set forth in plaintiffs' opening brief, the judgment of the district court should be reversed.

ARGUMENT

I. The District Court Improperly Denied Class Certification on the Basis of Factors Not Found in 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).

Defendants do not dispute that the district court failed to perform the analysis required by *Adamson*. Nevertheless, they claim that the novel five-part test applied by the district court, none of whose factors appear in Rule 23, was proper. However, defendants can cite no authority from this Court in support of this unprecedented test.

For example, in their opening brief, plaintiffs cited authority holding that precise identification of class members is not necessary where, as here, certification is sought pursuant to Rule 23(b)(2) in an action seeking only injunctive relief. Brief of Plaintiffs-Appellants ("Pl. Br.") at 25-27. Defendants respond by citing an unpublished Magistrate Judge's Report and Recommendation involving a (b)(3) class action seeking damages. *See* Ans. Br. at 5 (citing *Rahim v. Sheahan*, 2001 WL 1263493 (N.D. Ill. 2001)). Moreover, defendants simply fail to respond to plaintiffs' citation of cases in which courts have certified prisoner classes in terms indistinguishable from the class proposed here. *See* Pl. Br. at 26-27. They similarly fail to acknowledge that plaintiffs specifically proposed an alternative class definition that would have obviated any problems (if any there were) with identifying members of the class. *See id*. at 27 n. 7.

Defendants also entirely fail to rebut plaintiffs' showing that the "manageability" criterion applied by the district court is not a proper consideration when, as here, certification is sought under Rule 23(b)(2). *See* Pl. Br. at 27-28.

In short, in requiring plaintiffs to precisely identify members of the class and in imposing a requirement of "manageability," "[t]he district court placed upon the class a burden that the rule does not authorize." *Adamson*, 855 F.2d at 676. The judgment of the district court must therefore be reversed. *Id*. at 676-77.

II. The District Court Improperly Considered the Merits of Plaintiffs' Claims

Defendants concede that the district court considered the merits of plaintiffs' claims. Ans. Br. at 3, 9; *see also* Pl. Br. at 23-24 (the district court questioned plaintiffs' counsel as to whether plaintiffs' claims rose to the level of a constitutional violation, ordered plaintiffs to submit a brief demonstrating that the relief they seek is required by the Eighth Amendment, and, in its order denying class certification, made substantive rulings adverse to plaintiffs on the scope of the Eighth and Fourteenth Amendments). However, defendants contend that the district court's focus on the merits of plaintiffs' claims was required by defendants' motion for summary judgment. Ans. Br. at 8.

This is incorrect. Defendants' motion for summary judgment was based not on the merits of plaintiffs' claims under the Eighth and Fourteenth Amendments, but solely on the contention that plaintiffs had failed to exhaust administrative remedies as required by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a). *See* Motion to Dismiss or, in the Alternative, for Summary Judgment, May 13, 2002, Aplt. App. 4, Docket Entry No. 8. This motion – directed as it was to exhaustion arguments – provided no occasion for the district court to consider the requirements of the Eighth and Fourteenth Amendments. Rather, it is clear that when the district court improperly raised constitutional questions about the merits of plaintiffs' claims, it was considering only the motion for class certification:

THE COURT: And, are you suggesting that all of these things are required by the Eighth Amendment?

MR. FATHI: Yes, Your Honor.

THE COURT: And, who says so?

MR. FATHI: Your Honor, that's not before the Court. We're happy to provide –

THE COURT: I'm asking you who says so? You have to have a constitutional right before we can proceed.

Transcript, p. 23, line 23 – p. 24, line 5; Aplt. App. at 98-99.

MR. FATHI: Yes, Your Honor. And, so, you're asking us to explain why the things we're seeking are required by the Eighth Amendment?

THE COURT: Yes.

MR. FATHI: All right, we'll do that.

THE COURT: Because as far as I interpret your complaint, you've gone way beyond anything that any court has ever said is required under the Eighth Amendment.

