IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 06-CV-01405-PSF-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.

REPLY OF PLAINTIFFS IN SUPPORT OF AMENDED MOTION TO CERTIFY CLASS

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I. INTRODUCTION

The Response to the Amended Motion to Certify Class contains a central recurring theme. Put simply, Defendants argue that the proposed classes cannot be certified because, they contend, each class member is in some sense unique and the challenged policies and practices do not adversely affect every single member of the proposed class. Thus, they argue that, because of the purported individualized nature of Plaintiffs' claims, Plaintiffs cannot satisfy either Rule 23(a)'s threshold requirements of numerosity, commonality, typicality and adequacy of representation, or the requirements of Rule 23(b)(2), providing for injunctive relief. As explained below, Defendants mischaracterize Plaintiffs' allegations and misconstrue the law regarding class actions, and particularly class actions brought pursuant to Rule 23(b)(2) by residents of closed institutions, including prisons and jails, to redress violations of their civil rights.

In advancing their misguided argument that certification is unwarranted due to the alleged uniqueness of each member of the proposed classes, Defendants ignore Plaintiffs' allegations in their Amended Complaint that all class members are at substantial risk of serious harm as a result of the system-wide policies, practices and procedures that the Defendants apply generally to the proposed class. Moreover, Defendants ignore the legion of cases throughout the country certifying similar cases brought by inmates seeking to enjoin violations of their civil rights. In fact, class certification is widely recognized as appropriate for injunctive litigation

claims of inmates of closed institutions relating to complaints of excessive and disproportionate force, access to mental health, and denial of due process.[1]

Particularly egregious, Defendants ignore the Tenth Circuit's statement that Rule 23(b)(2) class actions are "well-suited" to cases in which "the plaintiffs attempt to bring suit on behalf of a shifting prison population." *Shook v. El Paso County*, 386 F.3d 963, 972 (10th Cir. 2004), cert. denied, 125 S.Ct. 1869 (2005). Defendants also disregard the Advisory Committee Notes to Fed.R.Civ.P. 23(b)(2) providing that "[a]ction or inaction is directed to a class within the meaning of subdivision (b)(2) even if it has taken actual effect as to only one or a few members of the class, provided it is based on grounds which have general application to the class."

Illustrative of Defendants' misconception of the law regarding class actions in the circumstances is *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995). In *Madrid*, the court found that prison officials at Pelican Bay State Prison violated the constitutional rights of the class of prisoners who are, or will be, incarcerated at Pelican Bay. Specifically, the court found that "defendants have failed to provide inmates at Pelican Bay with constitutionally adequate medical and mental health care, and have committed and condoned a pattern of using excessive

[1] For example, courts have certified class actions challenging the use of restraints (*see, e.g.*, *Christina A. v. Bloomberg*, 197 F.R.D. 664, 672 (S.D. 2000); *Von Colln v. County of Ventura*, 189 F.R.D. 583, 594 (C.D. Cal. 1999)); the use of tasers (*see*, *e.g.*, *Coleman v. Wilson*, 912 F.Supp. 1282, 1293, 1323 E.D.Cal. 1995)); the use of electroshock belts (*see, e.g.*, *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1238 (9th Cir. 2001)), remanding so plaintiff could identify appropriate subclasses to remedy class defects)); the denial of mental health care (*see*, *e.g.*, *Neiberger v. Hawkins*, 208 F.R.D. 301, 320 (D. Colo 2002)); and the use of excessive force (*Ingles v. The City of New York*, 2003 WL 402565 (S.D.N.Y.) at * 9)). Moreover, in this Circuit, as elsewhere, injunctive challenges to prison and jail conditions invariably proceed as class actions. *See, e.g.*, *Carper v. Deland*, 54 F.3d 613 (10th Cir. 1995); *Battle v. Anderson*, 970 F.2d 716, 719 n. 4 (10th Cir. 1992); *Arney v. Finney*, 967 F.2d 418 (10th Cir. 1992); *Diaz v. Romer*, 961 F.2d 1508 (10th Cir. 1992); *Duran v. Carruthers*, 885 F.2d 1485, 1486 (10th Cir. 1989); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980); *McClendon v. City of Albuquerque*, 272 F.Supp.2d 1250, 1252 (D.N.M. 2003); *Skinner v. Uphoff*, 209 F.R.D. 484, 489 (D. Wyo. 2002); *Montez v. Romer*, 32 F.Supp.2d 1235 (D. Colo. 1999); *Marioneaux v. Colorado State Penitentiary*, 465 F. Supp. 1245 (D. Colo. 1979); *Romero v. Schauer*, 386 F. Supp. 851 (D. Colo. 1974).

force, all in conscious disregard of the serious harm that these practices inflict." *Id*. at 1279. In finding such constitutional violations, the court aptly captured the anguish and despair suffered by the inmates at the mercy of the prison officials:

> As to the above matters, defendants have subjected plaintiffs to 'unnecessary and wanton infliction of pain' in violation of the Eighth Amendment of the United States Constitution. We observe that while the simple phrase articulates the legal standard, dry words on paper cannot adequately capture the senseless suffering and sometimes wretched misery that defendants' unconstitutional practices leave in their wake. The anguish of descending into serious mental illness, the pain of physical abuse, or the torment of having serious medical needs that simply go unmet is profoundly difficult, if not impossible, to fully fathom, no matter how long or detailed the trial record may be.

Id. at 1280.

The court in *Madrid*, contrary to Defendants' arguments that this Court cannot order an appropriate remedy, ordered counsel, with the assistance of a Special Master experienced in prison administration, "to develop a remedial plan that addresses the constitutional violations set forth in the accompanying conclusions of law." *Id*. at 1283.

Here the proposed classes readily satisfy all of the requirements of Rule 23(a) and (b)(2). Additionally, this action is manageable as a class action, and this Court is clearly capable of enjoining the unconstitutional policies, practices and procedures pursued at the Jail. Indeed, because the proposed classes comprise the fluid composition of the Jail population, Plaintiffs will be unable to present their constitutional claims to this Court in the absence of class certification. Thus, without class certification, plaintiffs cannot put an end to the senseless suffering and wretched misery that Defendants' unconstitutional practices leave in their wake. Accordingly, for all of these reasons, this Court should certify the proposed classes.

II. ARGUMENT

A. The Proposed Class Should Be Certified Because it Satisfies the Requirements of Rule 23(a).

Rule 23(a) requires an analysis of four elements which are preconditions to certification: numerosity, commonality, typicality, and adequacy of the named parties to represent the class. *Shook v. El Paso County*, 386 F.3d 963, 968 (10th Cir. 2004) (*Shook 2*).[2] The Court must then look to the category of class action under Rule 23(b) for additional prerequisites involving certification of the class. *Id*. Contrary to contentions of Defendants, the classes readily meet all of the elements of Rule 23(a), as well as the requirements contained in Rule 23(b)(2) which addresses injunctive relief.[3]

1. Plaintiffs Satisfy the Impracticability of Joinder Requirement in Rule 23(a)(1)

To establish the impracticability of joinder requirement in Rule 23(a)(1), Plaintiffs need only to define the class adequately and then establish that the class is so numerous that joinder of all members is impracticable. *Neiberger*, 208 F.R.D. at 313. In determining class size, the exact number of potential members need not be shown; instead, the court makes "common sense assumptions" to support a finding that joinder would be impracticable. *Id*. Here, the average daily number of prisoners is approximately 150 a day. *See* Amended Complaint, ¶ 285.

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[2] *Shook 2* reversed and remanded the decision entered in *Shook v. Board of County Com'rs of County of El Paso*, 216 F.R.D. 644 (D. Colo. 2003) ("*Shook 1*"). On remand, the court denied class certification in *Shook v. Board of County Com'rs of County of El Paso*, 2006 WL 1801379 at *8 (D. Colo. 2006) ("*Shook 3*").

[3] Plaintiffs propose a class and two subclasses. Plaintiffs refer to these classes collectively for purposes of this Reply as the "class."

