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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

ANTONIO CHEATHAM, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 4:14-CV-1952-VEH**
	)	
KIM THOMAS, Commissioner, Alabama Department of Corrections, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This is a civil action brought by the plaintiffs, Antonio Cheatham, Mark Duke, James Edwards, Dale Gilley, Franky Johnson, Michael Mays, Derrick White, Allan Williams, and Robert Woods, who, according to the complaint, "are men presently confined in the custody of the Alabama Department of Corrections ('ADOC') at St. Clair Correctional Facility ('St. Clair')." (Doc. 1 at 2). They bring this action on behalf of themselves, and purportedly on behalf on "all other current and future prisoners at St. Clair." (Doc. 1 at 4). The action names the following defendants:

– Kim Thomas, who is sued in his official capacity as Commissioner of the Alabama Department of Corrections;

– James Deloach, who is sued in his official capacity as the Associate Commissioner for Operations for the Alabama Department of Corrections;

> – Terrance G. McDonnell, who is sued in his official capacity as the Associate Commissioner for Plans and Programs for the Alabama Department of Corrections;
>
> – Greg Lovelace, who is sued in his official capacity as the Deputy Commissioner for Maintenance for the Alabama Department of Corrections;
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> – Grant Culliver, who is sued in his official capacity as the Institutional Coordinator for the Northern Region of the Alabama Department of Corrections;
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> – Carter Davenport, who is sued in his official capacity as the Warden of St. Clair Correctional Facility in Springville, Alabama;
>
> – Karen Carter, who is sued in her official capacity as an Assistant Warden of St. Clair Correctional Facility in Springville, Alabama;
>
> – Eric Evans, who is sued in his official capacity as an Assistant Warden of St. Clair Correctional Facility in Springville, Alabama;
>
> – Carl Sanders, who is sued in his official capacity as a Captain at St. Clair Correctional Facility in Springville, Alabama; and
>
> – Gary Malone, who is sued in his official capacity as a Captain at St. Clair Correctional Facility in Springville, Alabama.
>
> The complaint contains only one count and is brought under 42 U.S.C. § 1983.

The complaint alleges that the defendants,

> through their policies, practices, acts and omissions, exhibit deliberate indifference to the continuing real and imminent substantial risk of serious physical harm, in violation of the right of plaintiff class of prisoners to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

(Doc. 1 at 40). The plaintiffs' claims all relate to alleged

> mismanagement, poor leadership, overcrowding, inadequate security, and unsafe conditions, including broken and nonfunctioning locks on the majority of cell doors, [which] have lead to an extraordinarily high homicide rate, weekly stabbings and assaults, and a culture where violence is tolerated[.]

(Doc. 1 at 2). The plaintiffs seek only "injunctive and declaratory relief to redress [d]efendants' [alleged] violations of [the plaintiffs'] rights under the Eight and Fourteenth Amendments to the United States Constitution." (Doc. 1 at 3).

The case comes before the court on the motion to dismiss filed by defendants Deloach, McDonnell, Lovelace, Culliver, Davenport, Evans, Carter, Sanders, and Malone, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. 13). These defendants refer to themselves as the "Subordinate Defendants," and claim that, because they are not final policymakers for the Alabama Department of Corrections, they are not subject to suit in their official capacities under 42 U.S.C. § 1983. For the reasons stated herein, the motion will be **GRANTED in part** and **DENIED in part.**

I. STANDARD

Generally, the Federal Rules of Civil Procedure require only that the complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). However, to survive a motion to dismiss brought under Rule 12(b)(6), a complaint must "state a claim to relief that is plausible on its face."

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) ("*Twombly*").

A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556) ("*Iqbal*"). That is, the complaint must include enough facts "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citation and footnote omitted). Pleadings that contain nothing more than "a formulaic recitation of the elements of a cause of action" do not meet Rule 8 standards, nor do pleadings suffice that are based merely upon "labels or conclusions" or "naked assertion[s]" without supporting factual allegations. *Id.* at 555, 557 (citation omitted).

