UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

WILLIE CARL SINGLETON, a minor by NEVA SINGLETON, his mother and next friend, et al.,

Plaintiffs,

-vs-

BOARD OF COMMISSIONERS OF STATE INSTITUTIONS, et al.,

Defendants.

No. 963

RESPONSE TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' PETITION FOR RECONSIDERATION

COMES NOW the Board of Commissioners of State Institutions, et al., Defendants, and pursuant to the order of this Court on April 21, 1964, files this, their response to Plaintiffs' memorandum opposing Defendants' Petition for Reconsideration of this Court's denial of Defendants' Motion to Dismiss.

The purpose of this response is to re-assert Defendants' position that Plaintiffs lack the proper standing to maintain a class action, and in addition, to comment on those citations and propositions of law contained in Plaintiffs' opposing memorandum.

It is to be pointed out at the outset that the Plaintiffs were released from the custody of the Division of Child Training Schools at the request of the said Plaintiffs as indicated in their petition (copy attached). An examination of the minutes of the Defendant Board indicates that the Defendant released the said Plaintiffs pursuant to their request and "into the custody of the parents under the terms and conditions set by the Court", (copy of minutes attached).

As this Court will note, the Defendants' order makes no reference to a "probationary release", "probation" or reference to any other term that would indicate that the Board still retains supervision over the said Plaintiffs. Whatever the conditions or restrictions may be, the same are those which have been previously fixed by the Court. In commenting upon the appeal of the instant Plaintiffs from the judgment of delinquency entered by the Juvenile Court of St. Johns County, District Court of Appeal, First District, made the following observation:

> "Taking as true the representation of counsel for appellants to the effect that the parents of the children are believed to be ready to accept the condition of probation previously offered by the Juvenile Judge, the ends of justice under the law indicate that this matter should again be submitted to the Juvenile Judge for consideration and disposition in the light of the changed attitude of the parents. Accordingly, jurisdiction of this cause is relinquished in part to the Juvenile Court of St. Johns County for the sole purpose of entertaining and disposing of such petition for probation or for bail as the appellants now deem it expedient to file, and upon the disposition thereof to furnish this court with a record of the proceedings had pursuant thereto." (Emphasis supplied). A.N.E. et al. v. State, Fla. 156 So. 2d. 525, 527.

It is important again that we point out to this Court that the action taken by the Defendants was pursuant to the petition and request of the instant Plaintiffs.

The case of Jones vs. Cunningham, 371 U. S. 236 (1963), 9 L. Ed. 2d 285, 83 S. Ct. 373, relied on by Plaintiffs, held that a person on parole is still in the "custody" of the Parole Board (of Virginia) within the meaning of the habeas corpus statute. The Jones case is both factually and legally distinguishable from the instant case. An interpretation of the scope of the writ of habeas corpus was involved in the Jones case with which matter we are not concerned in the instant situation. In addition, the Supreme Court of the United States was there dealing with a Virginia statute relating to parole. It is interesting to note that the Court recognized circumstances under which a case involving a dispute between parties can

become moot by virtue of the fact that the petitioner is no longer in the custody of the respondent. (See 9 L. Ed. 2d. 285, 290; see also 92 ALR 2d 682 at page 689, discussing custody and its relation to the writ of habeas corpus.) It is also interesting to note that the instant Plaintiffs constantly refer to "probation" but have, nevertheless relied upon the Jones case which concerns "parole" and which is entirely different from our circumstances.

The case of Bailey vs. Patterson, 369 U.S. 31, 7 L. Ed. 2d. 512, 82 S. Ct. 549, cited by the Plaintiffs in support of their right to maintain a class suit held that the appellants there lacked the standing to enjoin criminal prosecution under Mississippi breach of peace statute since the appellants did not allege that they had been prosecuted or threatened with prosecution under them.

> ". . . They cannot represent a class of whom they are not a part." (7 L. Ed. 2d. 512, 514.)

To infer what the Court would have done under a set of facts or allegation different than those involved therein is mere conjecture and should not be indulged in by this Court in determining the standing of the Plaintiffs in the instant situation.