The proposed class is adequately defined and, indeed, essentially mirrors the definition of classes certified in similar cases brought by residents of closed institutions, including prisons and jails. *See, e.g.*, *Ramos*, 639 F.2d at 562 (plaintiff class comprised "all persons who are now or in the future may be incarcerated in the maximum security unit of the Colorado State Penitentiary at Canon City, Colorado"); *Neiberger*, 208 F.R.D. at 320 (class defined as "all adult patients who are now or in the future will be involuntarily committed to the Institute of Forensic Psychiatry ("IFP") of the Colorado Mental Health Institute at Pueblo ("CMHIP") due to adjudication of not guilty by reason of insanity.").[4]

Notwithstanding that the Plaintiffs' class is defined similarly to the classes in *Ramos* and *Neiberger*, Defendants nevertheless argue that the proposed class is overbroad, relying on the holding in *Shook 3* in stating that "recently, under similar circumstances, Judge Matsch ruled that identical class-defining language was "too broad." (Response at p. 7 citing *Shook v. Board of County Com'rs of County of El Paso*, 2006 WL 1801379 (D. Colo. 2006) ("*Shook 3*") at *8. Plaintiffs respectfully submit that *Shook 3,* which is currently on appeal, was wrongly decided (*see* Section II(A)2(a)(ii), *infra*), and Defendants mischaracterize the decision in *Shook 3* in any event.

In *Shook 3*, Judge Matsch ruled that a class consisting of "[a]ll persons with *serious mental health needs* who are now, or in the future will be, confined in the El Paso County Jail" "is a group that is too amorphous to proceed as a class, even one under Rule 23(b)(2). *Id*. at 7

[4] Other jurisdictions have certified classes which were defined similarly to the proposed class here. *See, e.g.*, *Hiatt v. County of Adams, Ohio*, 155 F.R.D. 605, 610 (S.D. Ohio 1994) (inmates challenging jail conditions -- class defined as "all persons confined at the Adams County Jail on August 19, 1993, all persons subsequently confined there, and all persons who may be so confined in the future"); *E. Jones 'EL v. Berge*, 2001 WL 34379611 at * 1 (W.D.Wis.) (class defined as "all persons who are now, or will in the future be, confined in the Supermax Correctional Institution in Boscobel, Wisconsin").

(emphasis in original). Judge Matsch also rejected, as too broad, a proposed alternative class defined as "all persons who are now, or in the future will be, confined in the El Paso County Jail." *Id*. at *8. Judge Matsch mistakenly reasoned that plaintiffs did not claim that certain alleged conduct constituted cruel and unusual punishment in every instance, but instead their complaint was about conduct imposed on prisoners with serious mental health needs. *Id*. Judge Matsch's conclusion that the class definition was improper is inconsistent with numerous cases in which classes have been certified in virtually identical terms.[5]

Defendants also mischaracterize Plaintiffs' allegations regarding the absence of written policies governing the use of four of the five so-called "compliance devices." Defendants contend, erroneously, that the absence of such written policies has no legal significance. On the contrary, the absence of written policies regarding the use of potentially dangerous devices is evidence of the class-wide risk of harm. This is especially so in view of the recommendations of the United States Department of Justice and other respected correctional organizations that certain devices be used only with strict regulations that limit their use and establish safeguards. (Amended Complaint at ¶¶ 21, 22, 23, 24, 73, 76 and 77).

Defendants next contend, without any legal support, that Plaintiffs' proposed designation of subclasses indicates a lack of commonality in the classes as a whole. They further contend that it would be error to permit a convicted prisoner to represent a class containing unconvicted pretrial detainees and *vice versa*. This argument does not pertain to the numerosity requirement

[5] *See, e.g.*, *McClendon v. City of Albuquerque*, 272 F.Supp.2d 1250, 1252 (D.N.M. 2003) ("all persons with mental and/or developmental disabilities" incarcerated in county jail); *Coleman*, 912 F. Supp. at 1293 ("all inmates with serious mental disorders who are now or who will in the future be confined within the California Department of Corrections"); *Bradley v. Harrelson*, 151 F.R.D. 422, 423 (M.D. Ala. 1993) ("all acutely and severely mentally ill inmates"); *Anderson v. Coughin*, 119 F.R.D. 1, 2, 3 (N.D.N.Y. 1988) (certifying class including "all inmates . . . who suffer from a mental illness").

in Rule 23(a)(1), and is wrong in any event. *See* ¶¶ 15 and 16 of Plaintiffs' Amended Motion to Certify Class for analysis of the designation of subclasses. Convicted prisoners are protected by the Eighth Amendment against "cruel and unusual punishments," whereas pretrial detainees are protected by the due process clause of the Fourteenth Amendment against any conditions that constitute "punishment." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Nevertheless, the Tenth Circuit has held that, in the context of challenges to conditions of confinement, the Eighth Amendment provides a benchmark for such claims under the Fourteenth Amendment, and Eighth and Fourteenth Amendment standards are equivalent. *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998). "Pretrial detainees... have been included in the same class as convicted inmates..." Newberg on Class Actions, 4th ed. § 25:8, citing *Green v. Ferrell*, 664 F.2d 1292 (5th Cir. 1982). Here, with respect to those claims where such an overlap in standards does not occur, Langley, the only class representative who is a prisoner, will only represent the subclass of prisoners, as opposed to the subclass of pretrial detainees.

Defendants further mistakenly contend that, with respect to the individual claims, numerosity is not satisfied, arguing that joinder is not impracticable because, for example, allegedly no inmate has actually been shocked by the Nova belt, and allegedly there is no evidence as to the population of jail inmates with "serious mental health needs." Moreover, Defendants argue that even assuming numerosity is met, "none of the classes can be certified since the Amended Complaint does not identify a single unified policy that applies to every

single member of the proposed classes."[6] Defendants are wrong on both counts for the same reason.

Plaintiffs have clearly alleged that all class members are at substantial risk of serious harm as a result of the policies, practices and procedures described in the Amended Complaint and the Amended Motion to Certify Class and applied generally to the proposed class. The Amended Complaint provides examples of regular, frequent and routine acts and omissions which were carried out pursuant to these policies and practices. Alternatively, Plaintiffs allege that Defendants are aware of these regular, frequent, or routine acts or omissions and are deliberately indifferent to the risk they pose to prisoners' safety and constitutional rights. (Amended Complaint, ¶¶ 175-194).

Assuming the class is too broad, which it is not, Plaintiffs propose alternative subclasses which more narrowly describe the class of prisoners subjected to each specific type of harm. For example, with respect to the first claim for relief pertaining to Defendants' unconstitutional use of the so-called "compliance devices," a subclass could consist of all present and future prisoners at the Jail who have been or may be subjected to the use of the restraint chair, the pepperball gun,

[6] Defendants assert that the closest allegation of a specific identifiable policy that might apply across the board to all inmates is the attorney violation policy, and then argue that the deprivation alleged in the Amended Complaint was the result of an alleged misapplication of that policy. Defendants mischaracterize the allegations in the Amended Complaint. They do not allege any misapplication of policy, but instead allege that the denial of the visit on June 15, 2006, was carried out *pursuant* to the policy of the Defendants adopted for the purpose of interfering with the ACLU investigation. (Amended Complaint, ¶¶ 3, 229-30, 319). This policy violates, and threatens to violate, the constitutional rights of all inmates at the Jail. Moreover, contrary to Defendants' contention, this policy does not affect only prisoners who desire to file civil actions. Instead, Plaintiffs allege that prisoners facing criminal charges also face an unjustifiable risk of being prevented from meeting with criminal defense attorneys who are asked by family or friends to consider representing a prisoner. (Amended Complaint at ¶ 242).

tasers, and/or pepper spray. Such classes have been certified by federal district courts throughout the country.[7]

Defendants next rely on *Monreal v. Potter*, 367 F.3d 1224 (10th Cir. 2004) in support of their argument that class certification is not warranted in this case. Defendants' reliance on *Monreal* is unavailing. In *Monreal*, the Court found that "[p]laintiffs simply [had] not articulated a policy -- besides generalized non-compliance with Title VII -- that could be the subject of injunctive or declaratory relief. . ." *Id.* at 1236. Here, in contrast to *Monreal*, plaintiffs have articulated specific unconstitutional policies, procedures and practices which they seek to enjoin. *See* discussion of remedy in Section II(B)(1).