Transcript, p. 26, lines 7-14; Aplt. App. at 101.

In the alternative, defendants make the untenable argument that it was proper for the district court to inquire into the merits of plaintiffs' claims when considering the class certification motion. Ans. Br. at 9-10. But defendants' sole authority – a district court decision from Illinois – is no match for the binding

Supreme Court and Circuit precedent making clear that such an inquiry is impermissible. Pl. Br. at 22.[1]

III. The Prison Litigation Reform Act (PLRA) in No Way Affects the Law of Class Certification in Prison and Jail Cases

Defendants concede, as they must, that both the text and the legislative history of the PLRA are silent on class actions, but nevertheless contend that the statute's "tenor" somehow restricts their availability. Ans. Br. at 12, 14. Defendants are unable to cite a single case in support of this argument, because no court – except the district court below – has held that the PLRA affects in any way the availability of class certification in prison and jail cases.

Defendants' "tenor" argument essentially urges that courts must adopt whatever interpretation of the PLRA is least favorable to prisoners, even to the point of importing into the statute provisions that Congress chose not to include. This argument flies in the face of established rules of statutory construction, and must be rejected.

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 unchanged. *See* Pl. Br. at 32.

[1] The district court's decision to deny class certification because it erroneously concluded that the PLRA would bar the relief plaintiffs were seeking (*see* § IV, *infra*) also constituted an impermissible consideration of the merits of plaintiffs' claims.

Moreover, under the canon of statutory construction *expressio unius est exclusio alterius*, "the legislature's defining the reach of a statute implies that matters beyond that reach are not included." *Gardner by and Through Gardner v. Chrysler Corp*., 89 F.3d 729, 736 (10th Cir. 1996). "The notion is one of negative implication: the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced." *Youren v. Tintic School Dist*., 343 F.3d 1296, 1308 (10th Cir. 2003) (citation omitted). Thus, the fact that PLRA imposes limitations on other procedural devices such as prisoner release orders and special masters, but is entirely silent on class actions, compels the conclusion that Congress meant to leave existing law on class actions undisturbed.

The Second Circuit recently rejected an argument virtually identical to that defendants make here: that the PLRA *sub silentio* prohibits the use of court-appointed monitors:

> To be sure, one gathers from certain statements of the PLRA's sponsors that they were motivated in part by a perceived over-involvement of federal courts in the remedial aspects of prison conditions litigation. One could extrapolate from this concern a desire to limit, perhaps entirely to prohibit, the use of court-appointed monitors. *But we must ultimately look to Congress's text, not to concerns it did not address in the relevant statutory language*.

Benjamin v. Fraser, 343 F.3d 35, 47 (2d Cir. 2003) (emphasis added, citations omitted) (PLRA's "special master" provisions do not bar other kinds of court-

appointed monitors). This Court should similarly reject defendants' argument that PLRA's silence on class actions somehow indicates a Congressional intent to restrict or eliminate them.[2]

IV. The District Court Erred in Concluding that the PLRA Precluded it From Granting Relief, and in Denying Class Certification on that Basis

Defendants argue that the district court properly denied class certification because it "determined that the relief requested in the Complaint in this case, if granted, would violate 18 U.S.C. § 3626(a)(1)(A)." Ans. Br. at 14. But the district court could not possibly make such a determination at the class certification stage, before hearing any evidence on conditions at the Jail.

