Fluellen v. Wetherington

United States District Court for the Northern District of Georgia, Atlanta Division
March 21, 2003, Decided
CIVIL ACTION NO. 1:02-CV-479-JEC

Reporter: 2003 U.S. Dist. LEXIS 21712

Lacoya Fluellen, Franklin Allen, Antares Banks, Mckloyd Brooks, Rome Burnett, Lane Cherry, Chadwick Cochran, Albert Lee Ellison, Eddie Evans, Robert Hampton, Curtis Herring, Jonas Hopkins, Jeffrey Hughes, Albert Jones, Norman Maddox, Jeffrey McDonald, Richard Ralph, Franklin Rivers, Larry Smith, Grady Vaughn, and Tony Wise, on behalf of themselves and all others similarly situated, Plaintiffs, v. Jim Wetherington, James DeGroot, Michelle Martin, Cynthia Nelson, James Brown, and Elanor Brown, Defendants.

Disposition: [*1] Defendants' Motion for More Definite Statement denied without prejudice; Plaintiffs' Motion for Class Certification denied without prejudice; Defendants' Pre-Answer Motion to Dismiss denied without prejudice; Plaintiffs' Motion for Leave to Supplement Response to Defendants' Pre-Answer Motion to Dismiss granted, and Motion to Dismiss Plaintiffs Lane Cherry, Robert Hampton, and Norman Maddox Based Upon Mootness denied without prejudice.

Counsel: For LACOYA FLUELLEN, FRANKLIN ALLEN, ANTARES BANKS, MCKLOYD BROOKS, ROME BURNETT, LANE CHERRY, CHADWICK COCHRAN, ALBERT LEE ELLISON, ROBERT HAMPTON, CURTIS HERRING, JONAS HOPKINS, JEFFREY HUGHES, ALBERT JONES, NORMAN MADDOX, JEFFREY MCDONALD, RICHARD RALPH, FRANKLIN RIVERS, LARRY SMITH, GRADY VAUGHN, TONY WISE, plaintiffs: Stephen Brooks Bright, Tamara H. Serwer, Marion Dawn Chartoff, Lisa L. Kung, Atlanta, GA.

For JIM WETHERINGTON, JAMES DEGROOT, MICHELLE MARTIN, CYNTHIA NELSON, JAMES BROWN, BILL WALTON, defendants: John C. Jones, Kathleen Mary Pacious, Thurbert E. Baker, Office of State Attorney General, Atlanta, GA.

For EDDIE EVANS, plaintiff: Stephen Brooks Bright, Marion Dawn Chartoff, Lisa L. Kung, [*2] Atlanta, GA.

For ELEANOR BROWN, defendant: John C. Jones, Kathleen Mary Pacious, Thurbert E. Baker, Office of State Attorney General, Atlanta, GA.

Judges: JULIE E. CARNES, UNITED STATES DISTRICT JUDGE.

Opinion by: JULIE E. CARNES

Opinion

ORDER

This case is before the Court on Defendants' Motion for More Definite Statement [3]; Plaintiffs' Motion for Class Certification [8]; Defendants' Pre-Answer Motion to Dismiss [13]; Plaintiffs' Motion for Leave to Supplement Response to Defendants' Pre-Answer Motion to Dismiss [20]; and Motion to Dismiss Plaintiffs Lane Cherry, Robert Hampton, and Norman Maddox Based Upon Mootness [21]. The Court has reviewed the record and the arguments of the parties and, for the reasons set forth below, concludes that Defendants' Motion for More Definite Statement [3] should be **DENIED WITHOUT PREJUDICE;** Plaintiffs' Motion for Class Certification [8] should be **DENIED WITHOUT PREJUDICE;** Defendants' Pre-Answer Motion to Dismiss [13] should be **DENIED WITHOUT PREJUDICE;** Plaintiffs' Motion for Leave to Supplement Response to Defendants' Pre-Answer Motion to Dismiss [20] should be **GRANTED;** and Motion to Dismiss Plaintiffs [*3] Lane Cherry, Robert Hampton, and Norman Maddox Based Upon Mootness [21] should be **DENIED WITHOUT PREJUDICE.**

I. THE COMPLAINT

Plaintiffs in this case describe themselves as mentally ill and/or mentally retarded prisoners at Phillips State Prison. They originally filed their Complaint [1] and Motion for Class Certification [2] on February 20, 2002. This Court struck those pleadings in an Order [6] dated March 19, 2002, for failure to comply with the Northern District of Georgia's local rule regarding font size. *See* LR 5.1B, NDGa. Plaintiffs then filed a First Amended Complaint [10] and refiled their motion for class certification [8] on the next day.

Plaintiffs allege that they are subject to physical, mental, and sexual abuse, excessive use of force, improper and prolonged placement in administrative and disciplinary segregation, and to an on-going risk of suicide, self-injury, and death. Plaintiffs bring this suit pursuant to *42 U.S.C. § 1983*, asserting claims under the *Eighth* and Fourteenth Amendments to the United States Constitution, the Rehabilitation Act, 29 U.S.C. § 794, and the Americans

with [*4] Disabilities Act, 42 U.S.C. § 12131, *et seq.* Plaintiffs bring their claims on behalf of themselves and of all others similarly situated: a class they define as "all individuals whose abilities to cope with the demands of life within the correctional environment are impaired or in need of monitoring due to mental illness and/or mental retardation, who are now or will be in the future incarcerated at Phillips State Prison." (First Amended Compl. [10] at P17.) Plaintiffs attempt to assert their claims on behalf of this entire class, as a class action pursuant to *Rule 23(b)(2) of the Federal Rules of Civil Procedure.* (*Id.*)

The defendants in this action include Jim Wetherington, Commissioner of the Georgia Department of Corrections. Wetherington is responsible for the daily supervision of operations at the Georgia Department of Corrections and is the highest ranking official in the Department. (*Id.* at P6.) Defendant James DeGroot is the statewide Mental Health and Mental Retardation Program Supervisor and is responsible for developing, implementing, and overseeing the system of services to treat the mentally [*5] ill and mentally retarded inmates in accordance with Georgia Department of Corrections policy and professional standards of care. (*Id.* at P11.) Defendant Michelle Martin is Warden of Phillips State Prison. (*Id.* at P12.) Defendant Cynthia Nelson is Deputy Warden for Security at Phillips State Prison. She, in conjunction with the Warden, establishes and implements conditions, practices, and policies of the prison relating to security. (*Id.* at P13.) Defendant James Brown is Deputy Warden for Care and Treatment at Phillips State Prison and has responsibility for the operation of all medical, mental health, and mental retardation programs there. (*Id.* at P14.) Finally, defendant Elanor Brown is Director of Mental Health at Phillips State Prison and is responsible for the general supervision and control of the prison's psychiatric staff. (*Id.* at P15.)

This case is before the Court on plaintiffs' motion for class certification and defendants' motions to dismiss, as well as other miscellaneous motions. Accordingly, all facts are taken from plaintiffs' First Amended Complaint and are assumed to be true, for purposes of these motions.

Plaintiffs allege that some members [*6] of the class suffer from mental illnesses, such as schizophrenia and bipolar disorder, "which cause them to experience delusions or other symptoms that interfere with their ability to comprehend and relate rationally to what is happening around them." (*Id.* at P2.) Some members take anti-psychotic drugs as a result of their disorders. (*Id.*) Plaintiffs also allege that some class members are mentally retarded and are not capable of understanding beyond a basic level. (*Id.*)

According to the Complaint, there are approximately 300 mentally ill and/or mentally retarded inmates at Phillips State Prison ("Phillips"). (*Id.* at P3.) Phillips is one of only two prisons in the Georgia Department of Corrections that is designated to house and treat the most severely mentally ill prisoners in the State of Georgia. (*Id.* at P23.) All prisoners in the state who are classified as mental health status "Level IV," the most severe level of impairment, are housed at Phillips or Augusta State Medical Prison. (*Id.*) Phillips also houses prisoners who are classified as Level II and Level III mental health patients and who are not as severely impaired as those who are classified at Level [*7] IV. (*Id.*) Mentally ill prisoners at Phillips also include approximately 50 individuals who violated the conditions of their probation and were sentenced as probation detainees to Probation Detention Centers; because of their mental illnesses they are held in detention at Phillips. (*Id.* at P26.)

With the exception of the probation detainees, nearly all prisoners who are mentally ill and/or mentally retarded are housed together at Phillips in certain buildings. (*Id.* at P24.) The mental health patients at Phillips suffer from such illnesses as schizophrenia, schizoaffective disorder, major depressive disorder, bipolar disorder, psychotic disorder not otherwise specified, and post-traumatic stress disorder. (*Id.* at P25.) Many of the mental health patients are also mentally retarded and have intellectual functioning well below that of the average person. (*Id.*)

Plaintiffs allege that the Phillips correctional staff who have contact with mentally ill and mentally retarded prisoners have not "received adequate specialized training to safely manage the special needs and problems of mentally ill and mentally retarded prisoners, and to recognize signs and symptoms of mental [*8] illness." (*Id.* at P28.) Plaintiffs complain that prison staff sometimes use force or threats of force to control and frighten these inmates who are misbehaving. (*Id.* at PP28-29.) According to plaintiffs, this use of force by the prison staff sometimes prompts the mentally ill and/or mentally retarded person to respond in kind, which then necessitates an even greater use of force by the staff member to control the prisoner. (*Id.* at P30.) Plaintiffs also complain that prison staff sometimes beat mentally ill and/or retarded prisoners who become involved in altercations with prison staff and/or restrain these inmates in shackles and handcuffs, place them in five-point restraints, or inject them with Haldol or other anti-psychotic drugs. (*Id.*)

In addition to excessive discipline directed toward prisoners, plaintiffs alleged that some correction staff sexually abuse or threaten to abuse mentally ill and/or mentally retarded prisoners by taunting them with sexual gestures and remarks, making inappropriate advances toward them, or forcing them to engage in sexual conduct. (*Id.* at P31.)