Defendants' contention that no inmate has yet been shocked by the Nova belt, assuming this fact be true, is irrelevant. All inmates are subject to having to wear the belt and are threatened by an unwarranted shock. Thus, Plaintiffs are subjected to the terror and fear of being shocked. As Defendants acknowledged in their Answer, any prisoner can be classified as "supermax" at any time, and Defendants have declared that all prisoners in supermax status must wear the belt. Similarly, the statement in Mr. Dawson's Affidavit that most of the inmates are

[7] *See, e.g., Austin v. Hopper*, 15 F.Supp.2d 1210, 1229-30 (M.D.Ala. 1998) ("all present and future Alabama inmates who have been or may be placed on the hitching post"); *Umar v. Johnson*, 1995 WL 493485 (N.D. Ill.) at *1 (all inmates at Stateville Correctional Center (a) who now have, or who hereafter during the pendency of this action will have, pending disciplinary or grievance hearings; (b) who have requested or hereafter request the presence of witnesses at such hearings; and (c) whose requests in that respect have been or are hereafter denied as a result of defendants' practice of such denials); *Anderson v. Cornejo*, 199 F.R.D. 228, 263 (D. Ill. 2000) (certifying injunctive class under 23(b)(2) defined as "all airline passengers subjected to non-routine personal searches by United States Customs employees at any United States international airport); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 184 F.R.D. 583, 586 (D. Ohio 1998) ("all current and future Hispanic motorists and/or passengers traveling in Ohio, who are involved in traffic stops by officers, agents or employees of the Ohio State Highway Patrol, and are questioned about immigration matters, or suffer the seizure of their lawfully issued immigration documents").

"docile and nonviolent" is irrelevant.[8] Plaintiffs have alleged that Defendants act or refuse to act on grounds that are generally applicable to the entire class of prisoners.

Prison and jail officials violate the Eighth Amendment when, acting with deliberate indifference, they subject prisoners to a "substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). The threatened harm need not be imminent. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("[w]e have great difficulty agreeing that prison authorities ... may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next . . . year"). Indeed, for purposes of injunctive relief, the threatened harm need never materialize; it is the risk that violates the Eighth Amendment and entitles the plaintiffs to injunctive relief. "[I]t 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 yet had happened to them". *Id.*

Here, as in *Neiberger*, the focus is on common issues such as the Defendants' policies and general practices, not the application of those policies in particular cases. *Neiberger*, 208 F.R.D. at 314. In *Neiberger*, the court, in addressing numerosity, rejected the argument that because each plaintiff had different diagnosis and treatment issues, each plaintiff's case required a particularized analysis. Thus, the court held that "[p]laintiffs are alleging across-the-board systemic defects." Therefore, in determining that numerosity was met, the court held that these common issues outweigh individualized problems. *Id*.

2. There are questions of law and fact common to the class.

[8] Even if the alleged "facts" were somehow relevant to this inquiry, an examination of the merits should not be performed in deciding whether to certify a class. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177 (1974) (the court cannot consider the merits of plaintiffs' claims in determining whether a suit may be maintained as a class-action).

Rule 23(b)(2) requires only a single common question of law or fact. *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1989). Thus, "the commonality requirement has been characterized as a 'low hurdle' [that is] easily surmounted [citations omitted], because to satisfy commonality, a plaintiff need only show that there is 'at least one question of law or fact common to the class.'" *Westefer v. Snyder*, 2006 WL 2639972 at *3 (S.D.Ill.) (internal citations omitted); *Skinner v. Uphoff*, 209 F.R.D. at 488 ("Because a single common issue can satisfy commonality, some courts have described the commonality standard as one that is fairly easily met.") (citing *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994)).

Here, Plaintiffs meet the commonality requirement of Rule 23(a)(2).

a. **There are common questions of fact.**

The Amended Complaint identifies numerous common questions of fact that readily satisfy Rule 23(a)(2). (Amended Motion, at pp. 5-6). Plaintiffs identify, for example, as a common question of fact "[w]hether the acts and omissions of the Defendants and their deputies with regard to the use of force, including the restraint chair, the pepperball gun, pepper spray, tasers, and/or the electroshock belt, pose unreasonable risks of harm to prisoners' health, safety, welfare, and constitutional rights."

(i) **Plaintiffs properly challenge the Jail's system-wide policies, practices and procedures imposed upon all inmates.**

Defendants argue that they are not constitutionally required to adopt written policies, and that the nonexistence of written policies cannot constitute a common fact that satisfies Rule 23(a)(2). The Amended Complaint, however, alleges common issues of fact far more extensive than the lack of written policies to mitigate potential abuses by deputies. The common factual issues include the actual policies, practices and procedures that the Defendants apply generally

on a class-wide basis to all of the prisoners at the Jail. These policies, practices, and procedures pose unreasonable risks of harm to the health, safety, and welfare of the prisoners, in violation of the Eighth and Fourteenth Amendments.

Defendants argue that not one of the facts alleged by Plaintiffs is common to all members of the proposed class. They contend that not all jail inmates will be subjected to the use of compliance devices, denied access to courts or counsel, disciplined or in need of mental health care. This argument is misplaced.

"In a civil rights suit, commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001). In their Amended Complaint, Plaintiffs allege that Defendants have subjected and/or threatened to subject, all present and future inmates at the Jail to their unconstitutional system-wide policies, practices and procedures. Thus, commonality is satisfied in that each prisoner, by virtue of the Jail's policies, practices and procedures, is subject to the same harm actually physically imposed upon other prisoners.

For example, an inmate need not wait until he is actually physically unconstitutionally abused; instead, threat of such abuse through the Jail's unconstitutional policies, practices and procedures is sufficient. *Ramos*, 639 F.2d at 572 ("an inmate does have a right to be reasonably protected from constant threats of violence and sexual assault from other inmates. . . . Moreover, he does not need to wait until he is actually assaulted before obtaining relief."); *Baby Neal*, 43 F.3d at 56 ("[C]lass members can assert such a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are *subject* to the same harm will suffice") (emphasis in original); *Hassine v. Jeffes*, 846 F.2d 169, 177-78, n. 5 (3d Cir. 1988)

(Rule 23 does not require all plaintiffs actually suffer the same injury; rather, the fact that plaintiffs were subject to the injury, and that they faced the immediate threat of these injuries, the possible need for adequate mental health care in the future) sufficed for Rule 23; *Riley v. Jeffes*, 777 F.2d 143, 147 (3d Cir. 1985) (finding constitutional violation in prisoners being subject to constant threat of violence and sexual assault, and rejecting contention that plaintiff must actually be assaulted before obtaining relief).

Contrary to Defendants' argument, the Tenth Circuit's decision in *Milonas v. Williams,* 691 F.2d 931 (10th Cir. 1982) supports class certification in this case. The practices challenged in *Milonas* included placing boys in isolation facilities and using unjustifiable and excessive physical force. Although there was no allegation that each and every resident of the facility was actually the victim of excessive force or was actually placed in isolation, the court explained that every resident was indeed "in danger of being subjected to" the enjoined behavior-modification practices. *Id.* at 938. Here, as in *Milonas*, Plaintiffs allege that each prisoner is in danger of being subjected to the excessive use of force. Indeed, Defendant Dawson has vowed to use so-called "compliance devices" on any prisoner who fails to comply with orders or who makes a verbal statement that deputies construe as a "threat." (Amended Complaint, ¶¶ 30, 57).

(ii) ***Shook 3* is factually distinguishable, and wrongly decided.**

In an effort to establish lack of commonality, Defendants rely on Judge Matsch's decision in *Shook 3* finding that the class defined as "all persons with serious mental health needs who are now, or in the future will be, confined to the El Paso County Jail" lacked sufficient commonality to warrant certification. *Shook 3* at *9 (appeal pending).

In *Shook 3*, Plaintiffs brought a class-action complaint alleging various policies and practices at the El Paso County Jail, such as inadequate staffing and training, that increased the risk of mental and physical harm to mentally ill inmates, including the risk of self harm. All of the policies and practices complained of related to prisoners with serious mental health needs. The plaintiffs in *Shook 3* sought an order enjoining the defendants to remedy these deficiencies including, for example, to "cease using restraints, pepper spray, and electroshock weapons (tasers) against prisoners exhibiting signs of mental illness in circumstances that pose a substantial risk of serious harm to such prisoners." *Id*. at *3.

Judge Matsch noted that "[t]he plaintiffs candidly state that the purpose in pursuing this action is to determine the 'scope of prisoner's constitutional rights to mental health services' and identify it as the legal standard that is common to the entire class of 'jail prisoners with serious mental health needs.'" *Id*. at *5. Judge Matsch, however, observed that mental disorders are "difficult to categorize, and indeed the term 'mental disorder' is not subject to precise boundaries." *Id*. at *6. Judge Matsch held that the term "serious mental health needs" was vague and that the class was too amorphous to proceed as a class. Judge Matsch further held that "[c]ertification of a nebulous class would result in numerous problems." *Id.* at *7.

