IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case 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;
SCOTT DAWSON, a Commander in the Garfield County Sheriff's Department, in his official capacity,

Defendants.

PLAINTIFFS' AMENDED MOTION TO CERTIFY CLASS

D.C.Colo.LR 7.1 Conference

Plaintiffs' counsel has not consulted opposing counsel with respect to this motion because no counsel has yet appeared.

INTRODUCTION

1. Pursuant to Fed. R. Civ. P. 23, Plaintiffs respectfully move the Court for an order certifying this proceeding as a class action. Plaintiffs ask that the Court certify, pursuant to Fed. R. Civ. P. 23(b)(2), a plaintiff class comprising:

> All persons who, now or at any time in the future, are or will be prisoners in the custody of the Garfield County Sheriff's Department.

2. Plaintiffs further ask the Court to certify two subclasses, defined as follows:

> Subclass A: All pretrial detainees who, now or at any time in the future, are or will be prisoners in the custody of the Garfield County Sheriff's Department.

> Subclass B: All post-conviction prisoners who, now or at any time in the future, are or will be prisoners in the custody of the Garfield County Sheriff's Department.

3. As the First Amended Class Action Complaint ("First Amended Complaint") explains, Plaintiffs and the proposed class are subject to an imminent risk of harm from the Defendants' acts, omissions, policies and practices, and their deliberate indifference to prisoners' health, safety, welfare, and their constitutional and statutory rights. The Plaintiffs seek only injunctive and declaratory relief on behalf of the class. Plaintiffs do not seek damages on behalf of the class.[1]

4. Prisoners in the Garfield County Jail are short-term detainees. On information and belief, the average length of detention is less than one month. Very few prisoners stay in the jail more than a year. It is extremely unlikely that any one prisoner will remain in the jail long enough to litigate until final judgment a claim for injunctive and declaratory relief. Long before the trial-level and appellate proceedings are completed, the prisoner will be either released or convicted and transferred to the Colorado Department of Corrections. "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). When the prisoner is released from the jail in such cases without any certainty of return, the Tenth Circuit has held that the prisoner's individual claim for prospective relief has become moot and must be dismissed. *See, e.g., Green v. Branson*, 108 F.3d 1296, 1300 (10th Cir. 1997).

[1] Plaintiff Jared Hogue is the only plaintiff seeking any form of monetary relief in addition to declaratory and injunctive relief on behalf of the class. Mr. Hogue asks the Court to impose against Defendants the monetary penalty provided by C.R.S. § 16-3-404, for violation of his right to meet with an attorney on June 15, 2006. He seeks that relief individually and not on behalf of the proposed class.

5. Thus, unless a class is certified, the policies and practices of the Garfield County Jail will be effectively immunized from judicial scrutiny to determine whether prospective relief is warranted. For this reason, and because the requirements of Fed. R. Civ. P. 23(a) and (b)(2) are amply satisfied, the motion for class certification should be granted.

ARGUMENT

I. Applicable principles of class certification.

6. In ruling on a motion for class certification, "the district court must determine whether the four threshold requirements of Rule 23(a) are met. If the court determines that they are, it must then examine whether the action falls within one of three categories of suits set forth in Rule 23(b)." *Adamson v. Bowen*, 855 F.2d 668, 675 (10th Cir. 1988) (footnote omitted).

7. Class certification is solely a procedural issue, and the court's inquiry is limited to determining whether the proposed class satisfies the requirements of Rule 23. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974); *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982). In ruling on the motion for class certification, the court must take the substantive allegations of the complaint as true. *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1290 n.7 (10th Cir. 1999). If the court has some doubt, it should err in favor of certification, since the decision is subject to later modification. *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968); *see also Anderson v. Boeing Co.*, 222 F.R.D. 521, 531 (N.D. Okla. 2004) (same, citing *Esplin*); *Harrington v. City of Albuquerque*, 222 F.R.D. 505, 508-09 (D. N.M. 2004) (same)

II. The requirements of Rule 23(a) are satisfied.

8. In order for a class to be certified, the following requirements must be satisfied:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). As Plaintiffs demonstrate below, all four requirements of Rule 23(a) are easily met in this case.