Defendants apparently believe that the PLRA precludes relief if multiple constitutional violations are shown in a prison or jail conditions case. But the statute does no such thing. The PLRA requires that prospective relief be "narrowly drawn, 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*." 18 U.S.C. § 3626(a)(1)(A) (emphasis added). Thus, under the

[2] Defendants misinterpret *Anderson v. Garner*, 22 F.Supp.2d 1379 (N.D. Ga. 1997), in which the court 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*. at 1383. Contrary to defendants' contention, the *Anderson* court's decision turned not on the specific relief sought in that case, but rather on its conclusion that 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).

plain language of the statute, it is impossible to determine whether relief complies with the PLRA until evidence is presented and the scope of the violation of federal rights is ascertained. If prisoners demonstrate violations of their federal rights with respect to multiple conditions of their confinement, then relief that is narrowly tailored to correct those multiple violations complies with the PLRA. The PLRA does not purport to strip federal courts of the power to remedy constitutional violations, whether those violations are few or many. *See Gilmore v. People of the State of California*, 220 F.3d 987, 1007-08 (9th Cir. 2000) (under the PLRA, "a district court cannot … refuse to grant prospective relief necessary to correct a current and ongoing violation, so long as the relief is tailored to the constitutional minimum"); *Armstrong v. Davis*, 275 F.3d 849, 872-73 (9th Cir. 2001) (detailed, systemwide injunction was consistent with PLRA, where district court had "narrowly tailored the injunction to remedy only those violations … established in the district court's findings of fact"), *cert. denied*, 537 U.S. 812 (2002). Thus, the PLRA's restrictions on relief are properly considered when deciding what relief to grant for violations that have been established at trial; they cannot be used to bar plaintiffs from court at the outset of the litigation.

Indeed, many of the post-PLRA prison and jail cases in which courts have granted class certification (*see* Pl. Br. at 31) involved challenges to multiple conditions of confinement. *See*, *e.g.*, *Russell v. Johnson*, 2003 WL 22208029

(N.D. Miss. 2003), at *1 (challenge to isolation, lack of exercise, poor sanitation, malfunctioning plumbing, dangerously high temperatures and humidity, uncontrolled vermin infestation, lack of mental health care, and exposure to psychotic prisoners in adjoining cells); *Maynor v. Morgan County, Alabama*, 147 F.Supp.2d 1185, 1186 (N.D. Ala. 2001) (challenge to crowding, lack of adequate clothing, poor sanitation, inadequate ventilation, extreme temperatures, lack of exercise, inadequate and unsanitary food, inadequate health care, and fire safety hazards); *Jones'El v. Berge*, 2001 WL 34379611 (W.D. Wis. 2001), at *1 (challenge to multiple conditions of confinement, violation of privacy rights, inadequate health care, and excessive force). By contrast, in the eight years since the PLRA was enacted, no court, except the district court below, has relied on the PLRA's limitations on prospective relief as grounds for denying certification of a class of prisoners seeking injunctive relief from unconstitutional conditions of confinement.

Moreover, defendants entirely fail to address the well-settled principle that 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. *See* Pl. Br. at 37-39. Thus, even if there were a defect in plaintiffs' prayer for relief (and there was not), that was

not a valid reason for denying class certification, especially when that denial had the practical effect of ending the case. *See* Pl. Br. at 49-53.[3]

V. Plaintiffs Satisfy the Requirements of Rule 23(a) and (b)(2)

A. The Commonality Requirement is Satisfied

1. The Existence of Common Questions of Law and Fact is Apparent

In their opening brief, plaintiffs cited ten questions of fact and four questions of law that are common to the class. Pl. Br. at 43-45. The district court did not find, and defendants do not argue, that these questions are not common to the class; indeed, the defendants correctly observe that "they all center around alleged violations of Plaintiffs' Eighth and Fourteenth Amendment rights." Ans. Br. at 27-28. In spite of the uncontested existence of common questions of both law and fact, defendants argue that the "diverse situations," Ans. Br. 24, and "unique

---

[3] Although defendants rely on *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982) (Ans. Br. at 28), that case supports plaintiffs' contention that, given the rapid turnover in a county jail, a class action is the only way the injunctive claims of jail prisoners can be brought before the federal courts:

> The court erred in concluding that the prospect of future transfer or release makes a prisoner an inadequate class representative. ... To the contrary, this very prospect supports class certification: while any individual prisoner's claim for injunctive relief is in danger of becoming moot before the court can grant relief, class certification ensures the presence of a continuing class of plaintiffs with a live dispute against prison authorities.