Plaintiffs' Complaint lists several incidents that they contend typify the above stated [*9] allegations. (*Id.* at P33.) These incidents include a mentally ill prisoner who was allegedly thrown to the floor by two officers and placed in an isolation cell for continuing to talk to a counselor after a lock-down was ordered. [1] (*Id.*) Another mentally ill prisoner was allegedly beaten, put in restraints, and injected with Haldol after he had spit on a counselor. (*Id.*) A third prisoner was allegedly beaten and placed in an isolation cell for banging on his cell door to try to get attention for a toothache from which he was suffering. (*Id.*) "Prisoner 4," who is mentally ill, was allegedly beaten and placed in restraints for stopping up his toilet and flooding his cell because his mental health medication was making him sick. (*Id.*) "Prisoner 6" was allegedly kept in lock-down for 18 days when he had supposedly been given only a 14-day assignment. He complains that, after he kicked the door of his cell in protest, he was beaten with metal handcuffs and then handcuffed and shackled in the shower. (*Id.*) "Prisoner 7" was allegedly roused from sleep and then handcuffed and beaten by three officers. (*Id.*) On another occasion, "Prisoner 7" was allegedly accosted [*10] by an officer who demanded that he show him his penis. (*Id.*) "Prisoner 10," who had been accused of stabbing an officer, was allegedly beaten and thrown to the floor for refusing to place his hands through the tray slot of his cell door so that he could be handcuffed. (*Id.*)

Plaintiffs allege that the named defendants do not properly discipline, train, or supervise prison staff and are aware of the "indiscriminate violence and intimidation" and sexual abuse against mentally [*11] ill and/or mentally retarded prisoners, but they do not take steps to stop these behaviors. (*Id.* at P32.)

In addition to complaining about excessive physical discipline that they allegedly receive at the hands of prison staff, plaintiffs also allege that other mentally ill or retarded prisoners are permitted to physically abuse and intimidate their fellow prisoners. (*Id.* at P35.) Plaintiffs allege that defendants place mentally ill and/or retarded prisoners in administrative and disciplinary segregation cells without taking steps to prevent them from physically and sexually assaulting each other. (*Id.* at P36.) Plaintiffs contend that Phillips does not have sufficient correctional staff who are adequately trained to monitor and supervise these mentally ill and/or retarded prisoners who could pose a risk to other prisoners. (*Id.* at P37.) They also allege that sexual abuse among prisoners is condoned, ignored, or encouraged by the prison staff, who do not take steps to stop it from occurring. (*Id.* at P38.) Furthermore, plaintiffs allege that due to defendants' deliberate indifference, in the ten months before the filing of their Complaint, at least two prisoners were [*12] killed by other prisoners at Phillips. (*Id.* at P40.)

Plaintiffs also complain that prison staff do not adequately protect prisoners who inflict injuries on themselves. Plaintiffs contend that mentally ill prisoners at Phillips sometimes cut themselves with razors and other sharp instruments because of their mental illness, and that they are then punished for this behavior. (*Id.* at P42.) Plaintiffs also contend that the corrections staff does not adequately monitor mentally ill prisoners with known histories of suicide attempts and other self-injurious behaviors. (*Id.* at P43.) Plaintiffs allege that defendants are aware that groups of mentally ill patients sometimes engage in "cutting parties," in which they engage in self-mutilation by repeatedly cutting themselves, but that defendants improperly allow plaintiffs to have access to razors and sharp metal objects that plaintiffs then use to hurt themselves. (*Id.*)

Plaintiffs' allegations of physical violence and sexual abuse clearly constitute their most serious claims. They raise other less serious claims concerning what they believe to be less than optimal mental health treatment. For example, they also complain that [*13] the treatment plans for mental health patients at Phillips are inadequate or inappropriate. (*Id.* at P46.) They further allege that defendants do not provide adequate mental health staff to deliver individualized mental health treatment to prisoners suffering from serious mental illnesses. (*Id.* at P47.) Plaintiffs complain that defendants do not provide enough mental health therapy and counseling for mentally ill prisoners who might benefit from these services. (*Id.* at P49.) Plaintiffs also contend that mentally ill patients are not always informed of their right to refuse medication. (*Id.* at P51.) As a result, plaintiffs complain that some patients are medicated for a longer period of time than might be optimal. (*Id.* at P52.)

As part of their complaint that defendants often do not administer appropriate therapeutic care, plaintiffs allege that prisoners with mental illness are punished when they exhibit symptoms of their illness. (*Id.* at P57.) That is, plaintiffs believe that defendants sometimes treat misbehavior by a prisoner as a disciplinary infraction, when, in fact, defendants should perceive that the

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[1] The prisoners involved in these incidents are not referred to by name but rather by numbers (Prisoner 1, Prisoner 2, and so on). The Court is under the impression that these unspecified prisoners are in fact the named plaintiffs in this case, but that the numbers by which they are referred to in the Complaint have nothing to do with the order in which they are listed in the case caption. This method of pleading is problematic for several reasons, as the Court will discuss in the section of this Order on class certification below.

misbehavior is caused by the plaintiff's mental illness. [*14] (*Id.* at P58-59.) This reaction to the prisoner's misbehavior can lead to what plaintiffs believe is excessive and inappropriate discipline, such as placing prisoners in isolation cells for long periods of time or issuing disciplinary reports to prisoners as a result of their misbehavior, accrual of which reports can delay parole eligibility dates and increase the chances that they will be denied parole. (*Id.* at PP59,61.)

Plaintiffs also complain about the prison grievance procedure, which requires a prisoner to complete an informal grievance process before he can receive a formal grievance form. Plaintiffs contend that prisoners are sometimes strongly encouraged by their mental health counselors not to file grievances. (*Id.* at P63.) Plaintiffs further allege that the defendants have interfered with the access of lawyers to prisoners for the purpose of providing legal services by interfering with legal mail addressed to prisoners and by interrogating prisoners about their interest in seeing a lawyer. (*Id.* at P64.)

Albeit complaining about the operation of the grievance procedures, plaintiffs allege that they have exhausted all administrative remedies "to the extent [*15] that they are available." (*Id.* at P66.) They allege that administrative remedies are not available to many prisoners "due to the refusal of prison staff to provide prisoners with grievance forms, prison staff'[s] coercion of and interference with efforts by mentally ill and/or mentally retarded prisoners to file timely grievances and appeals, explicit threats by prison staff toward mentally ill and/or mentally retarded prisoners, and lack of access to the grievance process due to prisoners' mental illness, mental retardation, illiteracy, and/or the effects of medication." (*Id.* at P67.) Plaintiffs assert that prison staff "continually change the rules or the application of the rules for prisoners to obtain, file and appeal a grievance" and that some prisoners receive responses to their grievances, while others do not. (*Id.*)

Plaintiffs allege that the defendants have acted with deliberate indifference to the substantial risk of serious harm that their policies have created for the mentally ill and/or retarded prisoners under their supervision. (*Id.* at P62.) Plaintiffs further allege that the defendants have been placed on notice of the ill effects of their policies [*16] by such things as the deterioration in prisoner mental health, complaints by prisoners and their families, and the violent deaths of three prisoners in less than a year. (*Id.*)

Plaintiffs allege that "defendants' policies and practices in failing adequately to train, supervise and discipline prison staff who physically, sexually, and verbally abuse class members constitute deliberate indifference to a substantial risk of serious harm and amount to cruel and unusual punishment in violation of plaintiffs' rights under the *Eighth* and Fourteenth Amendments to the United States Constitution." Plaintiffs also allege that defendants' policies and practices that fail to protect prisoners from physical and sexual abuse by other prisoners constitute deliberate indifference to a substantial risk of serious harm and amount to cruel and unusual punishment under the *Eighth* and Fourteenth Amendments. (*Id.* at P71.) (*Id.* at P69.) Plaintiffs also complain that "Defendants' policies and practices in failing to administer minimally adequate health treatment to class members, forcing them to take medication against their will, and punishing them for exhibiting symptoms of their mental illness, [*17] constitute deliberate indifference to inmates' serious psychiatric needs and amount to cruel and unusual punishment in violation of plaintiffs' rights under the Eighth and Fourteenth Amendments to the United States Constitution." (*Id.* at P70.)