A. Impracticability of Joinder – Rule 23(a)(1).

9. Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable." There can be no doubt that the proposed class satisfies this requirement. The jail's average daily population is about 150 prisoners.

10. Thus, based only on the number of class members in the jail at any one time, the requirements of Rule 23(a)(1) are satisfied. *See Rex v. Owens ex rel. State of Okla.*, 585 F.2d 432, 436 (10th Cir. 1978) ("Class actions have been deemed viable in instances where as few as 17 to 20 persons are identified as the class"); *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 276 (10th Cir. 1977) (trial court erred in denying class certification on numerosity grounds where class consisted of between 41 and 46 persons).

11. Moreover, the proposed class includes not only current prisoners, but future prisoners as well. In any given year, the jail books hundreds and hundreds of prisoners, many of whom stay for only a short time. The fluid nature of the class, and the inclusion in the class of future prisoners, whose identities obviously cannot now be ascertained, makes joinder of all class members not just impracticable but literally impossible. *See Skinner v. Uphoff*, 209 F.R.D. 484, 488 (D. Wyo. 2002) (finding certification appropriate for class of current and future prisoners seeking injunctive relief; "[a]s members *in futuro*, they are necessarily unidentifiable, and therefore joinder is clearly impracticable"). The requirements of Rule 23(a)(1) are satisfied.

B. Commonality – Rule 23(a)(2).

12. Rule 23(a)(2) requires only a single issue of law or fact common to the class. *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999); *see also Anderson*, 222 F.R.D. at

537 (finding commonality requirement satisfied based on two common questions of fact). For that reason, the commonality requirement is "easily met." 1 Herbert B. Newberg, Newberg on Class Actions § 3.10, at 274 (4th ed. 2002) (hereinafter "Newberg").

13. There is no requirement that each class member be identically affected by the challenged conditions or practices. In *Milonas v. Williams*, 691 F.2d 931 (10th Cir. 1982), two boys challenged conditions of confinement at a juvenile detention facility, including policies regarding the use of force. The Tenth Circuit rejected the argument that the commonality requirement was not met, and held that a class was properly certified under Rule 23(b)(2). "Regardless of … their individual disability or behavioral problems, all of the boys at the school were in danger of being subjected to" the challenged conditions and practices. *Id.* at 938. *See also Adamson*, 855 F.2d at 676 (where a case involves "a common policy," the fact "[t]hat the claims of individual class members may differ factually should not preclude certification under Rule 23(b)(2)").

14. In this case, the members of the proposed class are housed in a single facility, and all of them are subject to the Defendants' policies, practices, acts, and omissions that are challenged in this lawsuit. Accordingly, there are numerous questions of fact that are common to the class, including (but not limited to) the following:

a. Whether the Defendants have failed to adopt a written policy governing use of force within the Detention Division?

b. Whether the Defendants have failed to adopt written policies governing their deputies' use of the restraint chair, the pepperball gun; tasers; and the electroshock belt?

c. Whether the Defendants' written policy on the use of pepper spray fails to provide adequate guidance to prevent violations of prisoners' constitutional rights?

d. Whether Defendants have failed to ensure adequate training of their deputies on the proper and improper use of force, including the restraint chair, the pepperball gun; pepper spray, tasers; and/or the electroshock belt?

e. Whether Defendants have been failed effectively to monitor and supervise their deputies' use of force, including the restraint chair, the pepperball gun; pepper spray, tasers; and/or the electroshock belt?

f. Whether 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?

g. Whether prisoners are receiving adequate mental health care for their serious mental health needs?