Once a claim has been stated adequately, however, "it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 563 (citation omitted). Further, when ruling on a motion to dismiss, a court must "take the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff." *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008) (citing *Glover v. Liggett Group, Inc.*, 459 F.3d 1304, 1308 (11th Cir. 2006)).

II. ANALYSIS

A. The Defendants Need Only Have the Authority To Implement the Injunctive Relief Sought

The movants are sued in their official capacities only. They contend that "a plaintiff in an official-capacity lawsuit has the burden of proving that the defendant is a final policymaker for the governmental entity in which the defendant serves." (Doc. 14 at 3). They argue that only defendant Thomas has final policymaking authority for the Alabama Department of Corrections, and, therefore, they each must be dismissed.

Exactly how the defendants come to the conclusion that they must each be a final policymaker to be sued in their official capacity for prospective relief is unclear. Section 1983 itself contains no such requirement. It provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ..

42 U.S.C.A. § 1983 (emphasis added). In the instant case, the defendants are all state officials, sued in their official capacities, for declaratory and injunctive relief to remedy alleged deprivations of the plaintiffs' right to be free from cruel and unusual punishment. The Supreme Court has held that "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n. 10, 109 S. Ct. 2304, 2312, 105 L.

Ed. 2d 45 (1989). Further, in the context of an Eleventh Amendment immunity analysis, the Eleventh Circuit has noted that "[a] state official is subject to suit in his official capacity when his office imbues him with the responsibility to enforce the law or laws at issue in the suit." *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011) (*citing Ex Parte Young*, 209 U.S. 123, 161, 28 S.Ct. 441, 52 L.Ed. 714 (1908)).

The defendants argue that the rule set out in *Grizzle* is limited to the context of an Eleventh Amendment immunity analysis.[1] However, the Eleventh Circuit, in a more recent opinion outside of the immunity context, seems to indicate that non-policy making officials can be sued in their official capacity for prospective relief. In *Doe v. Wooten*, 747 F.3d 1317, 1326 (11th Cir. 2014), the plaintiff, a prisoner in the custody of the Federal Bureau of Prisons, alleged that two BOP officials violated his rights under the Eighth Amendment. *Wooten*, 747 F.3d at 1319. In addition to suing, in his official capacity, the then-Director of the Bureau of Prisons, the plaintiff also

[1] Recognizing that this suit is for declaratory and injunctive relief only, the defendants expressly disclaim any defense based on Eleventh Amendment immunity. (Doc. 19 at 2-3) ("Because [p]laintiffs request prospective relief only, [d]efendants at this time do not seek dismissal on sovereign immunity grounds."). They contend that the *Grizzle* standard "does not govern § 1983; it is a constitutional standard for analyzing whether sovereign immunity applies." (Doc. 19, at 3). They contend that "[t]o establish the *Ex Parte Young* exception is not to plead sufficiently a § 1983 claim." (Doc. 19 at 4). Interestingly, the defendants cite to *Grizzle* in another section of their brief dealing with whether Deloach is subject to suit. Citing to the above quoted language from *Grizzle*, they argue that Deloach is not properly sued because he retired prior to the time this action was filed. (Doc. 14 at 18). They do not explain why the rule in *Grizzle* applies in that context, which also has nothing to do with sovereign immunity.

sued Rick Stover, in his official capacity as a Senior Designator at the BOP's Designation and Sentence Computation Center ("DSCC"). In particular, he alleged that Stover and the director of the BOP violated his Eighth Amendment rights against cruel and unusual punishment by being deliberately indifferent to the protection he required after he assisted the BOP in the investigation of its own officer in Atlanta. *Wooten*, 747 F.3d at 1321. The plaintiff objected in part to transfers which continually placed the plaintiff in harms' way and subjected him to attack from guards and other inmates. Stover's department, the DSCC, made all transfer decisions and housing assignments. *Id.* at 1320.