Plaintiffs further allege that defendants' policies and practices that fail to protect prisoners from their own self-inflicted serious injury and suicide constitute deliberate indifference to a substantial risk of serious harm and amount to cruel and unusual punishment under the *Eighth* and Fourteenth Amendments. (*Id.* at P72.) Plaintiffs allege that defendants' failure to apply minimally adequate procedural safeguards when force-medicating mentally ill prisoners violates plaintiffs' right to substantive and procedural due process under the Fourteenth Amendment. (*Id.* at P73.) Further, plaintiffs contend that defendants discriminate against class members in the provision of programming, by failing to modify their programs to accommodate prisoners with mental illness and/or mental retardation, in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended by the Civil Rights Restoration Act of 1987, [*18] and Title II of the Americans with Disabilities Act, as codified in 42 U.S.C. § 12161 et seq. (*Id.* at P74.) Plaintiffs further allege that the defendants' discrimination against mentally ill and/or retarded prisoners in the grievance and disciplinary system, their failure to train prison staff adequately to manage the special needs of mentally ill and/or retarded prisoners, and their discrimination against class members in recreational and/or vocational programs, including the failure to provide recreational and/or vocational programs that are appropriate for mentally ill and/or retarded prisoners, all violate and Title II of the section 504 of the Rehabilitation ActAmericans with Disabilities Act. (*Id.* at PP75, 76, 77.) Finally, plaintiffs allege that defendants' interference with mentally ill and/or retarded prisoners' use of the prison's administrative grievance procedure has denied these prisoners access to the courts in violation of their rights under the *First* and Fourteenth Amendments. (*Id.* at P78.)

Plaintiffs seek declaratory relief that the acts and omissions of the defendants with regard to the class members violate the *First*, [*19] *Eighth*, and Fourteenth Amendments of the United States Constitution, the Rehabilitation Act, and the Americans with Disabilities Act. (*Id.* at P80.) Plaintiffs ask that this Court enjoin defendants and their agents from continuing "the unconstitutional and illegal acts, conditions, and practices described in this complaint," and that this Court award plaintiffs the costs of this lawsuit and reasonable attorney's fees. (*Id.* at PP81, 82.)

Plaintiffs have filed a motion to certify the class [8]. Defendants oppose that motion [11]. Defendants have also filed a motion to dismiss on the grounds that plaintiffs have failed to exhaust their administrative remedies and have failed to state a claim for which relief may be granted. (Defs' Pre-Answer Mot. to Dismiss [13].) Defendants have also moved to dismiss certain plaintiffs on the ground of mootness, as these plaintiffs have allegedly been transferred to other prisons or released [21].

II. Motion for Class Certification

A. Standards for a Class Action Under Rule 23

Plaintiffs have moved for this action to be certified as a class action pursuant to *Federal Rule of Civil Procedure 23* [*20] , which governs the class certification process.

Rule 23(a) provides as follows:

> (a) **Prerequisites to a Class action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (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)*.

Rule 23(b) provides as follows:

> (b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
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> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual [*21] members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) 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; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management [*22] of a class action.*Fed. R. Civ. P. 23(b)* (emphasis added).

Plaintiffs seek certification as a *Rule 23(b)(2)* class. (Pl.'s Mot. for Class Certification [8] at 1.) A class certification as a *Rule 23(b)(2)* class means that the plaintiffs are seeking only injunctive and declaratory relief, not monetary damages.

In order to establish that this action should proceed as a class action under *Rule 23*, the plaintiffs must first establish that all four of the prerequisites of *Rule 23(a)* --numerosity, commonality, typicality, and adequacy of representation--are met. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 613, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997); *Prado-Steiman v. Bush,* 221 F.3d 1266, 1278

(11th Cir. 2000). After first establishing that all four of the factors of *Rule 23(a)* are present, the plaintiffs must then establish that one of the three requirements of *Rule 23(b)* is met; that is: (1) that the prosecution of separate actions by the individual class members would create a risk of inconsistent judgments or would impair the ability to protect their interests; or (2) that the defendant [*23] has acted on grounds generally applicable to the class, making appropriate final injunctive or declaratory relief with respect to the class as a whole; or (3) that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Fed. R. Civ. P. 23(b)*; *see Amchem,* 521 U.S. at 614. As noted, plaintiffs argue that *Rule 23(b)(2)* applies in this case.

In considering all of these factors, a district court has considerable discretion in deciding whether to certify an action as a class action. *See, e.g., Griffin v. Dugger,* 823 F.2d 1476, 1486 (11th Cir. 1987); *Walker v. Jim Dandy Co.,* 747 F.2d 1360, 1363 (11th Cir. 1984); *Freeman v. Motor Convoy, Inc.,* 700 F.2d 1339, 1347 (11th Cir. 1983). In making its determination, the Court may consider the allegations of the complaint, as well as any supplemental evidentiary submissions from the parties. *Buford v. H & R Block, Inc.,* 168 F.R.D. 340, 346 (S.D. Ga. 1996) [*24] (citing *Blackie v. Barrack,* 524 F.2d 891, 901 n.17 (9th Cir. 1975)). Class certification is strictly a procedural matter, however, and courts are not to consider the merits of the plaintiffs' claims in determining whether the action should be allowed to proceed as a class action. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974). Furthermore, any doubts are to be resolved in favor of certification, because class certification is conditional only and the court may amend the certification order or decertify the class at any time prior to a final judgment on the merits. *Fed. R. Civ. P. 23(c)(1)*; *Prado-Steiman,* 221 F.3d at 1273.

The plaintiffs have filed a motion for class certification pursuant to *Rule 23(b)(2)*. They argue that they have presented sufficient evidence that this action meets all four of the prerequisites for class actions required by *Rule 23(a)*, and also that it meets the requirements of *Rule 23(b)(2)*: that the defendants have acted or refused to act on grounds generally applicable to the class, thereby making declaratory and injunctive relief [*25] appropriate with respect to the class as a whole. As noted, defendants have opposed the plaintiffs' motion.

B. Prerequisites of Rule 23(a)

The four requirements of *Rule 23(a)* "commonly are referred to as the prerequisites of numerosity, commonality, typicality and adequacy of representation, and they are designed to limit class claims to those fairly encompassed by the named plaintiffs' individual claims." *Piazza v. Ebsco Indus., Inc.,* 273 F.3d 1341, 1346 (11th Cir. 2001) (citing *Gen. Tel. Co. of S.W. v. Falcon,* 457 U.S. 147, 156, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982)) (internal quotation marks omitted). "These four requirements 'serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Id.* (quoting *Prado-Steinman,* 221 F.3d at 1279). The representative party or parties seeking class certification bear the burden of proving these prerequisites. *Hudson v. Delta Air Lines,* 90 F.3d 451, 456 (11th Cir. 1996) [*26] (citations omitted). In *Falcon,* the Supreme Court held that "actual, not presumed, conformance with *Rule 23(a)* [is] indispensable." *Falcon,* 457 U.S. at 160. Therefore, a trial court may certify a class action only after "a rigorous analysis" and determination that all the prerequisites of *Rule 23(a)* have been satisfied. *Id.* at 161.

Accordingly, the Court must first determine whether the plaintiffs have established that this action fulfills all four prerequisites of a class action under *Rule 23(a)*: numerosity, commonality, typicality, and adequacy of representation.

1. Numerosity

The first requirement of *Rule 23(a)* is that the class be so large that joinder of all members is impracticable. *Fed. R. Civ. P. 23(a)(1)*. "Practicability of joinder depends on many factors, including, for example, the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion." *Kilgo v. Bowman Transp., Inc.,* 789 F.2d 859, 878 (11th Cir. 1986). When a class is extremely large, the numbers alone may suggest [*27] that joinder is not feasible. *See Buford,* 168 F.R.D. at 348. Though there is no established threshold figure for determining whether a proposed class satisfies the numerosity requirement, the Eleventh Circuit has explained that "generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors." *Cox v. American Cast Iron Pipe Co.,* 784 F.2d 1546, 1553 (11th Cir.), *cert. denied,479 U.S. 883, 93 L. Ed. 2d 250, 107 S. Ct. 274, (1986)*.

Plaintiffs allege that, of the 1000 inmates at Phillips State Prison, approximately 300 are mentally ill and/or mentally retarded. (Pls.' Mot. for Class Certification [8] at 2.) They further allege that joinder of all putative class members is highly impracticable in this case because inmates are

continually entering and leaving the prison through commitments, transfers, and releases, so that the class includes numerous future inmates who cannot be joined. (Mem. of Law in Supp. of Pls.' Mot. for Class Certification [8] (hereinafter, "Mem. in Supp. of Class Cert.") at 5.) Assuming, for the moment, that all three hundred inmates with mental [*28] impairments would be members of the class, [2] the class seems large enough to satisfy the numerosity requirement.

> Class definition is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled to notice in a *Rule 23 (b) (3)* action. It is therefore necessary to arrive at a definition that is precise, objective, and presently ascertainable.Manual for Complex Litigation, Third § 30.14 at 235 (2002); *see also Buford,* 168 F.R.D. at 346.