The Plaintiffs rely upon the following cases as supporting their present allegation that the instant action may be maintained as a class action: Simkins vs. Moses H. Cone Memorial Hospital, U.S.C.A., 4th Cir., N.C.; 323 Fed. 2d. 959, (1963); Rackley vs. Board of Trustees of Orangeburg Reg. Hospital, U.S.C.A. 4th Cir. S.C.; 310 Fed. 2d. 141, (1962); Augustus vs. Board of Public Instruction of Escambia County, 185 F.S. 450, U.S.D.C., Fla. (1960); Evers vs. Dwyer, 358 U.S. 202; 3 L. Ed. 2d. 222; 79 S. Ct. 178; Morrison vs. Davis, U.S.C.A. 5th Cir. La.; 252 Fed. 2d. 103; (1958); Bailey vs. Patterson, U.S.C.A. 5th Cir., Miss.; 323 Fed. 2d. 201, (1963).

In the Simkins case the question of a class suit was not involved. In that case the Plaintiffs were Negro physicians and dentists who were denied the use of staff privileges at the defendant hospital and also patients who were in need of medical treatment desiring to enter the defendant hospital. The Plaintiffs were suing on behalf of "themselves and other Negro citizens similarly situated". Whatever we might say as to whether the said plaintiffs properly represented their class would simply be a matter of opinion; a matter which was not in controversy in the Simkins case. Additionally, the facts therein are distinguishable from the instant situation.

In the Rackley case the U. S. Court of Appeals affirmed the denial of a temporary injunction by two Negro citizens seeking to restrain the defendant hospital from maintaining separate facilities for white and colored patients in the hospital. There was no adjudication by the Court on action question. The court stated, (310 Fed. 2d. 141, 1430:

> "The appellants allege they sue for themselves as well as in behalf of others similarly circumstanced. Validity of the suit as a class action is denied by the hospital and Director. A class action, the trial court ruled, was not disclosed by the complaint and evidence. However, on trial of the permanent injunction we think this issue too should be reopened and reheard."

In the Bailey case, decided by the U. S. Court of Appeals, (distinguished from the first Bailey case decided by the U. S. Supreme Court) the Court did not conclusively pass upon the class action question. This case had come up upon direct appeal to the U. S. Supreme Court which, while making several observations concerning the ability of the appellants there to maintain a class action, vacated the judgment of the District Court and remanded the same in light of the appellants individual claims of their rights to unsegregated transportation service (369 U.S. 31). On remand, the U. S. District Court for the Southern District of Mississippi, Judge Mize presiding, denied

injunctive and class relief. On appeal to the Fifth Circuit Court of Appeals, Judge Hayes presiding and Judge Wisdom concurring, the Court issued the injunction prayed for by the Negro plaintiffs. However, the said Court stated as follows:

> "We find it unnecessary to determine, however whether this action was properly brought under rule 23(a), or whether or not appellants may properly represent all Negros similarly situated, the decree to which they are entitled is the same . . ."

So it seems that the determination of the class action was not necessary to the disposition of the Bailey case. This Court's attention is invited to the well-reasoned dissenting opinion of Judge Cameron in the Bailey case, (323 Fed. 2d. 201, 208). Judge Cameron indicates that the opinion in 206 Fed. 2d. 539 should be controlling. In that case (Clark vs. Thompson) Chief Judge Mize made the following observations at page 542:

> ". . .Whether this is a proper class action involves a question of fact . . .the plaintiffs cannot make this a ligitimate class action by merely calling it such . . .a class action cannot be maintained where the interests of the plaintiffs are antagonistic to and not wholly compatible with the interests of those whom they purport to represent. . .(citations omitted)."

In the Evers case, again, the class action question was not involved. The question concerned there was whether an "actual controversy" existed within the contemplation of the Declatory Judgment Act, 28 U.S.C.A. 2201. Based upon the facts in that case, which are distinguishable from the instant situation of facts, the Supreme Court of the U. S. held that the case presented an "actual controversy" within the meaning of the statute.

In the Morrison case, again, the question of a class action was not involved. The case stands for the proposition it is not necessary for persons to be arrested for violation of segregation laws before being able to test their constitutional

rights. The case was both factually and legally distinguishable from the instant situation.