In a footnote, the court wrote:

> The two remaining individual defendants in this case are Mr. Stover, a senior member of the BOP's DSCC, and current BOP Director Charles Samuels, Jr. Mr. Doe's remaining claims against them are in their official capacities only. For simplicity, we refer to these two defendants collectively as the BOP. Contrary to the BOP's arguments, Messers. Stover and Samuels—or any successors later substituted automatically pursuant to Fed.R.Civ.P. 25(d)—have the authority through their positions at the BOP to implement the injunctive relief Mr. Doe seeks. This Court has already affirmed that the violations alleged here are appropriate for injunctive relief, and on remand the District Court found the BOP is capable of providing Mr. Doe with the requested relief.

Id. at 1321, n. 2 (citations omitted). There is no indication in the opinion that the exact same issues before the court in the instant case were present in *Wooten*.

However, it is noteworthy that the court found that Stover, in his official capacity, had "the authority through [his] position at the BOP to implement the injunctive relief [sought]." *Id.* Arguably, Stover was not a "final policymaker" for the BOP–that would have been the director. This court is persuaded that, if the only proper defendant were always the person "at the top of the ladder," the court would have said so. Similarly, in the instant case, if the plaintiffs have sued individuals who have the authority to implement the injunctive relief the plaintiffs seek, they are proper defendants.

Regardless, as is shown in the next section, the defendants have cited no case, and this court has found none, which stands for the proposition that only a final policymaker can be sued in his official capacity for prospective relief.

B. There Is No Requirement that the Defendants Be Final Policymakers in order To Be Sued in their Official Capacities

The defendants have failed to show that they must be final policymakers in order to be subject to suit. They begin by discussing the long-settled principle that "Section 1983 plaintiffs bringing official-capacity lawsuits—regardless of the underlying constitutional right involved—must prove that a governmental entity caused the constitutional deprivation via the execution of that governmental entity's 'policy or custom.'" (Doc. 14 at 5 (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985), *in turn quoting Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658,

694 (1978)). Neither of the cases cited support the proposition that a non-final policymaker cannot be sued in his or her official capacity.

One of the questions before the Court in *Monell* was whether local governments could be held responsible for Section 1983 violations through the doctrine of *respondeat superior*. The Court held that

> a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell, 436 U.S. at 694. In *Graham*, the Court, noting that the "distinction [between personal and official capacity suits] apparently continues to confuse lawyers and confound lower courts," explained the difference in great detail. It wrote:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 237–238, 94 S.Ct. 1683, 1686–1687, 40 L.Ed.2d 90 (1974). Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611 1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Brandon, supra*, 469 U.S., at 471–472, 105 S.Ct., at 878. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking

> to recover on a damages judgment in an official-capacity suit must look to the government entity itself. On the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. *See, e.g., Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a "'moving force' " behind the deprivation, *Polk County v. Dodson*, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981) (*quoting Monell, supra*, 436 U.S., at 694, 98 S.Ct., at 2037); thus, in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law. *Monell, supra*; *Oklahoma City v. Tuttle*, 471 U.S. 808, 817–818, 105 S.Ct. 2427, 2433, 85 L.Ed.2d 791 (1985); id., at 827–828, 105 S.Ct., at 2437, 2438 (BRENNAN, J., concurring in judgment). When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law. *See Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (absolute immunity); *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) (same); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (qualified immunity); *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) (same). In an official-capacity action, these defenses are unavailable. *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980); *see also Brandon v. Holt*, 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985). The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, qua entity, may possess, such as the Eleventh Amendment. While not exhaustive, this list illustrates the basic distinction between personal- and official-capacity actions.

Graham, 473 U.S. at 165-67. After citing *Graham*, the defendants seem to assume that the above quoted language means that they cannot be sued in their official capacity unless they are final policymakers. They spend the rest of their briefs

attempting to demonstrate that each of them are not policymakers, and that Thomas is.