Shook 3 is factually distinguishable from this case. In *Shook 3*, Judge Matsch found that "the plaintiffs do not complain of a written policy or standard procedure or practice to which all class members are subject." *Shook 3* at *11. Judge Matsch further found that "[t]he plaintiffs do not complain of a lack of conduct that is premised on grounds applicable to the entire class." *Shook 3* at *11. Here, Plaintiffs complain of policies, practices and procedures to which all

persons in the Jail are subject. Thus, presumably even Judge Matsch would have certified the class proposed by Plaintiffs in this case.

Also, unlike *Shook 3*, no inquiry need be made as to whether a particular prisoner suffers from any mental disorder. Thus, unlike *Shook 3*, Plaintiffs do not seek an order requiring Defendants to "cease using restraints, pepper spray, and electroshock weapons ("tasers") *against prisoners exhibiting signs of mental illness* in circumstances that pose a substantial risk of serious harm to such prisoners" (Emphasis added). Instead, Plaintiffs seek, *inter alia*, an order requiring Defendants to cease their unconstitutional policies, practices and procedures to which all Jail prisoners are subject.

In any event, Plaintiffs respectfully submit that Judge Matsch's decision in *Shook 3* is wrong and that other decisions certifying such class actions represent the better view. C*f.*, *Jane B. v. The New York City Department of Social Services*, 117 F.R.D. 64, 70 (S.D. N.Y. 1987) ("common questions of fact as to whether defendants have failed to provide plaintiffs with adequate medical, psychological, counseling and educational services, safe and sanitary conditions, and adequate supervision."); *see also,* n. 5, *supra,* citing cases in which classes have been certified in virtually identical terms as that in *Shook 3*.

Among other things, Judge Matsch "prematurely focused on whether the court could ultimately fashion a remedy that satisfied" the Prison Litigation Reform Act ("PLRA"), contrary to the Court's admonition in *Shook 2* that it not do so. *Shook 2*, 386 F.3d at 972. Moreover, Judge Matsch focused on the difficulty in identifying the members of the class even though the Court in *Shook 2* made clear that perceived difficulty in identifying members of the plaintiff class not justify denial of certification under Rule 23(b)(2). *Id.* Additionally, Judge Matsch

improperly evaluated the merits of the plaintiffs' claims contrary to *Shook 2*. *Id*. at 971 ("In determining the propriety of a class-action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.")

In evaluating the merits, Judge Matsch also made errors of substantive law in concluding that the Constitution does not "affirmatively create[] a right to mental health services or treatment." *Shook 3* at *5. *Compare West v. Atkins*, 487 U.S. 42, 56 (1988) (the government bears "an affirmative obligation to provide adequate medical care" to prisoners in its custody); *Ramos*, 639 F.2d at 574 (the State is required to make available to inmates a level of medical care reasonably designed to meet the routine and emergency health care needs of inmates, including psychological or psychiatric care).

Finally, Judge Matsch erred in his application of Rule 23's requirements in assuming that a challenge to inadequate health care services in a prison or jail can never be litigated as a class because "[t]he interest protected by the Eighth Amendment is highly individualistic and case specific in character." The statement is directly contrary to the holding in *Ramos* affirming the District Court's finding of "deliberate indifference to the serious health needs of prison population." *Ramos*, 639 F.2d at 578.

Thus, to the extent Judge Matsch's decision is interpreted to prohibit all class actions seeking to enjoin systemic Eighth Amendment violations, including deliberate indifference to serious medical needs involving mental health, and excessive use of force, and particularly excessive use of force with respect to policies, practices and procedures pertaining to restraint chairs, chemical weapons and electroshock weapons, Plaintiffs submit that *Shook 3* was wrongly

decided and contrary to Tenth Circuit precedent and to federal court decisions in Colorado and throughout the country certifying similar class actions pursuant to Rule 23(b)(2). *See, e.g.*, *Baby Neal*, 43 F.3d at 57 (noting that "(b)(2) classes have been certified in a legion of civil rights cases where commonality findings were based primarily on the fact that defendants' conduct is central to the claims of all class members irrespective of other individual circumstances and the disparate effects of the conduct.") (citing 7A Wright et al, § 1763 at 219)[9]; *Neiberger, supra;* and *Christina A.*, 197 F.R.D. at 668.[10]

In *Neiberger*, patients in a state mental health facility, pursuant to adjudications of not guilty by reason of insanity ("NGRI"), brought a class-action seeking only injunctive and declaratory relief and alleging claims for, *inter alia*, violations of due process, the Rehabilitation Act, and the Colorado Care and Treatment of the Mentally Ill Act. In ruling that plaintiffs

[9] The Tenth Circuit in *J.B. Hart v. Valdez*, 186 F.3d 1280 (10th Cir. 1999) ruled that "[g]iven the complex facts and legal issues involved in this case, we cannot say the district court abused its discretion when it refused to characterize plaintiffs' claims as a systematic violation." *Hart*, 186 F.3d at 1289. In so ruling, the Court in *Hart* recognized that this conclusion differed from that reached by the Third Circuit in a similar case. *Id*. at 1289, n. 5 citing *Baby Neal*, 43 F.3d at 60-62. An analysis of the *Hart* decision is contained in Section II.(A)(2)(b)(ii).

[10] *See also Anderson v. Garner*, 22 F. Supp.2d 1379, 1387 (N.D. Ga. 1997) (certifying inmate class-action claiming use of excessive force during "shakedowns," and holding that the conduct of the Tactical Squad officers applies generally to members of the proposed class, thus satisfying the "generally applicable" requirement of Rule 23(b)(2) (citing *cf. LaMarca v. Turner*, 995 F.2d 1526, 1541-1544 (11th Cir. 1993) (affirming injunctive order issued to Rule 23(b)(2) class consisting of prisoners); *Kendrick v. Bland*, 740 F.2d 432 (6th Cir. 1984) (affirming portions of injunctive order preventing use of excessive force by prison guards at the Kentucky State Penitentiary, after inmates litigated in district court as Rule 23(b)(2) class); *Hoptowit v.Ray*, 682 F.2d 1237, 1245, 1250-51 (9th Cir. 1982) (affirming injunctive order issued to Rule 23(b)(2) class consisting of prisoners); *In re Southern Ohio Correctional Facility*, 173 F.R.D. 205, 208 (S.D. Ohio 1997) (approving settlement of Rule 23(b)(2) class action brought by prison inmates); *Austin v. Pennsylvania Dep't of Corrections*, 876 F. Supp. 1437, 1444 (E.D. Pa.) (same); *Murillo v. Musegades*, 809 F. Supp. 487, 502-03 (W.D. Texas 1992) (certifying Rule 23(b)(2) class consisting of Hispanic citizens who alleged, among other things, use of excessive force by El Paso Border Patrol officers); *Patrykus v.Gomilla*, 121 F.R.D. 357, 362-63 (N.D.Ill. 1988) (certifying Rule 23(b)(2) class consisting of homosexual and bisexual men who alleged use of excessive force by police during raid of nightclub); *Curtis v. Voss*, 73 F.R.D. 580, 582-83 (N.D.Ill. 1976) (certifying Rule 23(b)(2) class consisting of all inmates at Stateville Correctional Center based on allegations of excessive force by prison guards)).

satisfied the commonality requirement with respect to the NGRI patients at the facility, the court rejected defendants' argument that the individual differences in the cases required a particularized analysis that precluded class treatment. The court held that the defendants "mistakenly emphasized each patient's individual psycho-pathology, rather than the alleged systemic, institutional defects at [the state mental health facility]." *Neiberger*, 208 F.R.D. at 315. Moreover, the court held that "[i]t is these systemic problems which the Plaintiffs argue violate their statutory and constitutional rights. The commonality requirement is therefore met as to the NGRI patients at IFP." *Id*.

Here, as in *Neiberger*, Defendants mistakenly emphasize the particular circumstance of each inmate, rather than the class-wide policies and practices that are the focus of Plaintiffs' challenge. The commonality requirement is satisfied "as long as the members of the class have allegedly been affected by a general policy of the defendant, and the general policy is the focus of litigation." *Hiatt*, 155 F.R.D. at 609.