[*29] In addition to the sheer size of the class, however, a second element of the numerosity requirement is that the proposed class must meet a minimal standard of identifiability. [3]*In re Polypropylene Carpet Antitrust Litig.,* 178 F.R.D. 603, 612 (N.D. Ga. 1997) (Murphy, J.). Indeed, it is "elementary" that a class must be adequately defined so that all members of the class are clearly ascertainable before a class action can be certified under *Rule 23*. *See De Bremaecker v. Short,* 433 F.2d 733, 734 (5th Cir. 1970). Although "it is not necessary that the members of the class be so clearly identified that any member can be presently ascertained, . . . [Plaintiffs] must establish that there exists a legally definable 'class' that can be ascertained through reasonable effort." *In re Polypropylene Carpet Antitrust Litig.,* 178 F.R.D. at 612 (quoting *Earnest v. General Motors Corp.,* 923 F. Supp. 1469, 1473 & n.4 (N.D. Ala. 1996) (quotations and citations omitted)). In short, the class must meet a "minimum standard of definiteness" that will permit the trial court to identify the members of the proposed class. *Id.*

[*30] Establishing a precise definition of the class early in the litigation serves two functions: (1) it allows the court to determine whether the case is suitable for certification as a class action and (2) it "'insures that those actually harmed by defendants' wrongful conduct will be recipients of the relief eventually provided.'" *Buford v. H & R Block, Inc.,* 168 F.R.D. 340, 346 (S.D. Ga. 1996) (quoting *Simer v. Rios,* 661 F.2d 655, 670 (7th Cir. 1981)).

In their motion for class certification, the plaintiffs have moved the Court to certify a class as follows: "all persons who are now or will in the future be incarcerated at Phillips State Prison in Buford, Georgia, whose abilities to cope with the demands of life within the correctional [*31] environment are impaired or in need of monitoring due to mental illness and/or mental retardation." (Pls.' Mot. for Class Certification [8] at 1.) The Court concludes that this proposed class is not adequately defined so that all members of the class are clearly ascertainable. *See De Bremaecker,* 433 F.2d at 734. In short, for the reasons stated below, the class definition is so vague and amorphous that the Court cannot, at this stage of the litigation, effectively determine the membership of the proposed class.

There are three major problems with the class definition as it stands. First is the issue of who, exactly, is mentally ill. In their First Amended Complaint, plaintiffs state that mentally ill prisoners suffer from illnesses including, but not limited to schizophrenia, schizoaffective disorder, major depressive disorder, bipolar disorder, psychotic disorder not otherwise specified, depressive disorder not otherwise specified, and post-traumatic stress disorder. (First Amended Compl. [10] at P25.) This is a virtual laundry list of mental illnesses, and by its own terms, does not even include all those disorders suffered by members of the proposed class. [*32] When a current or future

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[2] Because plaintiffs have urged so many different types of allegations in this Complaint, however, it is not certain that all three hundred inmates are members of the same class, to the extent that this class is defined by objectionable behavior by defendants. That is, it is not clear--probably because it is as yet unknown to plaintiffs--how many prisoners, for example, have been subjected to excessive physical punishment. If, by way of example, only ten prisoners out of three hundred had been so subjected, it would seem odd to have a class of three hundred. Of course, this is another way of stating that it is unclear whether this case is anything more than a few individuals who have colorable *§ 1983* claims, or rather whether the unfolding of the facts will demonstrate widespread, systemic problems that call out for specific, injunctive relief. Of course, if the latter is shown, it would seem that a remedy could be devised, whether or not a class is certified.

[3] Some courts have held that the adequacy of the definition of the class is not part of the numerosity analysis of *Rule 23(a)*, but instead is an independent question that must be considered before the court addresses the four prerequisites of *Rule 23(a)*. *See, e.g., Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 346 (S. D. Ga. 1996) ("Before considering the requirements of *Rule 23*, however, a court must determine whether a class exists that can adequately be defined. . . . Thus, class definition is an implicit requirement which must be met before a Rule 23 analysis can be undertaken by the district court.") In any event, whether the class definition is addressed by the court before the Rule 23 analysis, or as part of the numerosity analysis required by *Rule 23(a)*, the law is clear that a class must be adequately and clearly defined before the class action may be certified. *De Bremaecker v. Short,* 433 F.2d 733, 734 (5th Cir. 1970).

inmate of Phillips State Prison appears and is diagnosed with an illness not listed above, but who claims to be "mentally ill," how is one to determine if he is a member of the would-be class or not? It seems that a class definition seeking to encompass all of the "mentally ill," without some sort of medical or psychological definition to guide the Court, now and/or in the future, is so broad and vague as to be unworkable. [4]

[*33] Second is the similar issue of who is to be considered "mentally retarded." The Court is aware of no universally accepted definition, and plaintiffs point to none, of who is mentally retarded and who is not. Again, it seems that some medical or psychological criteria would be necessary to make a judgment as to who the class members are. For example, if intelligence quotient (IQ) scores were to be the measuring stick, it would be necessary to know if an inmate scoring a 59 would be included in the class, while an inmate scoring a 60 would be excluded as not "mentally retarded."

The final problem is that part of plaintiffs' definition that reads "whose abilities to cope with the demands of life within the correctional environment are impaired or in need of monitoring." Again, this wording is so vague as to be unworkable. It is conceivable that an inmate might be technically mentally ill and/or mentally retarded, but might still be able to cope with the demands of life in prison. It seems equally plausible that an inmate not objectively mentally ill or mentally retarded might not be able to cope with life in prison, but for other reasons. Because of the vagueness problems with the definitions [*34] of "mentally ill" and "mentally retarded" discussed above, the latter inmate could be swept into the class. The basic problem is that the Court is provided with no guide as to who is to be considered unable to cope with life in prison, and thus in need of special monitoring, and who is not.

The Eleventh Circuit has held that *Rule 23(c)(1)* grants district courts broad discretion to alter or amend the definition of the class at any time throughout the litigation, prior to a final decision on the merits of the action. *Prado-Steiman v. Bush,* 221 F.3d 1266, 1273 (11th Cir. 2000). Because the Court finds other problems with class certification, discussed below, it will not exercise this discretion at this time, however. The Court therefore finds that the numerosity requirement is not met, for lack of a definable class.

2. Commonality

The second requirement of *Rule 23(a)* is that "there are questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*. It is not required that the claims of all putative class members be absolutely identical, only that they share questions of either law or fact in common. *See Johnson v. Am. Credit Co. of Georgia,* 581 F.2d 526, 532 (5th Cir. 1978); [*35] *Buford,* 168 F.R.D. at 349. The commonality requirement demands that a class action must involve issues that are susceptible to class-wide proof. *Murray v. Auslander,* 244 F.3d 807, 811 (11th Cir. 2001) (citation omitted).

The Eleventh Circuit has noted that in many ways, the commonality and typicality requirements overlap, as both requirements demand a nexus between the legal claims of the named class representatives and those of individual class members sufficient to warrant class certification. *Prado-Steinman v. Bush,* 221 F.3d 1266, 1278 (11th Cir. 2000). "Traditionally, commonality refers to the group characteristics of the class as a whole . . ." *Id.* at 1279. Plaintiffs argue that all members of the would-be class are mentally ill and/or mentally retarded prisoners who are or will be incarcerated at Phillips State Prison and are all therefore equally subject to the conditions, practices, and policies that constitute the factual core of the class claims. (Mem. in Supp. of Class Cert. [8] at 8.) They also argue that the legal issues raised by each member of the class's challenge to these conditions, practices, [*36] and policies involve common constitutional rights, and therefore common questions of law. (*Id.*)

Certainly at some very broad level of commonality, it could be said that the class has questions of fact in common. Specifically, the class claims essentially boil down to a claim that many mentally ill and/or mentally retarded prisoners at Phillips are being treated badly, and that this bad treatment is severe enough to violate the Constitution's prohibition against Cruel and Unusual Punishment. Even though the commonality bar is set low, the Court will not read it to be set this low. A closer reading of the plaintiffs' Complaint shows that it sets forth a wide array of factual situations affecting the various

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[4] The requirement of a definable class might at first blush seem less important in a 23(b)(2) class since only injunctive relief is requested that would cover the class as a whole, and since there are no monetary damages to be doled out to individuals, as there would be in a 23(b)(3) class. This requirement is just as important in a (b)(2) class, however, because it must be determined who would be bound by a final judgment. For example, suppose the Court were to certify a class based on the definition that the plaintiffs request. Further suppose that the certified plaintiff class goes on to lose their case, either on summary judgment or at trial. In the future the Court would have to know which inmates would be bound by that final judgment on the merits of this case, and which would be free to sue later, either in their individual capacities or as part of a new class. The current class definition is simply too amorphous for the Court to make that decision.

plaintiffs. The types of mistreatment that plaintiffs complain of varies wildly from case to case. Some inmates claim that they were beaten and forcibly restrained; others claim they were medicated against their will; others complain that they were beaten and sexually assaulted, not by prison officials, but by other inmates; others claim that they injured and mutilated themselves because they were not properly monitored; still others claim that they have been locked away in isolation [*37] cells for exhibiting symptoms of their mental illnesses. When lined up side by side, it becomes apparent that what the plaintiffs have is a hodgepodge, or grabbag, of many different kinds of claims. Plaintiffs may fairly respond that it is not their fault that Phillips suffers from a wide array of problems, if the allegations are in fact true. Yet, this response does not negate the fact that, at this juncture, plaintiffs' claims do not appear to involve issues that are susceptible to class-wide proof. [5]*See Murray,* 244 F.3d at 811 (citation omitted). The Court would have to take evidence on whether certain beatings occurred, on whether certain inmates were medicated against their will, and so on. The proceeding would almost immediately degenerate into a series of mini-trials, all with separate facts, [6] some with different elements to prove, and all with different factual defenses. Such a class would be totally unmanageable. [*38]

The Court is therefore forced to conclude that commonality of facts is lacking here. There are too many different kinds of allegations, involving too many factually different scenarios, to allow the Court to get its arms around all of them at once, in a class action. Similar problems arise when one attempts to find a common issue of law. Again, at the broadest level, the plaintiffs have a common complaint which is, essentially: that the system for treating and incarcerating mentally ill or mentally retarded inmates at Phillips State Prison is so lacking that prison staff are regularly in violation of Constitutional standards. Again, however, the Court will not read the commonality bar to be set this low.