Stewart, 669 F.2d at 333-34 (footnote omitted).

allegations," Ans. Br. 25, of the named plaintiffs mean that the commonality requirement of Rule 23(a)(2) is not satisfied. Of course, if this were the rule, class certification could never be granted, for the situations of individual class members will always differ in some respects.

In a recent decision certifying a class of patients who challenge the conditions and the adequacy of mental health care at Colorado's Institute of Forensic Psychiatry (IFP), the court rejected the argument that individual differences among class members preclude a finding of commonality:

> The defendants mistakenly emphasize each patient's individual psychopathology, rather than the alleged systemic, institutional defects at IFP. It is these systemic problems which the Plaintiffs argue violate their statutory and constitutional rights. The commonality requirement is therefore met[.]

Neiberger v. Hawkins, 208 F.R.D. 301, 315 (D. Colo. 2002). As this Court said in *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982), "[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." *See also Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988) (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)").

2. *Hart* is Inapposite

Defendants rely on *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280 (10th Cir. 1999), but that case does not assist them. In *Hart*, the plaintiffs launched an across-the-board attack on the entire New Mexico child welfare system. The proposed class comprised all children who are or in the future will be in any form of state custody, or at risk of state custody, whose mental or developmental disabilities required some kind of services or support. *Id*. at 1287. This Court noted that the putative class members came into state custody in a variety of ways, and were housed in a wide range of different settings, including foster homes, residential treatment centers, group homes, temporary shelters, and psychiatric hospitals. The circumstances of the children varied so widely that other than being disabled "in some way" and having had "some sort of contact" with New Mexico's child welfare system, there was no common factual link. *Id*. at 1289.

In addition, some plaintiffs in *Hart* claimed under certain statutes while others claimed under different statutes. The Court rejected the argument that disparate legal claims under different statutes could, under the rubric of "systematic failures," substitute for the lack of a question of law that was common to *all* plaintiffs. *Id*. Thus, the Court held that the district court did not abuse its discretion when it concluded that there was no question of fact or law common to the class. *Id*. at 1288-89.

The ruling in *Hart* has no application here. Unlike in *Hart*, the class members in this case are all physically confined to a single institution where all mental health services are supplied pursuant to a single contract that applies to all class members. All class members are affected by the same staffing limitations and all are subject to the security and mental health policies, practices, and procedures of a single decisionmaker, defendant Terry Maketa. All class members make the same legal claim: that defendants' deliberate indifference to their serious mental health needs violates the Eighth and Fourteenth Amendments.

Defendants also assert that plaintiffs have claimed a "systematic" violation of the Constitution, and that under *Hart*, such a claim is automatically ineligible for class treatment. Ans. Br. at 29. This is an egregious misreading of *Hart*. That case states only that class certification is not *automatically* appropriate simply because plaintiffs allege "systematic failures." *Hart*, 186 F.3d at 1289 ("[w]e refuse to hold, as a matter of law, that *any* allegation of a systematic violation of various laws automatically meets Rule 23(a)(2)") (emphasis in original). The Court did not say that any claim that could be characterized as a "systematic violation" is automatically unsuited for class certification, and as far as plaintiffs are aware, no court has adopted this implausible reading of *Hart*. *See Neiberger*, 208 F.R.D. at 315 (post-*Hart* decision certifying class where plaintiffs, residents of a psychiatric facility, alleged "systemic" deficiencies).

B. The Plaintiffs' Claims are Typical of those of the Class

In arguing that the typicality requirement of Rule 23(a)(3) is not met, defendants simply rehash their assertion that the "fact-specific inquiry" required by the unique situation of each class member necessarily defeats typicality. Ans. Br. at 30. It is telling that defendants cite not a single case from this Court in support of this argument. Nor do they answer this Court's repeated admonition that "differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory." *Adamson*, 855 F.2d at 676. *See also* Pl. Br. at 45-46; *Cook v. Rockwell Intern. Corp*., 181 F.R.D. 473, 481 (D. Colo. 1998) ("Under Rule 23(a)(3), the threshold for typicality is low and the claims asserted by the class representative need only be typical of, not identical to, those of other class members").