The court's decision in *Christina A.,* like *Neiberger,* also demonstrates that Plaintiffs' allegations demonstrate the necessary commonality. The residents of a juvenile boarding school challenged several policies similar to policies challenged in this case, such as use of restraints, lack of disciplinary due process, and excessive use of force. With regard to the use of restraints, for example, the court noted that the common questions were the defendants' policies and practices, not the particular application of those policies in individual or specific cases. The court in *Christina A.* held that "[t]he fact that those conditions, policies and procedures affect the Plaintiffs differently does not defeat the commonality of their claims." *Id*. at 668. Moreover, the court held that "the Plaintiffs' claims are directed towards the conditions, policies and practices at

Plankinton in general and not the application of those conditions to each individual member of the class." *Id*. at 668.[11]

Here, as in *Christina A.*, the fact that the conditions, policies and procedures may affect the Plaintiffs differently does not defeat commonality. Plaintiffs' claims are directed towards the conditions, policies and practices at the Jail in general and not the application of those conditions to each individual member of the class. *See also Hargett v. Baker*, 2002 WL 1433729 (N.D.Ill.) at *3 ("Whatever the factual variations among the individual SVP [sexually violent persons] mental-health needs may be, the Plaintiffs' attack on the SVP treatment program is premised on a broad allegation that the Defendants engaged in standardized conduct toward the members of the proposed class…"); *Austin v. Hopper*, 15 F.Supp.2d at 1225 ("Though there certainly may be some factual differences between the individual class members and the nature and severity of their treatment on the chain gang [use of a hitching post as a disciplinary tool], such individual differences to not defeat certification because there is no requirement that every class member be affected by the institutional practice or condition in the same way").

b. **There are common questions of law.**

As set forth in Plaintiffs' Motion, the Amended Complaint identifies numerous common questions of law that readily satisfy Rule 23(a)(2). Plaintiffs identify, for example, as a common question of law: [w]hether the alleged policies and practices and alleged acts and omissions of the Defendants exhibit deliberate indifference to the risk that deputies will violate prisoners'

[11] In *Christina A.*, the defendants noted that each of the four plaintiffs agreed that the restraint was appropriate or necessary. Nevertheless, the court ruled that "[a] determination of commonality, however, should not be confused with an examination of the merits of the claim. *Id*. at 668, n. 1 (citing *Paxton v. Union National Bank*, 688 F.2d 552, 561 (8th Cir. 1982)).

rights under the Eighth and Fourteenth Amendments and Article II, Sections 20 and 25 of the Colorado Constitution."

(i) **All putative class members are subject to, and threatened by, Defendants' unconstitutional policies, practices and procedures.**

Defendants contend that "[t]here is no one statutory or constitutional claim common to all plaintiffs and all putative class members." (Response at 15). Specifically, Defendants contend that not all members have been, or are imminently likely to be, subjected to the use of compliance devices or other alleged physical abuses; that not all members of the putative class have been, or are imminently likely to be, affected by policies regarding attorney communications; and that not all members of the putative class suffer from serious mental health problems. Thus, Defendants argue that the common questions of law do not satisfy the commonality requirement of Rule 23(a)(2). Notwithstanding that this argument appears to be addressing whether there are common factual issues, Defendants' overly narrow interpretation of the commonality requirement is misguided.

Contrary to Defendants' argument, all of the questions of law identified in the Motion are common to all putative class members. That, for example, not all class members actually have been physically subjected to the use of compliance devices is not determinative. Instead, what is determinative is that each inmate at the Jail is threatened by, and subject to, the Jail's unconstitutional policies, practices and procedures, including those pertaining to the use of these compliance devices. *See Von Colln,* 189 F.R.D. at 591 ("plaintiffs' causes of action involve common questions of law – i.e., whether the Ventura County practice of using the Pro-straint chair violates an arrestee's constitutional and statutory rights."); *cf. Hayes v. Secretary of Dept. of*

Public Safety, 455 F.2d 798, 801 (4th Cir. 1972) (inmate of state institution who did not allege that brutality and other misconduct had been practiced against him, but rather that he was part of institutional population that must live from day to day under the threat of such brutality, was 'injured' and thus a member of the class that was injured, and he could maintain a class action for himself and other similar situated against the prison officials).

Similarly, that not all putative class members are in need of mental health care is not determinative. Instead, what is determinative is that putative class members are subject to the policies, practices, and procedures pertaining to inmate access to mental health care and may need such services in the future. *Cf. Jane B.*, 117 F.R.D. at 70 ("the conditions [failure to provide adequate medical and psychological services] they [incarcerated juveniles] challenge affect all members of the class and relief for all class members is predicated on the same legal theory"); *Hassine v. Jeffes*, 846 F.2d at 178, n. 5 (3d Cir. 1988) (prisoners were subject to the inadequacy of the provision of mental health care services "to which they are entitled, and which they might at some time require").

Here, because each putative class member is threatened by, and subject to, the Jail's unconstitutional policies, practices and procedures, including, as in *Anderson*, *Christina A.*, *Madrid*, and *Von Colln*, policies, practices and procedures pertaining to the use of excessive force, use of restraints and access to mental health care, the legal issues will be the same for all prisoners and future prisoners at the Jail.

Defendants contend that Plaintiffs have taken a number of specific allegations concerning incidents involving a few individuals over an extended period of time and applied them to the entire Jail population. Defendants then argue that the commonality requirement cannot be

satisfied via general allegations of systemic violations of various laws. (Response at 16 citing *J.B. Hart,* 186 F.3d at 1289). Defendants' argument is factually incorrect and their reliance on *Hart* is misplaced.

Contrary to Defendants' erroneous characterization, Plaintiffs have not simply extrapolated a number of specific incidents to the entire Jail population. Instead, Plaintiffs provide some specific examples of prisoners subjected to the challenged policies, practices and procedures that the Defendants apply generally to the class of all prisoners.

(ii) **Hart does not preclude certification of cases seeking to enjoin systemic institutional constitutional violations.**

Defendants misinterpret *Hart*. In *Hart*, mentally or developmentally disabled children in the custody of New Mexico launched an across-the-board attack on the entire New Mexico child welfare system, alleging that a host of New Mexico state officers had failed to provide protections and therapeutic services required by federal statutes and the Constitution. Plaintiffs in *Hart* initiated their class action "[i]n an effort to improve the services and protections provided by the state and to effect system-wide change." *Id*. at 1283. The proposed class comprised "all children who are now or in the future will be (a) in or at risk of State custody and (b) determined … to have any form of mental and/or developmental disability for which they require some kind of therapeutic services or support." *Hart*, 186 F.3d at 1287.

In *Hart*, children had come into the custody of the state in a variety of ways, and were housed in a variety of facilities and institutions including foster homes, residential treatment centers, group homes, temporary shelters and psychiatric hospitals. *Hart*, 186 F.3d at 1288. One plaintiff had been in seven separate facilities when the complaint was filed and an additional eleven facilities during the litigation. Thus, the court found that "the ways in which these

children come into state custody as well as their particular placements once in custody differ drastically," and that "the circumstances of these children vary greatly." *Id*. at 1288-89. "Other than all being disabled in some way and having had some sort of contact with New Mexico's child welfare system, no common factual link joins these plaintiffs." *Id*. at 1289. In addition, the class members claimed under different statutes. Thus, the court concluded that "there is no one statutory or constitutional claim common to all named Plaintiffs and all putative class members." *Id*. at 1290.

The Court next rejected plaintiffs' argument that the common claim was "that systemic failures in the defendants' child welfare delivery system deny all members of the class access to legally mandated services which plaintiffs need because of their disabilities." *Id.* at 1289. The court "refuse[d] to read an allegation of systematic failures as a moniker for meeting the class-action requirements." *Id*. Moreover, the court "refuse[d] to hold as a matter of law, that *any* allegation of systematic violation of various laws *automatically* meets Rule 23(a)(2)." (Emphasis in original and added). Instead, the court ruled that "[t]he District Court retains discretion to determine commonality because it is 'in the best position to determine the facts of the case, to appreciate the consequences of alternative methods of resolving the issues of the case and... to select the most efficient method for their resolution.'" *Id*.

Unlike *Hart*, the Plaintiffs here are all confined to a single institution and subject to the same policies and practices implemented by the same decision-makers. They seek to enjoin specific policies, practices and procedures that the Defendants direct to the class as a whole. Moreover, unlike *Hart*, where plaintiffs alleged unspecified violations of five statutes and a constitutional provision against a host of the New Mexico state officers, Plaintiffs here allege

specific constitutional violations against only the Jail. Whereas the circumstances of the children in *Hart* varied greatly, Plaintiffs and all members of the putative class here are inmates at the Jail and subject to Defendants' unconstitutional policies, practices and procedures.