15. The two subclasses are proposed because the phrasing of the Eighth Amendment standard that applies to prisoners who have been convicted of a criminal offense may differ, with regard to certain claims, from the phrasing of the Fourteenth Amendment standard that applies to pretrial detainees. Pretrial detainees have not been convicted of a crime and therefore, under the Fourteenth Amendment, cannot be subjected to punishment. *Bell v. Wolfish*, 441 U.S. 520, 539 (1979). Prisoners who have been convicted can be punished, but cruel and unusual punishment violates the Eighth Amendment. With regard to disciplinary sanctions for alleged violations of jail rules, the rights of post-conviction prisoners must be evaluated in light of *Sandin v. Conner*,

515 U.S. 472 (1995), which does not apply to pretrial detainees. *Peoples v. CCA Detention Centers*, 422 F.3d 1090, 1106 n.12 (10th Cir. 2005), *vacated on other grounds*, 449 F.3d 1097 (2006) (en banc). Similarly, when convicted prisoners contend that an application of force was excessive or disproportionate, the phrasing of the Eighth Amendment standard that applies may differ from the phrasing of the Fourteenth Amendment standard that applies to pretrial detainees.

16. With regard to at least some claims, courts have evaluated the rights of pretrial detainees and convicted prisoners by the same legal standard. For example, both the Eighth and Fourteenth Amendment are violated when jail or prison officials are deliberately indifferent to prisoners' serious medical or mental health needs. *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1315 (10th Cir. 2002). Similarly, the rights of both pretrial detainees and convicted prisoners are violated when their custodians are deliberately indifferent to conditions of confinement that pose a substantial risk of serious harm to prisoners. *Helling v. McKinney*, 509 U.S. 25, 35-36 (1993) (exposure to environmental tobacco smoke can violate the Eighth Amendment); *DeSpain v. Uphoff*, 262 F.3d 965, 973-75 (10th Cir. 2001) (lack of working toilets for thirty-six hours, exposing prisoners to human waste); *Shannon v. Graves*, 257 F.3d 1164, 1168 (10th Cir. 2001) (one-time exposure to raw sewage); *County of Sacramento v. Lewis*, 523 U.S. 833, 849-50 (1998) (explaining that the rights of pretrial detainees are at least as great as the rights of convicted prisoners). The right of prisoners to meet with attorneys in a confidential setting does not turn on their pretrial or post-conviction status. Accordingly, questions of law common to the entire class include, but are not limited to, the following:

a. Whether the alleged policies and practices and alleged acts and omissions of the Defendants exhibit deliberate indifference to the risk that deputies will violate prisoners' rights under the Eighth and Fourteenth

Amendments and Article II, Sections 20 and 25 of the Colorado Constitution?

b. Whether the alleged policies and practices and alleged acts and omissions of the Defendants pose unreasonable risks of harm to prisoners' health, safety, and welfare, in violation of the Eighth and Fourteenth Amendments and Article II, Sections 20 and 25 of the Colorado Constitution?

c. Whether Defendants' policy regarding attorney visits violates the constitutional and statutory rights of prisoners?

d. Whether Defendants are deliberately indifferent to prisoners' serious mental health needs?

17. Questions of law common to the subclass of pretrial detainees include, but are not limited to, the following:

a. Whether pretrial detainees are at risk of being subjected to the use of excessive and disproportionate force that violates their rights under the Due Process Clause of the Fourteenth Amendment and Article II, Section 25 of the Colorado Constitution?

b. Whether the alleged practices and policies with regard to the use of the electroshock belt inflict unconstitutional punishment that is not reasonably related to any legitimate governmental objective, in violation of both the substantive and procedural components of the Due Process Clause of the Fourteenth Amendment and Article II, Section 25 of the Colorado Constitution?

c. Whether the alleged practices and policies with regard to the use of the restraint chair inflict unconstitutional punishment that is not reasonably related to any legitimate governmental objective, in violation of both the procedural and substantive components of Due Process Clause of the Fourteenth Amendment and Article II, Section 25 of the Colorado Constitution?

d. Whether Defendants impose punishment for alleged disciplinary violations without due process of law?