The defendants misunderstand the language from *Monell* and *Graham*. The idea that an official capacity suit is actually an action against the governing body for whom that official works applies only in the context of a claim for money damages. *Graham* was clear that official-capacity suits only generally represent another way of pleading an action against an entity of which an officer is an agent. *Graham*, 473 U.S. at 165-67. The Court clearly stated that "a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself." *Id.* (emphasis added). Thus, the "official capacity equals the entity" rule is qualified, and limited to cases where money damages are at issue.

The cases cited by the defendants are not to the contrary. The defendants cite *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986). In *Pembaur*, the Sixth Circuit Court of Appeals had held that "a single decision to take particular action, although made by municipal policymakers, cannot establish the kind of "official policy" required by *Monell* as a predicate to municipal liability under § 1983." *Pembaur*, 475 U.S. at 477-78 (emphasis added). The Supreme Court disagreed, holding:

[I]t is plain that municipal liability may be imposed for a single decision

by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) (City Council passed resolution firing plaintiff without a pretermination hearing); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981) (City Council canceled license permitting concert because of dispute over content of performance). But the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. *Monell*'s language makes clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy," *Monell, supra*, 436 U.S., at 694, 98 S.Ct., at 2037–2038, and whose decisions therefore may give rise to municipal liability under § 1983.Indeed, any other conclusion would be inconsistent with the principles underlying § 1983. To be sure, "official policy" often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time. That was the case in *Monell* itself, which involved a written rule requiring pregnant employees to take unpaid leaves of absence before such leaves were medically necessary. However, as in *Owen* and *Newport*, a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

Having said this much, we hasten to emphasize that not every

> decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. *See, e.g., Oklahoma City v. Tuttle*, 471 U.S., at 822–824, 105 S.Ct., at 2435–2436. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law. However, like other governmental entities, municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances. To hold a municipality liable for actions ordered by such officers exercising their policymaking authority is no more an application of the theory of respondeat superior than was holding the municipalities liable for the decisions of the City Councils in Owen and Newport. In each case municipal liability attached to a single decision to take unlawful action made by municipal policymakers. We hold that municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. *See Tuttle, supra*, at 823, 105 S.Ct., at 2436 (" 'policy' generally implies a course of action consciously chosen from among various alternatives").

Id. at 480-84. This language, quoted in pieces and out of context by the defendants, very clearly discusses only the circumstances under which a government entity may be liable for the acts of an official. When discussing whether "the decisionmaker

possesses final authority to establish municipal policy," it was discussing only what decisions, by which officials, could be imputed to the municipality. *Pembaur* had nothing to do with whether an official could be sued in his official capacity for injunctive relief.

The defendants also cite *Connick v. Thompson*, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011), which they contend supports their position. While the Court in *Connick* did note that official municipal policy includes both the decisions of a government's lawmakers and the acts of its policymaking officials, *Connick*, 131 at 1359, the issue in *Connick* was not whether a non-policymaking official could be sued in his or her official capacity for declaratory or injunctive relief. Instead, like in *Pembaur*, the issue was whether a local government entity, in this case the Orleans Parish District Attorney's Office, could be held liable for the conduct of its prosecutors. *Id.* at 1353.

The defendants state

> Consistent with *Thompson*, the Eleventh Circuit Court of Appeals has held that, to establish official-capacity liability against an official, a plaintiff must prove: (1) that "an official responsible for making final policy" has taken action or made final policy that caused the constitutional deprivation; or (2) that "a practice or custom . . . is so pervasive" that is "the functional equivalent of a policy adopted by the final policymaker" and that that "practice or custom" caused the constitutional deprivation.