Thus, here, unlike in *Hart*, there is a "constitutional claim common to all named Plaintiffs and putative class members" (*Hart*, 186 F.3d at 1290), and the commonality requirement is satisfied. *See Neiberger*, 208 F.R.D. at 315 ("finding that the commonality requirement was met, and holding that "[t]he Defendants mistakenly emphasize each patient's individual psycho-pathology, rather than the alleged systemic, institutional defects at IFP. It is these systemic problems which the Plaintiffs argue violate their statutory and constitutional rights.").

3. The claims are typical of the claims of the class.

The typicality requirement of Rule 23(a)(3) is not an onerous one. *Christina A.*, 197 F.R.D. at 668 (citing *Paxton*, 688 F.2d 562). Indeed, "the typicality requirement is ordinarily not argued…. it is to be recognized that there may be varying fact situations among individual members of the class and this is alright so long as the claims of the plaintiffs and the other class members are based on the same legal theory or remedial theory." *Penn v. San Juan Hosp., Inc.*, 528 F.2d 1181, 1189 (10th Cir. 1975); *see Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1998). "Typicality may be assumed where the nature of the relief sought is injunctive and declaratory." *Nicholson v. Williams*, 205 F.R.D. 92, 99 (E.D.N.Y. 2001). Here, Plaintiffs seek only injunctive and declaratory relief, and all class members' claims are based on the same legal and remedial theories.

a. **All Plaintiffs and putative class members are subjected to the Jail's policies, practices and procedures.**

Defendants argue that Plaintiffs cannot show that they suffer the same type of harm as that of the putative class based on the varied and disparate actions complained of by Plaintiffs, the alleged fact that none of the named Plaintiffs have ever been tasered or shocked by the Nova belt, and the erroneous conclusion that much of the putative class will suffer no justiciable injury at all. (Response, at 19). Plaintiffs, as well as the putative class members, however, are all subject to the Jail's unconstitutional policies, practices and procedures. *Von Colln,* 189 F.R.D. at 591 (finding that typicality was met, reasoning that "[i]f it is found that the policies of the VCSD [Ventura County Sheriff's Department] associated with the use of the [Pro-straint] chair are in violation of the inmates' constitutional or statutory rights, then that policy would be unconstitutional as to all Ventura County Jail detainees.")

In *Christina A.*, the court found that the due process and First Amendment claims of all six plaintiffs with regard to several of the conditions, policies and practices complained of, including excessive force during cell extraction, isolation for arbitrary reasons, the conditions in the crisis cells, the inadequate training and supervision of the staff, the lack of procedure involved in disciplinary decisions, and the reading and censoring of plaintiffs' mail were typical of the due process claims of the entire class. *Id.* at 668. The court held that "the fact that each named Plaintiff has personally experienced a different combination of these conditions, policies and practices does not defeat the typicality of the claims because everyone in the class was subject to them. *Id.* at 668 (citing *Milonas v. Williams*, 691 F.2d at 938). Thus, the court ruled

that "all the Plaintiffs' claims are based on the same legal theory regardless of the 'factual variations' in their claims." *Id.*[12]

Similarly, in *Hargett, supra*, prisoners detained in a sexually violent persons unit brought a class action against the State of Illinois, alleging that punitive conditions and inadequacies of a treatment program deprived them of a realistic opportunity to progress through the treatment program and gain their release. In certifying the plaintiffs' class, the court rejected the argument that the alleged mistreatment, as it related to each class member, was unique in that the claims of each individual class member required the application of separate defenses and determinations of liability. *Id.*, at *4. The court held that "[t]he named Plaintiffs and members of the proposed class, while all subjected individually to varying treatment, are united in their allegation that they all receive constitutionally inadequate treatment flowing from the same systemic deficiencies in Defendants' program." *Id.* at * 4; *see Skinner v. Uphoff*, 209 F.R.D. at 488 (typicality satisfied where claims based on failure to properly train and supervise correctional officers regarding inmate-on-inmate violence, and by failing to adequately investigate and discipline staff misconduct regarding this violence).

Here, as in *Christina A.*, the fact that each named Plaintiff has personally experienced a different combination of these conditions, policies and practices does not defeat the typicality of

[12] The court in *Christina A.* noted that there were claims typical only for a certain group of plaintiffs, such as claims that relate to female plaintiffs. The court, however, noted that this did not defeat a finding of typicality as an action may be brought or maintained as a class action with respect to certain issues, or... a class may be divided into subclasses and each subclass treated as a class. *Id.* at 668-69. Similarly, should this Court find that any claims are typical only for a certain group of plaintiffs, the class may be divided into subclasses and each subclass treated as a class. Indeed, as explained in the Amended Motion at 6, Plaintiffs seek certification of two subclasses of pretrial detainees and convicted prisoners. (See pp. 15-16 of Plaintiffs' Amended Motion to Certify Class explaining why subclasses are necessary). Additional possible narrower subclasses are discussed in Section II(A)(1) at pp. 8-9, *supra*.

the claims because everyone in the class is subject to them. Plaintiffs' claims are based on the same legal theories regardless of the factual variations in their claims. The Plaintiffs and the putative class members are united in their allegation that they all are subject to the Jail's unconstitutional policies, practices and procedures and the same systemic deficiencies.

b. The Jail's threat of imposing its unconstitutional policies, practices and procedures upon all prisoners constitutes actual injury.

Defendants' argument that the threat of harm is not an actionable injury is also misplaced, and Defendants' reliance on *Collins v. Cundy*, 603 F.2d 825 (10th Cir. 1979) and *Gehl Group v. Koby*, 838 F. Supp. 1409 (D. Colo. 1993) is misplaced. These cases do not involve class actions brought by inmates seeking to enjoin unconstitutional policies, practices and procedures. Indeed, *Collins* involved an action for damages with respect to a single verbal threat of harm to an individual. Plaintiffs here are not simply complaining of "verbal harassment or abuse" as in *Collins*. Also, unlike in *Gehl*, Plaintiffs allege that the Jail's policies, practices and procedures "amount[] to more than mere verbal threats." *Id*. Indeed, as the court in *Gehl* recognized, "courts have found a violation of substantive due process in certain circumstances where threatening language is coupled with physical abuse or a physical threat to kill." *Gehl*, 838 F. Supp. at 1418.

c. Defendants cannot defeat class certification by attempting to intertwine the merits with class-action considerations.

Defendants next attempt to intertwine the merits with the otherwise proper consideration of issues germane to whether the case should be certified as a class-action. This effort is equally unavailing. For example, Defendants mistakenly argue that to individually prevail on their claim for inadequate mental health care, each Plaintiff would have to show a serious deprivation and that the defendants knew of and disregarded an excessive risk to Plaintiff's health or safety. On

the contrary, Plaintiffs challenge Defendants' policies and practices, not the way in which those policies impact the particular mental health problems of specific prisoners. For example, as a matter of policy, Defendants deny prisoners the opportunity to see a mental health professional unless they pay $100 for an appointment. The $100 price tag obviously will adversely affect indigent prisoners with serious mental health needs.

Plaintiffs' allegations are sufficient to establish the requisite deliberate indifference. In any event, the Amended Complaint's allegations regarding denial of adequate mental health care to indigent prisoners are narrower than Defendants argue. In fact, Plaintiffs merely request that indigent prisoners with serious mental health needs be provided with constitutionally required mental health care by appropriately trained professionals. Contrary to Defendants' erroneous contentions, Plaintiffs' claims do not require inquiry into Defendants' knowledge of each prisoner's mental health status or needs.

d. Plaintiffs do not allege that the Jail's various lethal weapons are unconstitutional *per se*

Defendants also mischaracterize Plaintiffs' claims with respect to the use of restraints, chemical weapons and electroshock weapons. Contrary to Defendants' contention, Plaintiffs are not alleging that they are *per se* unconstitutional. Instead, Plaintiffs are alleging that Defendants' policies, practices and procedures with respect to the use of these weapons on prisoners are unconstitutional. *See Hawkins,* 251 F.3d at 1230 (injunction barring use of "stun" belt justified, but only in a narrower form that does not bar using the belt where necessary to protect courtroom security).