18. Questions of law common to the subclass of convicted prisoners include, but are not limited to, the following:

a. Whether the alleged policies and practices and Defendants' acts and omissions threaten to subject convicted prisoners to wanton and unnecessary infliction of physical or mental pain, in violation of the Eighth Amendment and Article II, Section 20 of the Colorado Constitution?

b. Whether convicted prisoners retain a liberty interest in freedom of bodily movement, protected by the Due Process Clause and Article II, Section 25 of the Colorado Constitution, that is infringed by fully-immobilizing restraints such as the restraint chair?

c. Whether the alleged practices and policies and Defendants' acts and omissions with regard to the use of the restraint chair violate and threaten to violate the rights of convicted prisoners under the Due Process Clause and Article II, Section 25 of the Colorado Constitution?

d. Whether convicted prisoners retain a liberty interest, protected by the Due Process Clause and Article II, Section 25 of the Colorado Constitution, in freedom from the conditions of confinement imposed by being forced to wear the electroshock belt?

e. Whether the alleged practices and policies and Defendants' acts and omissions with regard to the use of the electroshock belt violate and threaten to violate the rights of convicted prisoners under the Due Process Clause and Article II, Section 25 of the Colorado Constitution?

f. Whether deprivations imposed as punishment for alleged disciplinary infractions are atypical and significant deprivations in light of the normal incidents of incarcerations in the Garfield County Jail?

g. Whether Defendants impose disciplinary sanctions that deprive convicted prisoners of liberty interests without due process of law?

19. Plaintiffs have alleged that the injuries and threatened injuries detailed in the First Amended Complaint—both those of the named Plaintiffs and those of the class—stem from the challenged policies and procedures and the acts and omissions of the Defendants. This fact alone requires a finding of commonality. *See Skinner*, 209 F.R.D. at 488 (commonality requirement satisfied where "this case revolves around a common nucleus of operative facts, namely the policies and customs of the prison regarding inmate-on-inmate violence").

20. The controlling questions of fact in this case are common to the entire class, and the controlling questions of law are either common to the entire class or common to either of the two proposed subclasses.

C. Typicality – Rule 23(a)(3).

21. Fed. R. Civ. P. 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." In this case, the claims asserted by the class representatives coincide precisely with the claims asserted on behalf of the class and the subclasses.

22. In this case, all of the Plaintiffs named as class representatives in the First Claim for Relief allege that they are at risk of being subjected to the use of force, including the use of restraint chairs, pepperball guns, tasers, pepper spray and/or the electroshock belt, in a manner that violates their constitutional rights. With regard to this claim, the claims of Mr. Langley are typical of the claims of the subclass of convicted prisoners. The claims of Mr. Vandehey, Mr. Lincoln, and Mr. Hogue are typical of the claims of the subclass of pretrial detainees.

23. The Second Claim for Relief regards the use of the electroshock belt. With regard to this claim, the claims of Plaintiffs Langley, Vandehey, and Lincoln are typical of the claims of the entire class of prisoners. Similarly, the claims of Mr. Langley are typical of the claims of the subclass of convicted prisoners. The claims of Mr. Vandehey and Mr. Lincoln are typical of the claims of the entire subclass of pretrial detainees.[2]

24. The Third Claim for Relief is a separate claim regarding the use of the restraint chair. With respect to this claim, the claims of Plaintiffs Vandehey, Langley, and Lincoln are typical of the claims of the entire class of prisoners. Similarly, the claims of Mr. Langley are

[2] Although Mr. Hogue is a member of the proposed class and the proposed subclass of pretrial detainees with regard to the separate claim regarding the electroshock belt, he does not seek at this time to be named as class representative regarding this claim.

typical of the claims of the subclass of convicted prisoners. The claims of Mr. Vandehey and Mr. Lincoln are typical of the claims of the entire subclass of pretrial detainees.[3]

25. The Fourth Claim for Relief is a separate claim challenging Defendants' policy regarding confidential communications between prisoners and attorneys, including face-to-face interviews at the jail. The claims of Plaintiffs Hogue and Vandehey are typical of the claims of the entire class of prisoners.[4]

26. With regard to the Fifth Claim for Relief, the claims of Mr. Langley are typical of the claims of class members who have serious mental health needs.

27. The Sixth Claim for Relief alleges that Defendants impose punishments for alleged disciplinary infractions in violations of prisoners' rights to due process of law. The claims of Mr. Langley are typical of the claims of the subclass of post-conviction prisoners. The claims of Mr. Vandehey, Mr. Hogue, and Mr. Lincoln are typical of the claims of the subclass of pretrial detainees.