The situation in the case at hand is very similar to the one the Tenth Circuit considered in *J.B. v. Valdez,* 186 F.3d 1280 (10th Cir. 1999). [*39] In that case, the plaintiffs were mentally or developmentally disabled children who were in the custody of the State of New Mexico and who brought suit for declaratory and injunctive relief, alleging that the defendants, those state officials responsible for their care, had failed to provide protections and therapeutic services required by federal statute and the United States Constitution. *Id.* at 1282. The sixteen named plaintiffs sought to represent a class comprised of all children who were currently, or could in the future be, in state custody and who were determined by the defendants to have any form of mental and/or developmental disability for which they would require some kind of therapeutic services or support. *Id.* In denying class certification, the district court noted that the named plaintiffs all had varied backgrounds, needs, and custodial situations. *Id.* at 1284. In affirming the district court's refusal to certify a class, the Tenth Circuit pointed out that "the diverse situations of the named plaintiffs show there is no question of fact common to the class." *Id.* at 1288. "Other than being disabled in some way and [*40] having had some sort of contact with New Mexico's child welfare system, no common factual link joins these plaintiffs." *Id.* at 1289.

The Tenth Circuit also agreed with the district court's finding that there was no common question of law. *Id.* Plaintiffs argued "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.* The court responded by saying "we refuse to read an allegation of systematic failures as a moniker for meeting the class action requirements. … For a common question of law to exist, the putative class must share a discrete legal question of some kind." *Id.* Instead of advancing a discrete question of law, however, the plaintiffs had merely attempted to "broadly conflate a variety of claims to establish commonality via an allegation of 'systematic failures.'" Id. The Tenth Circuit therefore refused to hold, as a matter of law, the mere allegation of a systematic violation of various laws automatically meets *Rule 23(a)(2)*.

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[5] Hundreds, if not thousands, of claims are filed each year by prisoners in Georgia prisons, claiming unlawful conditions of confinement. A plaintiff could collect all the claims directed against any one prison and argue that a class, defined of people who are prisoners in this prison, has been identified and that the Court should intervene to direct the particular practices of the prison. Yet, class actions, based on the fact that a given prison has been the subject of multiple claims, are rarely filed, and, if filed, courts would presumably deny class certification on the ground that each individual claim presents different facts that call for an individualized adjudication.

In making this observation, the Court does not intend to dismiss the possibility that there could be a situation where a prison had, as a systemic matter, so broken down that some broad systemic relief might be necessary to provide an effective remedy. In making that decision, however, the plaintiffs would have to meet whatever burden is required for the issuance of injunctive relief. Further, if proper, such injunctive relief would presumably be appropriate whether or not a class had ever been certified.

[6] For example, in some instances, the finder may conclude that the force administered was reasonable or that the prison official acted properly in medicating the prisoner; in other instances, the finder of fact may reach a different conclusion as to the behavior complained of.

The plaintiffs in the above case had also contended that all their class members [*41] had suffered violations of the Medicaid Act, the Americans with Disabilities Act (ADA), and the Rehabilitation Act. *Id.* The Tenth Circuit pointed out that their complaint failed to specifically tie the particular allegations with individual children, but instead merely stated the factual circumstances of each child and then, in very general terms, alleged violations of various statutory provisions. *Id.* at 1290. The Tenth Circuit determined, however, that there was no common allegation of a Medicaid Act violation for all named plaintiffs and that only a few asserted claims under the Fourteenth Amendment. *Id.* Likewise, all named plaintiffs had alleged that they had been denied benefits or services in violation of the ADA and Rehabilitation Act. *Id.* Yet, the Tenth Circuit noted that "even if this were sufficient to establish a common legal question as to the named plaintiffs, plaintiffs had not shown that such denials were common to all putative class members under the proposed class definition." *Id.*

> Plaintiffs sought to *certify a class of all* children in state custody who "have any form of mental *and/or* developmental disability for which [*42] they require some kind of therapeutic services or support." (emphasis in original). This broad definition would include not just children whom New Mexico improperly denied assistance, but also children who actually receive all services under the ADA and Rehabilitation Act. Children receiving appropriate services have no claim under these statutes.*Id.* (emphasis in original). Thus, the Tenth Circuit concluded that the district court had correctly stated that there was no one statutory or constitutional claim that was common to all named plaintiffs and putative class members. *Id.*

The similarities between *J.B.* and the case at hand are striking. Though the plaintiffs here have not explicitly stated their case as such, it appears to the Court that they, like the *J.B.* plaintiffs, have attempted to broadly conflate a variety of different claims to establish commonality via a systematic failure. They have essentially attempted to add together claims that some mentally ill prisoners were beaten, some were forcibly medicated, and so on, to reach the overarching claim that all mentally ill prisoners' rights are being violated in a systematic way by the policies and practices [*43] of Phillips prison officials. They have presented no discrete legal question common to all of them. [7]

[*44] Further, as in *J.B.,* it appears to the Court that there is no one statutory or constitutional claim common to all named plaintiffs and all putative class members. Even if the plaintiffs here had alleged that all the named plaintiffs were subject to treatment in violation of the *Eighth Amendment*, or the ADA, or the Rehabilitation Act[8]--which is impossible to tell based on the way the Complaint was drafted, with prisoners referred to by unexplained numbers instead of names--and even if the plaintiffs were able to establish a common legal question as to the named plaintiffs, they have not shown that this legal question is common to all putative class members under their proposed class definition. Plaintiffs seek to certify a class of all prisoners at Phillips State Prison who are mentally ill and/or mentally retarded. This broad definition would include not only prisoners who were treated improperly, but also those who were never treated improperly--who were never beaten, or medicated against their will, and so on. Yet, prisoners who were not subject to any alleged ill treatment would have no claims under the *Eighth Amendment*, ADA, or Rehabilitation Act. Thus, there is no one statutory [*45] or constitutional claim that is common to all named plaintiffs and putative class members.

3. Typicality

In order to meet the third prerequisite for class actions under *Rule 23(a)*, the plaintiff must establish that the claims or defenses of the representative parties are typical of the claims or defenses of the class. *Fed. R. Civ. P. 23(a)(3)*. As the Supreme Court has explained, "we have repeatedly held that a class representative must be part of the class and possess the same interest and suffer the same

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[7] In contrast to the present case is *Anderson v. Garner*, 22 F. Supp. 2d 1379 (N.D. Ga. 1997). In *Anderson*, Judge Harold Murphy certified a 23(b)(2) class composed of all prison inmates housed in Georgia Department of Correctional Facilities who will be subjected to *"shakedowns"* by the defendant administrators. *Id.* at 1390. In that case, the class did present the discrete legal questions of whether excessive force had been used in the shakedown in question and whether the defendants, through a custom or policy, encouraged, facilitated, and ratified the use of excessive force during all such shakedowns. *Id.* at 1385. Along with the common discrete legal question, this class also had common facts: all the class members had been or could be subjected to shakedowns, not to a wide array of alleged violations, such as beatings, or forced medications, or improper confinement, and so on.

[8] The Court is especially perplexed about the plaintiffs' allegation that the defendants violated the Rehabilitation Act by discriminating against them in recreational and vocational programs. (First Amended Compl. at P77.) There appears to be no factual allegation anywhere in the First Amended Complaint to back up this paragraph.

injury as the class members." *Gen. Tel. Co. of S.W. v. Falcon,* 457 U.S. 147, 156, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982) [*46] (quoted in *Prado-Steiman v. Bush,* 221 F.3d 1266, 1278 (11th Cir. 2000)). One of the "core purposes" of this "typicality" requirement is to "ensure that 'the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented.'" *Prado-Steiman,* 221 F.3d at 1279 (quoting *Baby Neal v. Casey,* 43 F.3d 48, 57 (3rd Cir. 1994)). Though typicality tends to overlap with the commonality requirement, as noted above, because traditionally, "typicality refers to the individual characteristics of the named plaintiff in relation to the class." *Id.*

Typicality may be satisfied "even if some factual differences exist between the claims of the named representatives and the claims of the class at large." *Id.* at 1279 n.14 (citing *Appleyard v. Wallace,* 754 F.2d 955, 958 (11th Cir. 1985) (citation omitted)). Yet, in order for the plaintiffs to establish that their claims are typical of the claims of the other class members, they must establish that their claims share the same "essential characteristics as the claims of the class at large." *Id.* [*47] at 1279 n.14 (quoting *Appleyard v. Wallace,* 754 F.2d 955, 958 (11th Cir. 1985) (citation omitted)). If the claims are substantially similar, a plaintiff can usually meet this burden because "a strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences." *Id.* at 1279 n.14 (quoting *Appleyard v. Wallace,* 754 F.2d 955, 958 (11th Cir. 1985)*see also Kornberg v. Carnival Cruise Lines, Inc.,* 741 F.2d 1332, 1337 (11th Cir. 1984) ("A factual variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class.").