Thus, for example, Plaintiffs allege that Defendants' policies, practices, procedures and practices with respect to the restraint chair are unconstitutional and life-threatening, and seek to

enjoin such policies, practices and procedures. *See Ferola v. Moran*, 622 F. Supp. 814, 824-25 (D.R.I. 1985) (issuing injunction that incorporates Federal Prison System criteria for use of restraints as a guide).[13]

4. The proposed class representatives can adequately represent the entire class.

The criteria for assessing whether the lead plaintiffs will adequately represent the class include whether they and their counsel have any conflicts of interests with the members of the potential class and whether they will vigorously prosecute the interest of the class through qualified counsel. *Rutter & Willbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187-88 (10th Cir. 2002); *Neiberger*, 208 F.R.D. at 316. Plaintiffs meet these criteria.

Defendants mistakenly contend that the proposed class representatives cannot represent the entire class, arguing that several of the named Plaintiffs have suffered no justiciable injury. For example, Defendants argue that none of the Plaintiffs have been subjected to activation of the Nova belt and therefore have suffered no judicially recognized harm. All named Plaintiffs and all members of the putative class, however, are subject to the Jail's unconstitutional policies, practices and procedures. For example, all inmates are subject to having to wear the Nova belt, and all inmates are threatened with being shocked by the belt.

Defendants' argument that a pretrial detainee cannot represent a class including convicted prisoners, and *vice versa*, also misses the mark. As set forth above, in the context of challenges

[13] In *Fuentes v. Wagner*, 206 F.3d 335, 340 (3rd Cir. 2000), the court, in ruling that the prison's use of the restraint chair did not violate the Eighth Amendment, found that the inmate's "confinement in the restraint chair was consistent with the institution's policy. COs [Correction Officers] checked him at 15 minute intervals and he was released every two hours for a 10 minute period of stretching, exercise, and use of the toilet. In addition, he was given a meal and seen by the medical staff at the end of the first two-hour interval." *Id.* When finally released, he was examined by a staff nurse, as dictated by policy. *Id.* Here, Plaintiffs complain that the Jail fails to require adequate medical involvement and safety precautions.

to conditions of confinement, the Eighth and Fourteenth Amendment standards are equivalent. *Craig*, 164 F.3d at 495. With respect to those claims under which the same legal standards apply to both convicted prisoners and pretrial detainees, there can be overlapping convicted prisoners/pretrial detainees as class representatives/putative class members.

Defendants argue that because Lincoln is not currently an inmate at the Jail, his claims are moot, and he therefore is not an adequate class representative. Defendants' argument is actually one of standing, as opposed to mootness. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189-92 (2000) (standing is evaluated at the time the complaint is filed, and mootness analyzes post-complaint developments). Although Mr. Lincoln was not a prisoner in the Jail on the date the lawsuit was filed, the Amended Complaint alleges that he is certain to return to the Jail where he will again be subject to the challenged policies and practices. (Amended Complaint, ¶ 12). Because Mr. Lincoln is certain to return, he has alleged a sufficient likelihood of future harm to demonstrate standing to seek prospective relief. *Id*. at 190.[14]

B. <u>The Proposed Class Should Be Certified Because It Satisfies the Requirements of Rule 23(b)(2).</u>

[14] Even if Mr. Lincoln left the jail permanently after the complaint was filed, the mootness of his individual claims do not affect the viability of his claim to represent a class. *Christina A.,* 197 F.R.D. at 670 (fact that four plaintiffs have been transferred does not make them inadequate representatives, recognizing that "[w]hen a claim on the merits is 'capable of repetition, yet evading review,' the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation.") (citing *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980); *Milonas*, 691 F.2d at 937 ("'[t]here may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion'. . . in such instances, the district court may apply a 'relation back' theory and grant late certification in an otherwise moot case and thereby prevent mootness").

Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on the grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole...." Rule 23(b)(2). Indeed, the courts of this Circuit have consistently recognized that a challenge to prison or jail conditions is "a classic Rule 23(b)(2) civil rights action." *Knapp v. Romer*, 909 F. Supp. 810, 812 n. 1 (D. Colo. 1995); *see generally* n. 1, *supra.* Moreover, this Circuit has stated that Rule 23(b)(2) is "well-suited" to cases in which "plaintiffs attempt to bring suit on behalf of the shifting prison population." *Shook*, 386 F.3d at 972. Plaintiffs satisfy the requirements of Rule 23(b)(2).

1. Plaintiffs have adequately specified a remedy.

Defendants suggest, erroneously, that Plaintiffs cannot obtain class certification because the First Amended Complaint does not identify injunctive remedies that will apply on a class-wide basis. (Defendants' Response, at 25-27). The nature and scope of any injunctive or declaratory relief depends, of course, on the nature and scope of the proof at trial.

Contrary to Defendants' suggestion, Plaintiffs are not required to set forth in the pleadings the requested injunction to the specificity required by Rule 65. *Monreal,* 367 F.3d at 1236, n. 11; *Dasrath v. Continental Airlines, Inc.*, 228 F.Supp.2d 531, 546, n. 23 (D.N.J. 2002) ("the specificity requirements of [Rule 65(d)] are not applicable in assessing an attack on the complaint) (citing Wright & Miller, *Federal Practice and Procedure 2d* § 2955 (1995)); Moore's Fed. Prac. § 54.72[1][a](3d ed.) ("the available relief is determined by the proof, not the pleadings, and it is the duty of the court to grant all relief to which a party is entitled on that proof").

Instead, Plaintiffs meet their burden under Rule 23(b)(2) when the complaint shows that the defendants have "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.'" *Monreal*, at 1236, quoting Rule 23(b)(2).

In *Monreal*, on which Defendants rely, the plaintiffs had "not articulated a policy—besides general noncompliance with Title VII—that could be the subject of injunctive or declaratory relief." *Id.* In this very different litigation, however, Plaintiffs challenge a number of class-wide policies and practices that are specifically described in the Amended Complaint and that can be and should be remedied by class-wide declaratory and injunctive relief. [15]

2. This Court can enjoin Defendants' systemic deficiencies.

Defendants next argue that the facts alleged in the Amended Complaint might support individual claims for relief, and contend that "given the systemic deficiencies alleged by Plaintiffs, any injunctive or declaratory remedy would be so broad as to violate Rule 65 and [the PLRA] 18 U.S.C. § 3626." Defendants again are mistaken. This Court can fashion both declaratory relief and an injunction enjoining Defendants from continuing to engage in their unconstitutional policies, practices and procedures. Indeed, the Tenth Circuit has recognized that courts have continued to allow prison condition cases to be certified, notwithstanding the PLRA, so long as the elements of Rule 23 have been met, even cases broadly challenging conditions of

[15] For example, the Court can issue an injunction enjoining Defendants from using one or more of the so-called "compliance devices," or an order specifically limiting the use of a particular device to a limited range of specific situations and/or with a specific set of safeguards. *See, e.g.*, *Hawkins*, 251 F.3d at 1230 (regarding shock belt); *Von Colln*, 189 F.R.D. at 599 (class-wide injunction regarding restraint chair); *Coleman*, 912 F.Supp at 1323-24 (order for development and implementation of remedial plan addressing, among other things, restricting use of tasers on mentally ill prisoners); *Ferola*, 622 F.Supp. at 824-25 (issuing injunction that incorporates Federal Prison System criteria for use of restraints).

confinement. *Shook 2,* 386 F.3d at 970 (citing authorities); *see also, e.g.*, *Skinner*, 209 F.R.D. at 489 (certification of class under Rule 23(b)(2) seeking "systemic declaratory and injunctive relief against the policies, practices, and customs of the Defendants that purportedly violate[d] the Eighth Amendment rights of present and future WSP inmates"); *Hargett*, at WL *4 (Rule 23(b)(2) class certified seeking declaratory and injunctive relief to remedy what they perceived as systemic constitutional deficiencies in the treatment program offered to sexually violent persons at the Joliet facility); *Hiatt,* 155 F.R.D. at 610 (Rule 23(b)(2) class certified alleging that defendants' policies, practices and continuing course of conduct and the condition existing at the jail affected the class as a whole).

Defendants also mistakenly argue that this Court cannot issue class wide injunctive relief enjoining Defendants' use of excessive force because such Eighth Amendment violations must be evaluated on the basis of individual circumstances. "Factually different claims of individual class members 'should not preclude certification under Rule 23(b)(2) of a claim seeking the application of a common policy.'" *Shook II*, 36 F.3d at 971 (citing *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988). Thus, "[a]ll the class members need not be aggrieved by or desire to challenge the defendant's conduct in order for one or more of them to seek relief under Rule 23(b)(2)." *Anderson v Garner*, 22 F. Supp.2d 1379, 1386 (N.D. Ga. 1997) (citing *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526, 532 (5th Cir. 1978). Indeed, theAdvisory Committee Notes to Fed.R.Civ.P. 23(b)(2) state that "[a]ction or inaction is directed to a class within the meaning of subdivision (b)(2) even if it has taken actual effect as to only one or a few members of the class, provided it is based on grounds which have general application to the class."