28. Although the challenged policies and practices may affect different class members in different ways, that does not defeat a finding of typicality. As the leading treatise on class actions explains, the typicality requirement is met, notwithstanding the inevitable differences in the factual circumstances of each individual class member:

> Typicality refers to the nature of the claim or defense of the class representative and not to the specific facts from which it arose or to the relief sought. Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.

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[3] Although Mr. Hogue is a member of the proposed class and the proposed subclass of pretrial detainees with regard to the separate claim regarding the restraint chair, Mr. Hogue does not seek at this time to be named as a class representative regarding this claim.

[4] With regard to the Fourth Claim for Relief, Mr. Lincoln, and Mr. Langley are members of the proposed class. They do not seek at this time to be named as class representatives regarding this particular claim.

1 Newberg, § 3.15, at 335. The Tenth Circuit has reiterated the well-settled principle that individual factual differences do not defeat typicality. As the court explained in *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988), "differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representatives and class members are based on the same legal or remedial theory"). That is precisely the case here. The claims of the class representatives are based on the same legal or remedial theory as the claims of the class members. The typicality requirement is met.

D. Adequacy of Representation – Rule 23(a)(4).

29. Adequacy of representation involves two inquiries: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Rutter & Willbanks Corp. v. Shell Oil Co*., 314 F.3d 1180, 1187-88 (10th Cir. 2002). These criteria are clearly satisfied in this case. There is no conflict between plaintiffs or their counsel and other class members. Plaintiffs are represented by attorneys associated with the ACLU of Colorado who are experienced in class action cases in general and class-action challenges to prison and jail practices in particular.

III. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(2).

30. Certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) when

> the party opposing the class has 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.

Fed. R. Civ. P. 23(b)(2). "[I]t is well established that civil rights actions are the paradigmatic 23(b)(2) class suits, for they seek classwide structural relief that would clearly redound equally to the benefit of each class member." *Marcera v. Chinlund*, 595 F.2d 1231, 1240 (2d Cir. 1979)

(allowing class certification in suit seeking visitation for jail prisoners), vacated on other grounds, 442 U.S. 915 (1979). More specifically, "[t]he writers of Rule 23 intended that subsection (b)(2) foster institutional reform by facilitating suits that challenge widespread rights violations of people who are individually unable to vindicate their own rights." *Baby Neal v. Casey*, 43 F.3d 48, 64 (3d Cir. 1994). Recognizing these principles, the Tenth Circuit explained that Rule 23(b)(2) is "well suited" to cases in which "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).

31. Indeed, the leading treatise on class actions explains that Rule 23(b)(2) was drafted with this kind of civil rights case in mind:

> Rule 23(b)(2) was drafted specifically to facilitate relief in civil rights suits. Most class actions in the constitutional and civil rights areas seek primarily declaratory and injunctive relief on behalf of the class and therefore readily satisfy Rule 23(b)(2) class action criteria.

8 Newberg, § 25.20, at 550. In this case there can be no doubt that the First Amended Complaint challenges policies and practices that apply to the entire population of the Garfield County Jail. Thus this is clearly a case in which the Defendants have "acted or refused to act on grounds generally applicable to the class," Fed. R. Civ. P. 23(b)(2). As the Rule explains, that renders it appropriate to pursue "final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *Id.*; *see Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980) (Rule 23(b)(2) "is an especially appropriate vehicle for civil rights actions seeking … declaratory relief 'for prison and hospital reform'") (quoting 3B J. Moore & J. Kennedy, Moore's Federal Practice 23.-40[1]); *Knapp v. Romer*, 909 F. Supp. 810, 812 n.1 (D. Colo. 1995) (challenge to prison conditions is "a classic Rule 23(b)(2) civil rights action")

CONCLUSION

Wherefore, Plaintiffs respectfully request that the Court grant Plaintiffs' motion to certify the proposed class and subclasses.

Dated August 1, 2006

Respectfully submitted,

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