The Court is forced to conclude, for many of the reasons discussed above, that typicality is lacking here as well. The named plaintiffs cannot establish that their claims share the same "essential characteristics as the claims of the class at large." *Prado-Steiman,* 221 F.3d at 1279 n.14. What the First Amended Complaint essentially shows is that some named plaintiffs claim they were beaten or otherwise victims of excessive force, some named plaintiffs claim [*48] they were medicated against their will, some claim to have been placed in disciplinary confinement improperly, and so forth. From this varied group of complaints, they seek to certify a class consisting of all mentally ill and/or retarded prisoners at Phillips. All the named plaintiffs could only be considered to be typical of the class as a whole only at the most heightened level of generality: that they are all mentally ill and/or retarded prisoners at Phillips who claim to have been mistreated. At a more particular level, however, the Court cannot say that the claim of a named plaintiff who alleges that he was beaten excessively is typical of the claim of a putative class member who allegedly was forcibly medicated. Any common sensical appraisal leads one to conclude that this Complaint comprises dramatically different claims, with different elements of proof, different possible defenses, and so on. Therefore, the factual posture of the representative's claim would seem, necessarily, to differ from that of some of the would-be class members in question here.

In short, all of the claims of the named plaintiffs and of the would-be class members are not substantially similar, so the [*49] plaintiffs cannot carry their burden here. Likewise, there is no strong similarity of legal theories that would satisfy the typicality requirement, despite the substantial factual differences among all of the different claims. [9]

[*50] Furthermore, the way in which the Complaint was drafted does not aid the Court in making the typicality judgment. The manner of referring to the named plaintiffs in the body of the Complaint, not by their names, but by numbers, makes it very difficult to determine what exactly happened to which individuals. *Rule 23(a)* requires that the claims of the named plaintiffs be typical of the claims of the class as a whole. This requirement is not satisfied by a bare assertion that the claims of several numbered, unnamed individuals, who may or may not all match up to the named plaintiffs, have claims that are typical of the class as a whole. Though the conclusion of the Court on the typicality requirement would no doubt be the same based on these facts, even with a properly pled class action complaint, the method by which plaintiffs have drafted this Complaint has not aided their efforts to create a class. Ultimately, the burden of proving that the *Rule 23(a)* prerequisites are met is on the representative parties seeking class certification. *Hudson v. Delta Air Lines,* 90 F.3d 451, 456 (11th Cir. 1996) (citations omitted).

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[9] Through all of this analysis runs the Court's judgment that the plaintiffs seek to stretch both the typicality and commonality requirements to levels that the Court simply cannot manage in a single action. For example, plaintiffs might argue that they all have similar legal theories in the sense that they all allege a pattern or practice on the part of the defendants of abusing and/or neglecting them, though this manifests itself in different ways with different class members (a beating of one versus the forced medication of another). Yet, the legal theory supporting an *Eighth Amendment* claim regarding a beating is very different than the legal theory supporting an ADA claim regarding discrimination in the level of care provided to mentally ill and/or retarded inmates, for example. All of these different claims are simply too disparate to place them under one umbrella and to say that the same group of named plaintiffs can be typical of all the class members with these different claims.

4. Adequacy of Representation

The fourth and [*51] final prerequisite of *Rule 23(a)* is that the plaintiffs must show that they will fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)(4)*. Courts have traditionally held that, in order to satisfy this prerequisite, the plaintiff must show that: (1) the plaintiff's attorney is qualified, experienced, and will vigorously prosecute the action; and (2) the interest of the class representative is not antagonistic to or in conflict with the other members of the class. *Griffin v. Carlin,* 755 F.2d 1516, 1533 (11th Cir. 1985); *Buford,* 168 F.R.D. at 351.

The Court assumes that defendants do not question the qualifications of the organization representing plaintiffs to prosecute a class action. On the other hand, the Court does question whether the interests of some class members would be in conflict with other members of the class. As discussed in the sections above, these are very disparate claims that the plaintiffs have tried to package together as one class action lawsuit. For example, plaintiffs complain that some inmates are medicated against their will or for an excessive period of time. [*52] With regard to other inmates, however, plaintiffs complain that the staff does not protect the inmates against their own suicidal tendencies and that staff often administer beatings to gain control of mentally ill prisoners, when lesser measures would suffice. One lesser measure to control behavior or to prevent suicide attempts would seem to be the administration of anti-psychotic medication, yet the first group of plaintiffs would complain about such a response by defendants.

Moreover, the manner in which the Complaint is drafted again makes it hard to judge the adequacy of the named plaintiffs to represent the class. All the Court really knows about them is that their names are listed in the caption. It does not know what is purported to have happened to each individual among them. In other words, it is impossible to tell who is who. It might be that the named plaintiffs overwhelmingly represent prisoners who were beaten, and might not adequately represent prisoners with other sorts of claims. The Court does not have enough information to make an affirmative judgment that these plaintiffs would be adequate representatives. Again, the burden is on the class representatives to show [*53] that the requirements of *Rule 23(a)* are met, and it is the duty of the Court to conduct a rigorous inquiry to make sure that the requirements of the Rule are all fulfilled.

Having found that the proposed class does not meet the requirements of *Rule 23(a)*, it is unnecessary for the Court to conduct further inquiry into whether the class would satisfy *Rule 23(b)(2)*. Since the basic requirements of *Rule 23* are not met in this case, Plaintiffs' Motion for Class Certification is **DENIED WITHOUT PREJUDICE.**

At this juncture, the Court would typically break the case down into twenty-one (21) separate cases, representing the twenty-one individual plaintiffs. Given the way the case was pled, however, the Court is unable to determine which plaintiff would pursue which grievance. Further, as it is not clear that all individual plaintiffs will wish to proceed with their individual claims, the Court will not attempt to break down the existing Complaint into different cases. Instead, the Court will maintain, as a single case, the action styled: *Fluellen, et al. v. Wetherington, et al.,* 1:02-CV-479-JEC. **Plaintiff Fluellen** shall filed an amended complaint, **within thirty (30) days** [*54] from the date of this Order. The Court further severs the claims of the remaining twenty plaintiffs and directs these plaintiffs to file individual complaints, **within thirty (30) days** of the date of this Order. The Clerk shall be directed to docket each such complaint under its own docket number. Each plaintiff will then be free to go forward and to litigate his case separately, as he sees fit. The Court emphasizes that the denial of class certification is without prejudice. Should the plaintiffs, at some point in the future, develop a more cohesive class that could meet the requirements of *Rule 23*, the Court will entertain again a motion for class certification. That decision can likely best be made after discovery is concluded and motions for summary judgment have been resolved. Of course, the Court's denial of Plaintiffs' Motion for Class Certification is not as harsh a blow as it might seem, given that plaintiffs are seeking only injunctive relief anyway, which injunctive relief can presumably be granted, upon a proper showing, even without the certification of a class.

III. Motions to Dismiss

A. Motion to Dismiss Standard

In deciding a motion to dismiss [*55] brought pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, [10] the Court shall not dismiss the complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). Motions to dismiss for failure to state a claim will rarely be granted because of the liberal pleading requirements of the federal rules. *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev.*

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[10] As plaintiffs correctly point out, defendants do not specify under which subsection of *Rule 12(b)* they bring this motion to dismiss. Defendants do, however, state that plaintiffs have failed to state a claim upon which relief may be granted, so the Court will, for the most part, treat this as a 12(b)(6) motion. The Court will also deal with the possibility of dismissal under 12(b)(1) below.

Corp., S.A., 711 F.2d 989, 995 (11th Cir. 1983). Furthermore, courts must "accept the well pleaded facts as true and resolve them in the light most favorable to the plaintiff." *Beck v. Deloitte & Touche,* 144 F.3d 732, 735 (11th Cir. 1988) (citation omitted). The purpose of a

> *Rule 12(b)(6)* motion is to test the facial sufficiency of the statement of a claim for relief. It is read alongside *Fed. R. Civ. P. 8(a)*, which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." The rule is not designed to strike [*56] inartistic pleadings or to provide a more definite statement to answer an apparent ambiguity, and the analysis of a 12(b)(6) motion is limited primarily to the face of the complaint and the attachments thereto.*Brooks v. Blue Cross & Blue Shield of Florida, Inc.,* 116 F.3d 1364, 1368 (11th Cir. 1997) (citing 5 Charles A. Wright & Arthur Miller, Federal Practice and Procedure § 1356 at 590-92 (1969)). Thus, in general, "the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." *Quality Foods,* 711 F.2d at 995. Defendants bear the "very high burden" of showing that a plaintiff cannot conceivably prove any set of facts that would entitle him to relief. *Beck,* 144 F.3d at 735-36.

[*57] **B. Exhaustion of Administrative Remedies**

Defendants argue that the plaintiffs' Complaint must be dismissed because they have not exhausted their administrative remedies under 42 U.S.C. § 1997e(a). (Br. in Supp. of Defs.' Mot. to Dismiss [13] (hereinafter, "Br. in Supp") at 2.) The Prison Litigation Reform Act of 1996 (PLRA) provides, in relevant part,

> No action shall be brought with respect to prison conditions under *section 1983* of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.42 U.S.C. § 1997e(a). Defendants state that "When Congress makes exhaustion of administrative remedies a mandatory prerequisite to a federal action, the courts lack jurisdiction over such an action unless and until those remedies are exhausted." (Br. in Supp. [13] at 2-3.) The Court will therefore briefly deal with the possibility that defendants intended their motion to dismiss to be based upon *Federal Rule of Civil Procedure 12(b)(1)*, which provides for dismissal [*58] of a complaint on the basis of "lack of jurisdiction over the subject matter." *Fed. R. Civ. P. 12(b)(1)*.