Thus, courts routinely certify such class actions. *See, e.g.*, *Milonas*, 691 F.2d at 935 (Rule 23(b)(2) class-wide challenge was made to 13 policies and practices concerning conditions of confinement at the Provo Canyon School); *Ingles*, 2003 WL 402565 at *9 (Rule 23(b)(2) satisfied by alleging supervisory complicity or acquiescence in excessive force and abuse committed by officers against members of class); *Anderson*, 22 F. Supp. 2d at 1386 (certifying under Rule 23(b)(2) inmate class which will be subjected to future shakedowns) (collecting authorities); *Austin*, 15 F.Supp at 1225 (certifying under Rule 23(b)(2) class challenging the chaining of inmates to "hitching post").

Moreover, contrary to Defendants' argument, courts have certified classes seeking injunctive relief regarding the use of restraints; *see, e.g.*, *Christina A.,* 197 F.R.D. at 672 (mechanical restraints); *Von Colln*, 189 F.R.D. at 59 (Pro-straint chairs); and the use of electroshock weapons; *see, e.g.*, *Coleman*, 912 F.Supp at 1293, 1323 (tasers); *Hawkins*, 251 F.3d at 1238 (shock belts). Courts have also certified classes seeking injunctive relief regarding due process and disciplinary violations; *see, e.g.*, *Christina A.*, 197 F.R.D. at 672; *Thompson v. County of Medina, Ohio*, 29 F.3d 238, 240 (6th Cir. 1994); *Umar v. Johnson*, 173 F.R.D. 494, 503-504 (N.D. Ill. 1997).

Also, contrary to Defendants' arguments, courts certify classes regarding prisoners access to mental health facilities or challenging prison or jail health care. *See Ramos*, 639 F.2d at 575.[16] Indeed, the same argument made by Defendants here was rejected in *Neiberger*, which involved a challenge to conditions of confinement at the Colorado Mental Health Institute at Pueblo. The

[16] *See also Arney*, 967 F.2d at 419; *Diaz*, 961 F.2d at 1511; *Duran*, 885 F.2d at 1485; *McClendon*, 272 F.Supp.2d at 1252; *Montez*, 32 F.Supp.2d at 1237; and *Coleman*, 912 F.Supp at 1293.

Neiberger defendants argued that class certification pursuant to Rule 23(b)(2) was impermissible "because of the individual and differing circumstances of each Plaintiff's case" and because "each case is psychiatrically and medically unique." *Id*. at 317. In rejecting this argument, the court in *Neiberger* held "that Plaintiffs' claims seek application of a common policy by way [of] injunctive and declaratory relief which do not depend on individual facts of each case, but apply equally to all cases pending within the class." *Id*. at 307. The court further held that the "issues of systemic abuse and conditions can be addressed without resorting to case-by-case analysis." *Id*.

Defendants also erroneously contend that Plaintiffs are simply asking this court to set standards for jail practices, observing that this Court is not the proper decision-maker to set standards. Response at 27. Plaintiffs, however, are not requesting the Court to set standards for Jail practices, but instead are seeking to enjoin Plaintiffs from continuing to engage in its unconstitutional policies, practices and procedures. This Court is well-equipped to enter such injunction. *Madrid*, 889 F.Supp at 1283 (remedial plan); *Garris v. Gianetti*, 160 F.R.D. 61, 63 (E.D. Pa. 1995) (development of policies and procedures relating to the use of force in the Philadelphia prison system "falls within the ambit" of the court's administration of the consent decree in *Harris v. Reeves*); *Skinner v. Uphoff*, 234 F.Supp.2d 1208, 1217-18 (D. Wyo. 2002) (ordering submissions of a Remedial Plan to abate existing Eighth Amendment violations).

C. <u>This Action Is Manageable As a Class Action</u>.

Defendants note that in the context of Rule 23(b)(2), "courts also need to look to whether the class is amenable to uniform group remedies … [since] [t]he vehicle of class-action litigation must ultimately satisfy practical as well as purely legal considerations." (Response at 28 citing

Shook 2, 386 F.3d at 973. Defendants then argue that the proposed class-action would be unmanageable due to the highly particularized claims of the individual plaintiffs, repeating the same arguments they raised in addressing commonality, typicality and Rule 23(b)(2) requirements. Defendants' argument fails here for the same reasons its earlier arguments must be rejected. Put simply, issues of systemic abuse and conditions can be addressed without resorting to case-by-case analysis, and class certification under Rule 23(b)(2) is the appropriate vehicle to redress such systemic abuses and conditions.

Indeed, *Ramos* and *Milonas* alone refute Defendants' manageability argument. 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, mental health, and dental 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* involved a class-wide challenge to thirteen policies and practices at a juvenile detention facility. *Milonas*, like *Ramos*, was litigated to final judgment on a class basis, with the district court granting, and the Tenth Circuit affirming, common class-wide relief on four of the thirteen issues (restrictions on mail, use of polygraph examinations, use of isolation facilities, and use of physical force). *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. Similarly, this class action is also manageable. *See also Neiberger*, 208 F.R.D. at 317 (rejecting argument that proposed class was "as a practical matter unworkable" on the ground that "each [class member's] case is psychiatrically and medically unique").

Defendants' manageability argument also ignores the presumption against dismissing a case for manageability reasons. *In re Potash Antitrust Litigation*, 159 F.R.D. 682, 700 (D. Minn. 1995); *see also Yaffe v. Powers*, 454 F.2d 1362, 1365 (1st Cir. 1972) ("for a court to refuse to certify a class … because of vaguely-perceived management problems is counter to the policy which originally led to [Rule 23], … 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").

Moreover, manageability is a consideration only if there are other means available to litigate plaintiffs' claims. "[D]ifficulties in management are of significance only if they make the class action a less fair and efficient method of adjudication than other available techniques." *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 282 (S.D.N.Y. 1971) (emphasis, quotation marks omitted). Accordingly, denial of certification on manageability grounds is inappropriate when there is no other way to litigate plaintiffs' claims.

Finally, courts are properly reluctant to deny certification at the outset of a case based on hypothetical manageability concerns that might never materialize. *See Shelter Realty Corp. v. Allied Maintenance Corp.*, 75 F.R.D. 34, 38 (S.D.N.Y. 1977) ("[t]his court joins with the numerous judges and commentators who have deprecated the idea of blocking class suits on threshold predictions of a manageability"). As this Court observed:

> 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) (citations omitted). That reluctance should be especially great where, as here, denial of

certification will terminate the litigation and make it impossible for plaintiffs to present their constitutional claims to the federal courts.

D. Class Certification Is Necessary to Allow Plaintiffs to Present Their Constitutional Claims to the Federal Courts.

"Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted." *Gerstein v. Pugh*, 420 U.S. 103, 111 n. 11 (1975). Given the rapid turnover in a jail, the class-action is the only way the injunctive claims of jail prisoners can be brought before the federal courts. *See Stewart v. Winter*, 669 F.2d 328, 333-34 (5th Cir. 1982) ("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."); *Clarkson v. Coughlin*, 783 F. Supp. 789, 797 (S.D.N.Y. 1992) ("The class-action device is particularly well-suited in actions brought by prisoners due to the fluid composition of the prison population").

"When a prison regulation or practice affords a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Overton v. Bazzetta*, 539 U.S. 126, 138 (2003) (internal citations omitted). The fact that denial of certification in this case would prevent the Court from discharging this duty militates strongly in favor of class certification.

Accordingly, because a class action is the only realistic means to challenging Defendants' unconstitutional policies, practices, and procedures, the class should be certified in these circumstances.

III. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' Amended Motion to certify the proposed class and subclasses.

Respectfully submitted this 24th day of October, 2006.

SHUGHART THOMSON & KILROY, P.C.
This document was e-filed and/or e-served via ECF, and a duly signed copy is on file and available for inspection at the offices of undersigned counsel.

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CERTIFICATE OF SERVICE

I certify that on October 24, 2006, a true and correct copy of the foregoing **REPLY OF PLAINTIFFS IN SUPPORT OF AMENDED MOTION TO CERTIFY CLASS** was e-filed and/or e-served on the following:

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