(Doc. 14 at 8 (*quoting Hale v. Tallapoosa Cnty.*, 50 F.3d 1579, 1582 (11th Cir. 1995);

also citing White v. Thompson, 299 F. App'x 930, 933 (11th Cir. 2008); *Church v. City of Huntsville*, 30 F.3d 1332, 1343 (11th Cir. 1994)). The defendants cite this language out of context. The entire quote from *Hale* actually reads:

> To prevail against the County through Smith in his official capacity, Hale was required to prove that the deprivation resulted from "(1) an action taken or policy made by an official responsible for making final policy in that area of the [County's] business; or (2) a practice or custom that is so pervasive, as to be the functional equivalent of a policy adopted by the final policymaker."

Hale, 50 F.3d at 1582 (quoting *Church v. City of Huntsville*, 30 F.3d 1332, 1343 (11th Cir.1994)) (emphasis added). Further still, the *Church* opinion, cited in *Hale*, was clearly discussing only municipal liability for the acts of its agents. In *Church*, the Eleventh Circuit wrote:

> Municipal liability for the actions of a subordinate employee cannot be based solely on the theory of respondeat superior. *Jett*, 491 U.S. at 736, 109 S.Ct. at 2723. However, liability will attach for "constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the [municipality's] official decisionmaking channels." *Monell*, 436 U.S. at 690–91, 98 S.Ct. at 2036. " 'Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a "custom or usage" with the force of law.' " *Id.* at 691, 98 S.Ct. at 2036 (*quoting Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167–68, 90 S.Ct. 1598, 1613–14, 26 L.Ed.2d 142 (1970)). A municipality can be liable when "a series of decisions by a subordinate official manifest[s] a 'custom or usage' of which the supervisor must have been aware." *Praprotnik*, 485 U.S. at 130, 108 S.Ct. at 928.22
>
> Thus, municipal liability may be based upon (1) an action taken

> or policy made by an official responsible for making final policy in that area of the city's business; or (2) a practice or custom that is so pervasive, as to be the functional equivalent of a policy adopted by the final policymaker..

Church, 30 F.3d at 1342-43 (emphasis added). The issue in *Hale* and *Church* was clearly not whether an official capacity suit could be maintained against a non-policymaker for declaratory or injunctive relief only.

The court notes that the *White* case, also cited by the defendants, seems to state the rule more broadly when it says:

> In order to be held liable under § 1983 in an official capacity, the plaintiff must show the deprivation of a constitutional right resulted from: "(1) an action taken or policy made by an official responsible for making final policy in that area of the [governmental entity's] business; or (2) a practice or custom that is so pervasive, as to be the functional equivalent of a policy adopted by the final policymaker." *Church v. City of Huntsville*, 30 F.3d 1332, 1343 (11th Cir.1994). Only a final policymaker may be held liable in an official capacity. *Id.* at 1342.

White, 299 F. App'x at 933. Similarly, this court has found that a panel of the Eleventh Circuit has written the following in another case:

> In order to be held liable under § 1983 in an official capacity, the plaintiff must show that the deprivation of a constitutional right resulted from: "(1) an action taken or policy made by an official responsible for making final policy in that area . . . ; or (2) a practice or custom that is so pervasive, as to be the functional equivalent of a policy adopted by the final policymaker." *Church v. City of Huntsville*, 30 F.3d 1332, 1343 (11th Cir.1994). Only a final policymaker may be held liable in an official capacity. *Id.* at 1342.

Lloyd v. Van Tassell, 318 F. App'x 755, 760 (11th Cir. 2009). The court finds neither of these unreported cases persuasive,[2] as each case dealt with liability of a local official for the acts of his agent,[3] not whether an official capacity suit can be maintained for declaratory and/or injunctive relief. At the end of the day, none of the authority cited by the defendants stands for the proposition that an official capacity suit cannot be maintained against a non-policymaking official for declaratory and/or injunctive relief. Accordingly, the court sees no reason to review the defendants' argument that only defendant Thomas is the final policymaker. (Dc. 14 at 9-17).[4]

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[2] Both opinions are unpublished. "Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. R. 36-2.