The exhaustion requirement of 42 U.S.C. § 1997e(a) does not limit this Court's subject matter jurisdiction. Though the Eleventh Circuit has not yet decided whether a dismissal under 1997e(a) amounts to a dismissal for failure to state a claim upon which relief may be granted, under *Rule 12(b)(6)*, or for lack of subject matter jurisdiction over the unexhausted claims, under *Rule 12(b)(1)*, it has recognized that "most courts addressing this issue have decided that § 1997e(a) is not a jurisdictional mandate." *Brown v. Sikes,* 212 F.3d 1205, 1207 n.2 (11th Cir. 2000) (citing *Nyhuis v. Reno,* 204 F.3d 65, 69 n.4 (3d Cir. 2000)). The clear majority of circuit courts that have ruled on the issue have held that section 1997e(a) is not a jurisdictional requirement, such that failure to comply with the section would deprive federal courts of subject matter jurisdiction. *See Foulk v. Charrier,* 262 F.3d 687, 697 (8th Cir. 2001); *Nyhuis v. Reno,* 204 F.3d 65, 69 n.4 (3d Cir. 2000); [*59] *Massey v. Helman,* 196 F.3d 727, 732 (7th Cir. 1999); *Wyatt v. Leonard,* 193 F.3d 876, 879 (6th Cir. 1999); *Rumbles v. Hill,* 182 F.3d 1064, 1068 (9th Cir. 1999); *Underwood v. Wilson,* 151 F.3d 292, 294-95 (5th Cir. 1998); *Basham v. Uphoff,* 1998 U.S. App. LEXIS 30999, No. 98-8013, 1998 WL 847689, at *3 (10th Cir. Dec. 8, 1998) (unpublished decision). This Court will therefore not dismiss plaintiffs' claims under *Rule 12(b)(1)*, but will consider defendants' motion to dismiss under *Rule 12(b)(6)*.

The Supreme Court has held that § 1997e(a)'s exhaustion requirement applies to all prisoners seeking redress for prison conditions or occurrences. *Porter v. Nussle,* 534 U.S. 516, 520, 152 L. Ed. 2d 12, 122 S. Ct. 983 (2002). All available remedies must be exhausted; even if those remedies would not meet federal standards, even if the available remedies are not quick or effective, and even when the prisoner seeks relief that may not be available in grievance proceedings. *Id.* at 524. Further as noted, the exhaustion requirement of the PLRA applies to all inmate suits about prison life, no matter the nature [*60] of the complaint. *Id.* at 532.

The exhaustion requirement cannot be waived merely because the prisoner believes that pursuing administrative procedures would be futile. *Higginbottom v. Carter,* 223 F.3d 1259, 1261 (11th Cir. 2000) (citation omitted). As Congress has mandated exhaustion in section 1997e(a), courts have no discretion to waive the exhaustion requirement. *Alexander v. Hawk,* 159 F.3d 1321, 1325 (11th Cir. 1998). Further, section 1997e(a)'s requirement that a prisoner exhaust such administrative "remedies" as are available simply acknowledges that not all prisons actually have administrative remedy programs. *Id.* at 1326.

If a state penal institution does not have an administrative remedy program to address prison conditions, there would be no 'available' administrative remedies to exhaust. Thus, Section 1997e(a) would permit these prisoners to pursue their claims directly in federal court. *Id.* at 1326-27. Nevertheless, if a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system [*61] before filing a claim. *Massey v. Helman,* 196 F.3d 727, 733 (7th Cir. 1999).

Defendants argue that out of all the plaintiffs in this case, only one (the unnamed prisoner known to the Court only as "Prisoner Two") "has properly filed a grievance and properly appealed this grievance and exhausted his administrative remedies." (Br. in Supp. [13] at 12.) Defendants therefore contend that all of the complaints of the rest of the plaintiffs must be dismissed.

Plaintiffs argue that they have adequately exhausted their remedies for purposes of a class action lawsuit, as it is undisputed that at least one class representative has fully exhausted the administrative grievance procedure. (Pls.' Resp. to Defs.' Mot. to Dismiss [18] (hereinafter, "Pls.' Resp.") at 6.) As the Court is denying Plaintiffs' Motion for Class Certification, the doctrine of vicarious exhaustion obviously does not apply here. *See Hartman v. Duffey,* 319 U.S. App. D.C. 169, 88 F.3d 1232, 1235 (D.C. Cir. 1996), *cert. denied,520 U.S. 1240, 137 L. Ed. 2d 1048, 117 S. Ct. 1844 (1997)* (discussing the doctrine of vicarious exhaustion, whereby exhaustion of administrative [*62] remedies by one member of the class satisfies the requirement for all others with sufficiently similar grievances (citation omitted); *see also Griffin v. Carlin,* 755 F.2d 1516, 1532 (11th Cir. 1985) ("The only issues that may be raised in a class action claim are those issues that were raised by representative parties in their administrative complaints, together with those issues that may reasonably be expected to grow out of the administrative investigation of their claims.") (citation omitted).

As the plaintiffs will be proceeding on individual claims, at least initially, they will have to address, initially, the matter whether they have exhausted available administrative remedies. Of course, plaintiffs argue now, and will presumably argue in the future, that, even if they have not exhausted all of their administrative remedies, the grievance system at Phillips should be construed as being "unavailable" to them, because the prison staff routinely interferes with their efforts to exhaust grievances and because the grievance procedure fails to recognize that mentally ill or retarded prisoners simply lack the wherewithal to follow a grievance procedure. (Pls.' Resp. [*63] [18] at 11-19.) Such an argument carries some facial appeal to this Court. It is unnecessary for the Court to decide the ultimate merits of plaintiffs' position at this time, however. More importantly, at the moment, plaintiffs allege in their First Amended Complaint that they have exhausted all of their administrative remedies to the extent that they are available. (First Amended Compl. [10] at P66.) Thus, taking the well pleaded facts as true and resolving them in the light most favorable to the plaintiffs, as the Court must do on this motion to dismiss, this paragraph is sufficient to allege exhaustion of administrative remedies and to avoid dismissal. Given the confusing jumble of the First Amended Complaint, in which no plaintiff is ever referred to by name and prisoners are only referred to by number, the Court cannot not make any judgment about whether any individual plaintiff had actually exhausted his administrative remedies before filing suit, even if it were necessary or appropriate for the Court to do so. [11] Based on the face of the Complaint, it does not appear beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle [*64] them to relief. *See Conley,* 355 U.S. at 45-46.

[*65] **C. Vicarious Liability Under 42 U.S.C. § 1983**

Defendants also allege in this same motion to dismiss that "Prisoner Two's" claims against them are based on a theory of vicarious liability and must be dismissed. (Br. in Supp. [13] at 12.) It is true that a claim under *42 U.S.C. § 1983* cannot be based upon vicarious liability. *Brown v. Smith,* 813 F.2d 1187 (11th Cir. 1987) (citation omitted). Instead, to state a *§ 1983* cause of action against prison

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[11] Of course, it is not appropriate. The defendants have attached the affidavit of Deryl Canady, the Assistant Director of Inmate Affairs for the Department of Corrections, as an exhibit to their motion to dismiss. The affidavit purports to examine all of the individual plaintiffs and present evidence to the effect that only one of the plaintiffs exhausted his administrative remedies. An affidavit attached to a motion to dismiss is "clearly the sort of evidentiary material that is not appropriate at the 12(b)(6) stage." *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1280 (11th Cir. 1999). The Court did not consider this affidavit, as considering this matter outside the pleading would have converted this *Rule 12(b)(6)* motion to a motion for summary judgment. *Ware v. Associated Milk Producers, Inc.*, 614 F.2d 413, 414-415 (5th Cir. 1980). The Court has discretion as to whether to accept material beyond the pleading that is offered in association with a 12(b)(6) motion. *Prop. Mgmt. & Invs., Inc. v. Lewis,* 752 F.2d 599, 604 (11th Cir. 1985) (citing *Ware,* 614 F.2d at 415)). If the district court chooses to ignore any supplementary materials outside the pleadings that are filed and determines the motion under the *Rule 12(b)(6)* standard, the motion to dismiss is not transformed into a motion for summary judgment. *Garita Hotel Ltd. P'ship v. Ponce Fed. Bank,* 958 F.2d 15, 18 (1st Cir. 1992) (citations omitted). This is exactly what the Court has done in this case.

officials based on a constitutional deprivation resulting from cruel and unusual punishment, the complaint must allege a conscious or callous indifference to a prisoner's rights by the particular defendant. *Zatler v. Wainwright,* 802 F.2d 397, 400 (11th Cir. 1986). Further, to prove a causal connection between the official's acts or omissions and the alleged constitutional deprivation, the plaintiff must allege and show that the official was somehow personally involved in the acts that resulted in the constitutional deprivation. *Id.* at 401. Such involvement could, however, be shown by proving that the defendant established or utilized [*66] a policy or custom that creates deliberate indifference to an inmate's constitutional rights. *Id.* (citation omitted).