Defendants complain that the named plaintiffs have not yet suffered every single injury that conditions at the Jail threaten to inflict on members of the plaintiff class. But defendants overlook the fact that plaintiffs seek *prospective* relief from conditions that pose a substantial risk of future harm to them and to the entire plaintiff class. It is beyond dispute that prisoners may seek injunctive relief from jail conditions that pose a substantial risk of future harm; indeed, both the Supreme Court and this Court have made clear that such conditions may be

enjoined under the Eighth Amendment, even if the threatened harm has not yet come to pass. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year"); *Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1980) (a prisoner "does not need to wait until he is actually assaulted before obtaining relief").

Plaintiffs do not and need not allege that each of them have already suffered each and every injury that the challenged practices are likely to inflict on some members of the class. The Complaint's allegations of a threat of future injury – in addition to the injuries already suffered by the named plaintiffs – are sufficient. *See Hassine v. Jeffes*, 846 F.2d 169, 178 (3d Cir. 1988) ("We hold that the complainants' assertion that these conditions existed, and that they were *subject* to them – even if they had not at the time of assertion themselves been injured by those conditions – was sufficient to require adjudication of the claims as to the class") (emphasis in original).[4]

[4] Even if one looks solely at injuries already suffered by the named plaintiffs, defendants' statement that the named plaintiffs' factual allegations do not implicate claims raised on behalf of the class is simply false. For example, defendants state that the named plaintiffs' allegations fail to raise the following issues: "use of special detention cells," "lack of protection from self-harm and suicide," "lack of an adequate system for distributing medication," and "lack of adequate mental health staffing." Ans. Br. at 32. In fact, the allegations of the named plaintiffs

In this case, the claims of *all* named plaintiffs and *all* class members are based on the theory that certain practices and policies of the defendants, which affect the entire plaintiff class, amount to deliberate indifference to prisoners' serious mental health needs and violate the Eighth and Fourteenth Amendments. Because the plaintiffs and the class all rely on "the same legal or remedial theory," *Adamson*, 855 F.2d at 676; *Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1189 (10th Cir. 1975), the typicality requirement is met.

C. The Named Plaintiffs and Their Counsel will Adequately Protect the Interests of the Class

Defendants cite the two settled requirements for adequacy of representation – lack of conflict between the class and the named plaintiffs, and adequacy of counsel, Ans. Br. 32 – and they do not assert that plaintiffs fail to meet either of them. Nevertheless, they assert, *ipse dixit*, that plaintiffs fail to satisfy the requirements of Rule 23(a)(4). This argument is without merit. "To say that plaintiff is not an adequate representative simply because her claim is not identical with that of all other class members is to require, in any class action, that the claims of each member of the class be absolutely identical. The rule does not

---

raise all of these issues. *See* Aplt. App. at 72-73 (Shirlen Mosby has been placed in special detention cells and told by staff that her condition is "a joke"); *id*. at 73 (Ms. Mosby has been able to attempt suicide three times while in the Jail); *id*. at 29 (Mark Shook went for several weeks without access to any medications); *id*. at 30 (Dennis Jones was denied medication for his mental illness for nearly a month); *id*. at 29 (after lengthy delay, Mr. Shook finally saw a medical doctor rather than a psychiatrist).

require this much." *Gerstle v. Continental Airlines, Inc.*, 50 F.R.D. 213, 219 (D. Colo. 1970).

D. Certification is Appropriate under Rule 23(b)(2)

In contesting the applicability of Rule 23(b)(2), once again defendants emphasize "the individual facts of each putative class member's unique situation," Ans. Br. at 34. This does not assist them. Obviously, it is always true that each class member is in some sense in a "unique situation," but if this were sufficient to defeat class certification, Fed. R. Civ. P. 23 would be a dead letter. The reality, of course, is that injunctive challenges to prison and jail conditions, in this Circuit and elsewhere, routinely proceed as class actions. *See* Pl. Br. at 52 n. 14.