[3] Each case cites to and quotes the language from *Church*, which addresses only local government agency liability for the acts of its agents. Also, in *White*, the issue was whether the official capacity defendants could be liable for the acts of others in allegedly improperly transferring a prisoner to the wrong facility. In *Lloyd*, the issue was whether the Sheriff, in his official capacity, could be liable for the acts of excessive force by a deputy in his department.

[4] The court also finds no merit in the defendants' underdeveloped argument that the plaintiffs will suffer no prejudice if they are dismissed because only Commissioner Thomas, "not any of the [other defendants], is the official [who] would ensure the ADOC's compliance with any potential relief ordered by this Court." (Doc. 14 at 17). At least some of the other defendants arguably have extensive control over aspects of the St. Clair facility that are at issue in this case. The defendants cite no authority, nor do they make any substantial argument, for why inclusion of the other defendants would be "superfluous and inappropriate." (Doc. 14 at 18). While it is likely that all issues concerning every Alabama prison may be under the authority of the ADOC and its director, the defendants discount the effect that an injunction, aimed directly at the Warden or other local prison officials responsible for the specific issues at hand, would have in remedying the problems. Regardless, the defendants have not addressed the specific problems discussed in the complaint, or the ability of each defendant to implement injunctive relief regarding each problem, and "[t]here is no burden upon the district court to distill every potential argument that could be made based upon the materials before it . . .." *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) (summary judgment).

C. The Proper Person, in his Official Capacity as the Associate Commissioner for Operations for the Alabama Department of Corrections, Will Be Substituted as a Defendant in Place of James Deloach

The defendants argue that James Deloach should be dismissed because "[e]ffective on July 1, 2014, prior to the filing of this action, [d]efendant James Deloach retired from the ADOC." (Doc. 14 at 18). Deloach was sued in his official capacity as the Associate Commissioner for Operations for the Alabama Department of Corrections. Whether Deloach himself still occupies that position is irrelevant as

> [a]n action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

Fed. R. Civ. P. 25(d). The ADOC website states that Terrance G. McDonnell is the current Associate Commissioner for Operations for the Alabama Department of Corrections.[5] The plaintiffs state that defense counsel has informed them that Grantt Culliver now occupies the position. (Doc. 18 at 22). The court also takes judicial notice of the fact that Thomas is not longer the director of the ADOC. Accordingly, within 14 days after the entry of this order, the parties shall file a joint motion to

[5] See the Alabama Department of Corrections website at http://www.doc.state.al.us/ExecutiveBios.aspx.

substitute the name of the correct persons for each official named in the complaint.

D. All Claims of Plaintiff White Are Due To Be Dismissed

"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. *Dudley v. Stewart*, 724 F.2d 1493, 1494–95 (11th Cir.1984). Past exposure to illegal conduct does not constitute a present case or controversy involving injunctive relief if unaccompanied by any continuing, present adverse effects. *O'Shea v. Littleton*, 414 U.S. 488, 495–96, 94 S.Ct. 669, 675–76, 38 L.Ed.2d 674 (1974)." *Wahl v. McIver*, 773 F.2d 1169, 1173-74 (11th Cir. 1985). The plaintiffs admit that White, having been transferred from the St. Clair facility, no longer can maintain a claim. (Doc. 18 at 22). Accordingly, his claims are due to be and will be **DISMISSED with prejudice**.

III. CONCLUSION

Based on the foregoing, it is hereby **ORDERED, ADJUDGED**, and **DECREED** as follows:

1. The defendants' motion to dismiss is **GRANTED** to the extent that it seeks dismissal of the claims of Derrick White. All claims of plaintiff Derrick White are **DISMISSED with prejudice**.

2. In all other respects, the motion is **DENIED**.

DONE and **ORDERED** this 17th day of February, 2015.

VIRGINIA EMERSON HOPKINS
United States District Judge