Reference is made by the Plaintiffs to the reversal on appeal of Anderson vs. Kelly, U.S.D.C., Ga., 32 F.R.D. cited by the Plaintiffs in their Petition for Reconsideration. (See Anderson vs. City of Albany, U.S.C.A. 5th Cir., Ga., 321 Fed. 2d. 649 (1963)). It is important to point out that the reversal was predicated upon the factual evidence rather than the legal principles involved. The lower Federal Court indicated that the evidence failed to show that the Plaintiffs, there, had ever been denied the use of any of the facilities referred to in their complaint because of their race, nor was there any evidence that they had ever been arrested or threatened with arrest. This being the finding of the Court, it would follow that the Plaintiffs under such circumstances, applying the established legal principles pertaining to class actions, lacked standing to seek injunctive relief for others who may have been injured because the Plaintiffs cannot represent a class of whom they were not a part. The Court of Appeals, however, found that there was sufficient evidence in the record below to indicate that the Plaintiffs were aggrieved or had suffered some injury being a justiciable class action for the Court's determination. In this regard the Court of Appeals stated (321 Fed. 2d. at page 652):

> ". . .We conclude, therefore, that there is no factual dispute but that the four plaintiffs were members of a class whose interests were the basis of demands made by them on the defendants and which the evidence clearly shows were rejected." (Emphasis supplied).

The legal principles involved in the Anderson case were not reversed and are still applicable to the instant situation insofar as the determination of what constitutes class action.

The Defendants again reaffirm and re-assert the holding in Carroll vs. Associated Musicians of Greater New York, U.S.C.A. 2d. Cir., N.Y. 316 Fed. 2d. 574 (1963), which illustrates what

happened to a class action where the status of the Plaintiffs change after commencement of their action.

We have intentionally left our discussion of the case of Augustus vs. Board of Public Instruction of Escambia County, U.S.D.C. Fla., 185 F.S. 450 (1960) as our concluding argument in support of our petition inasmuch as the observations therein are pertinent to the disposition of the instant case. In the Augustus case, this Court held that students were not entitled to maintain an action to enjoin school authorities in assigning teachers, principals and other school personnel to schools in the county on the basis of race and color of children inasmuch as there was no holding to the effect that such assignment is a violation of the equal protection clause. In effect, the students were attempting to assert the rights of these teachers and other school personnel in order to establish their legal standing as illustrated by the following (185 F.S. 454):

> "Plaintiffs cite the familiar and clear doctrine that one can raise the constitutional rights of another not a party to the suit if its nexus with them is sufficient to permit that it act as their representative before this Court . . . it seems too obvious for belaboring that no such standard of mutuality can be established between pupils and teachers, between pupils and administrative staff, between pupils and other school personnel."

The Defendants respectfully submit that the relation of the Plaintiffs in the instant situation to the class which they purportedly represent is analogus to the standing of the Plaintiffs in the Augustus case. For Plaintiffs to be able to assert that they represent a class of individuals in the Defendants' institutions is akin to the assertion by any citizen walking the streets to maintain the class action on behalf of all prisoners in all penal institutions merely by virtue of the fact that the said person may have some time in the past committed a crime and served his time or, may some time in the future commit a crime for which he may have to serve time. This rationale would appear to be absurd. As this Court observed in the Augustus case, on page 453:

". . .It would be an absurdity to say that students in one part of Florida in a county where the salaries of teachers are low could maintain an action against the school board to increase their teachers' salaries to conform to counties in Florida where salaries are higher on the grounds that having lower salaried teachers would deprive the student of equal protection of the laws under the Constitution. This is analogus to the allegations of the complainant here."

WHEREFORE Defendants respectfully requests that their Petition for Consideration be granted; this Court's Order denying Defendants' Motion to Dismiss be vacated and the instant suit be dismissed.

JAMES W. KYNES
ATTORNEY GENERAL

GERALD MAGER
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Response to Plaintiffs' Memorandum in Opposition to Defendants' Petition for Reconsideration has been mailed to the Honorable Earl M. Johnson, 625 West Union Street, Jacksonville 2, Florida, and the Honorable Constance Baker Motley and Honorable Jack Greenberg, 10 Columbus Circle, New York 19, New York, Attorney for Plaintiffs, this 21st day of May, 1964.

GERALD MAGER