Significantly, the Advisory Committee Notes with respect to Rule 23(b)(2) make clear that "[a]ction or inaction is directed to a class within the meaning of this subdivision *even it if has taken effect or is threatened only as to one or a few members of the class, provided it is based upon grounds which have general application to the class*." Fed. R. Civ. P. 23, Advisory Committee Notes, 1966 Amendment, Subdivision (b)(2) (emphasis added). That requirement is satisfied here. Defendants' decisions as to how many mental health staff to hire, what kind of a medication system to implement, and what policies to enforce with regard to suicide prevention, use of restraints, use of pepper spray, and other matters all

"have general application to the class" of prisoners with serious mental health needs.

Defendants attempt to support their argument with a citation to *Adamson v. Bowen*, 855 F.2d at 676, but the cited page of *Adamson* actually refutes defendants' contention:

> In the instant case, the remedies the class seeks – declaratory relief and an injunction directing the Secretary to follow the proper law of this circuit – do not depend on the individual facts of each case, but apply equally to all cases pending within the class. *That the claims of individual class members may differ factually should not preclude certification under Rule 23(b)(2) of a claim seeking the application of a common policy*.

Adamson, 855 F.2d at 676 (emphasis added).

Contrary to defendants' assertion, it is simply not true that "[a]djudication of this case will require individual analyses of each Plaintiff's psychiatric condition, treatment, and response to treatment." Ans. Br. at 34. For example, with the aid of expert testimony, the district court can decide whether two hours per week of psychiatrist time is sufficient for a jail that houses over a thousand prisoners (*see* Aplt. App. at 15, 18); no "individual analyses" of each class member is required. Similarly, if the district court were to order defendants to hire additional mental health staff, this would redound to the benefit of all class members, without regard to the factual differences between them. As a challenge to defendants' deliberate indifference to the class of Jail prisoners with serious mental health needs, this is

"a classic Rule 23(b)(2) civil rights action." *Knapp v. Romer*, 909 F. Supp. 810, 812 n. 1 (D. Colo. 1995) (prison conditions case).

CONCLUSION

For all the reasons set forth above and in plaintiffs' opening brief, the judgment of the district court should be reversed, and the case remanded with directions to certify the plaintiff class.

David C. Fathi
The National Prison Project of the ACLU Foundation, Inc.
733 15th Street NW, Suite 620
Washington, D.C. 20005
(202) 393-4930

Mark Silverstein
Legal Director
American Civil Liberties Union of Colorado
400 Corona Street
Denver, Colorado 80218
(303) 777-5482

DAVIS GRAHAM & STUBBS LLP
In cooperation with the American Civil Liberties Union Foundation of Colorado

Thomas S. Nichols
1550 Seventeenth Street, Suite 500
Denver, Colorado 80202
(303) 892-9400

Dated: March 16, 2004

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 4,556 words.

DAVIS GRAHAM & STUBBS LLP
In cooperation with the American Civil Liberties Union Foundation of Colorado

Thomas S. Nichols
1550 Seventeenth Street, Suite 500
Denver, Colorado 80202
(303) 892-9400

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF PLAINTIFFS-APPELLANTS MARK SHOOK, DENNIS JONES, SHIRLEN MOSBY AND JAMES VAUGHAN** was served by depositing same in the United States mail, first-class postage prepaid, on the 16th day of March, 2004, addressed to the following:

Gordon L. Vaughan, Esq.
Vaughan & DeMuro
111 South Tejon Street
Suite 410
Colorado Springs, CO 80903

Jay A. Lauer, Esq.
Assistant County Attorney
El Paso County Attorney's Office
27 East Vermijo Avenue
Colorado Springs, CO 80903

_____