In the First Amended Complaint, the plaintiffs allege that the beating incident regarding Prisoner Two resulted from the policies and practices implemented by the defendants and from the failure of the defendants to provide adequately trained and disciplined staff to manage and supervise the mentally ill and/or retarded inmates at Phillips. (First Amended Compl. [10] at PP28, 29, 32, 35, 37, 41, 44, 45, 47, 49, 56, 59.) As plaintiffs have alleged that a policy established by the defendants led to the deprivation of Prisoner Two's constitutional rights, this is sufficient to articulate a causal connection for purposes of liability under *Section 1983*. Moreover, the plaintiffs have made sufficient allegations that, if believed, could establish a history of widespread abuse. Looking at the First Amended Complaint as a whole, plaintiffs do not allege only one isolated incident, as the defendants seem to argue. *See Wilson v. Attaway,* 757 F.2d 1227, 1242 (11th Cir. 1985). The incidents regarding Prisoner Two are only some of the many constitutional [*67] deprivations that the plaintiffs allege to have occurred because of the alleged deliberate indifference of the defendants. Accepting the well pleaded facts as true, the Court concludes that plaintiffs have articulated a causal link between the defendants' alleged acts and omissions and the constitutional deprivations they allegedly suffered, necessary to charge liability under *Section 1983*. Thus, the Court cannot say that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *See Conley,* 355 U.S. at 45-46.

D. Moot Claims Due to Parole and Transfer

Defendants argue that many of the plaintiff inmates have been either transferred or paroled from Phillips State Prison, [12] making their claims for injunctive and declaratory relief moot. (Br. in Supp. [13] at 15.) As noted above, on a *Rule 12(b)(6)* motion to dismiss, the Court may consider only the face of plaintiffs' Complaint and any attachments thereto. Accepting the well pleaded facts as true and resolving them in the light most favorable to the plaintiffs leads the Court to conclude that none of the plaintiffs' complaints may be dismissed as moot at this juncture. [*68] It may well be true that some of the plaintiffs have been released, paroled, or transferred, as defendants state. If that is true, it may be that the particular plaintiff's injunctive claims may have become moot and defendants will therefore urge dismissal. [13] Yet, as the Court is denying class certification at this time and allowing the plaintiffs to file individual suits, the Court assumes that some of these plaintiffs may seek monetary relief, in which event a transfer or release would not moot such a claim. Accordingly, the Court **DENIES** defendants' motion to dismiss based upon mootness [13] **WITHOUT PREJUDICE.**

[*69] The defendants also filed a Motion to Dismiss Plaintiffs Lane Cherry, Robert Hampton, and Norman Maddox Based Upon Mootness [21] under *Federal Rule of Civil Procedure 12(h)*[14]. Defendants argue that these plaintiffs have been released from incarceration, mooting their claims, as they sought only declaratory and injunctive relief. As noted above, on a *Rule 12(b)(6)* motion to dismiss, the Court may consider only the face of plaintiffs' Complaint and any attachments thereto. Accepting the well pleaded facts as true and resolving them in the light most favorable to the plaintiffs leads the Court to conclude that none of the plaintiffs' complaints may be dismissed as moot at this juncture. Moreover, if the plaintiffs that move forward with individual cases were to seek money

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[12] Defendants do not identify these inmates in this particular motion.

[13] "Absent class certification, an inmate's claim for injunctive and declaratory relief in a *section 1983* action fails to present a case or controversy once the inmate has been transferred." *Wahl v. McIver,* 773 F.2d 1169, 1173 (11th Cir. 1985). The Court is not certain whether the *Wahl* holding applies with the same force where a prisoner could likely be transferred back to the same prison. That is, as Phillips is one of two state prisons that houses severely mentally ill or retarded prisoners, there may be some likelihood that a given plaintiff might be transferred back to Phillips in the future.

Of course, the reality that prisoners do get transferred or released and that, when such occurs, the defendant prison officials can successfully move for dismissal of injunctive claims is probably a fact that motivated plaintiffs to file this unwieldy class action. The Court is sympathetic to plaintiffs' plight. If plaintiffs do, in fact, prove systemic problems of a Constitutional magnitude, in its individual cases, the Court feels confident that some mechanism will be available to insure that injunctive relief is available.

[14] "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *Fed. R. Civ. P. 12(h).*

damages, these claims would not be mooted simply by their release from prison. They would remain valid during the applicable limitations periods, and this Court would retain jurisdiction over them. The Court therefore **DENIES WITHOUT PREJUDICE** defendants' Motion to Dismiss Plaintiffs Lane Cherry, Robert Hampton, and Norman Maddox Based Upon Mootness [21].

[*70] **IV. Motion for More Definite Statement**

Defendants also filed a Motion for More Definite Statement [3]. Defendants argue that the plaintiffs have failed to file a Complaint containing "a short and plain statement of the claim" as required by *Federal Rule of Civil Procedure 8(a)(2)*. Defendants express some of the same sentiments expressed by the Court above: that the Complaint is so lacking in specifics and detail as to be unintelligible, due to the manner in which it was drafted, with prisoners referred to only by numbers and not by name. (Br. in Supp. of Defs.' Mot. for More Definite Statement [3] at 4-5.) Because the Court is denying class certification and directing the plaintiffs to refile their claims as individuals, this concern has become **moot.** If and when individual plaintiffs file their individual complaints, they will of course have to allege specific wrongs, supported by specific facts, that occurred to them.

Defendants also argue that the Complaint does not allege facts specific enough for potential liability for prison administrators under *42. U.S.C. § 1983*. (*Id.* at 6-7.) Defendants further argue that [*71] the Complaint does not make proper allegations that plaintiffs properly exhausted the prison grievance procedure. (*Id.* at 8.) The Court disagrees. For the reasons discussed above in regard to the defendants' Motions to Dismiss, the Court concludes that the Complaint does sufficiently allege facts upon which *42 U.S.C. § 1983* liability could be based. The Complaint also sufficiently alleges, for this stage in the litigation, that the plaintiffs exhausted their administrative remedies. Accordingly, Defendants' Motion for More Definite Statement [3] is **DENIED, WITHOUT PREJUDICE.**

CONCLUSION

For the foregoing reasons, Defendants' Motion for More Definite Statement [3] is **DENIED WITHOUT PREJUDICE;** Plaintiffs' Motion for Class Certification [8] is **DENIED WITHOUT PREJUDICE;** Defendants' Pre-Answer Motion to Dismiss [13] is **DENIED WITHOUT PREJUDICE;** Plaintiffs' Motion for Leave to Supplement Response to Defendants' Pre-Answer Motion to Dismiss [20] is **GRANTED;** and Motion to Dismiss Plaintiffs Lane Cherry, Robert Hampton, and Norman Maddox Based Upon Mootness [21] is **DENIED WITHOUT PREJUDICE.**

At this juncture, [*72] the Court would typically break the case down into twenty-one (21) separate cases, representing the twenty-one individual plaintiffs. Given the way the case was pled, however, the Court is unable to determine which plaintiff would pursue which grievance. Further, as it is not clear that all individual plaintiffs will wish to proceed with their individual claims, the Court will not attempt to break down the existing Complaint into different cases. Instead, the Court will maintain, as a single case, the action styled: *Fluellen, et al. v. Wetherington, et al.,* 1:02-CV-479-JEC. **Plaintiff Fluellen** shall file an amended complaint, **within thirty (30) days** from the date of this Order, setting out specifically the claims he is filing and the factual allegations that support such a claim. The Court further **severs** the claims of the remaining twenty plaintiffs and directs these plaintiffs to file individual complaints, **within thirty (30) days** of the date of this Order. [15]**The Clerk shall be directed to docket each such complaint under its own individual case number.** Each plaintiff will then be free to go forward and to litigate his case separately, as he sees [*73] fit.

The Court emphasizes that the denial of class certification is without prejudice. Should the plaintiffs, at some point in the future, develop a more cohesive class that could meet the requirements of *Rule 23*, the Court will entertain again a motion for class certification. That decision can likely best be made after discovery is concluded and motions for summary judgment have been resolved. Of course, the Court's denial of Plaintiffs' Motion for Class Certification is not as harsh a blow as it might seem, given that plaintiffs are seeking only injunctive relief anyway, which injunctive relief can presumably be granted, upon a proper showing, even without the certification of a class.

The Court also hereby schedules a status conference for **Thursday, April 10, 2003, 10:00 a.m., Room 2321,** at which conference the Court will discuss with counsel the best means to get this litigation on [*74] a more organized track, to prioritize the more serious claims in plaintiffs' Complaint, and to discuss the status of plaintiff's Motion For Preliminary Injunction [30], filed on February 20, 2003. **The Court would like for counsel for both parties to be present, as well as an appropriate representative from Phillips State Prison.** The Court is aware that defendants are under no legal obligation to negotiate with persons who have not presented a valid legal claim for adjudication. Nevertheless, the Court intends to discuss with both parties their positions as to whether a more informal, collaborative process between the parties, prior

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[15] Should the plaintiffs need more time to file their new complaints, the Court would be receptive to such a request.

to litigation of the new complaints to be filed in the near future, would be feasible or wise.

SO ORDERED, this 21 day of March, 2003.

JULIE E. CARNES

UNITED STATES DISTRICT JUDGE