UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MICHAEL LINDSEY GAMBUZZA,
CHRISTOPHER SCOTT DRESCHER,
BARBARA SCHNURR, and
DEBORAH SORENSEN,
on behalf of themselves and all
others similarly situated,

Plaintiffs,

Case No. 8:09-cv-01891-EAK-TBM

v.

LIEUTENANT DIANE PARMENTER,
CAPTAIN ANTHONY ACKLES,
MAJOR JAMES HIGGINBOTHAM,
and SHERIFF BRAD STEUBE,
in their official capacities,

Defendants.
_____/

PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO THE COURT'S ORDER OF MARCH 11, 2011, REGARDING MOOTNESS

Plaintiffs, by their undersigned counsel, hereby respond to this Court's Order (D.E. 37) directing the parties to file memoranda of law regarding whether this case is moot. As set forth more fully below, (1) Plaintiffs bring their claims for injunctive and declaratory relief on behalf of a similarly situated class of persons, (2) Defendants' unconstitutional "postcard-only" mail policy is capable of repetition yet evading review, and (3) Plaintiffs seek injunctive relief for acts that were authorized or part of a policy. Accordingly, Plaintiffs have standing to seek the injunctive and declaratory relief on behalf of the proposed class sought herein, and this case is not moot.

However, at the outset, Plaintiffs note that Defendants' Motion for Disqualification for Bias or Prejudice (D.E. 25) remains pending before this Court. As more fully discussed in Plaintiffs' Motion for Reconsideration and Recusal (D.E. 31), pursuant to 28 U.S.C. § 144[1], this Court is precluded from making any substantive rulings pertaining to this matter, including any determinations regarding whether this case is moot, while Defendants' Motion for Disqualification is pending.[2]

BACKGROUND

Plaintiffs, Michael Lindsey Gambuzza, Christopher Scott Drescher, Barbara Schnurr, and Deborah Sorensen, on behalf of themselves and all others similarly situated, bring the present class action lawsuit pursuant to 42 U.S.C. § 1983 and F.R.C.P. 23(b)(2). Complaint at ¶¶ 1, 50 (D.E. 10). Plaintiffs Gambuzza and Drescher, inmates at the Manatee County Jail at the time this action was filed and when this Court last addressed the issue of class certification, seek to represent a class of Manatee County Jail Inmates, defined as the "Inmate Class." Complaint at ¶¶ 1, 50, 52 (D.E. 10); Order Granting Motion to Set Class Certification Briefing Schedule (D.E. 24). Plaintiffs Schnurr and Sorensen, family members of inmates at the Manatee County Jail at the time this action was filed and when this Court last addressed the issue of class certification, seek to represent a class of family members and friends of Manatee County Jail inmates, defined as the "Family Members and Friends Class." Complaint at ¶¶ 1, 50, 52 (D.E. 10); Order Granting Motion to Set Class Certification Briefing Schedule (D.E. 24). Plaintiffs Gambuzza and Drescher have since been released from the Manatee County Jail.

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[1] Pursuant to 28 U.S.C. § 144, "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." (emphasis provided).

[2] Pursuant to Rule 10(c), Federal Rules of Civil Procedure, Plaintiffs incorporate their Motion for Reconsideration and Recusal (D.E. 31), filed June 23, 2010, as if fully set forth herein.

Plaintiffs, on behalf of themselves, the Family Members and Friends Class, and the Inmate Class, seek to enjoin the Defendant officials of the Manatee County Sheriff's Office ("Sheriff") and Manatee County Jail from enforcing, in violation of the First and Fourteenth Amendments to the U.S. Constitution, a "post-card only" mail policy under which members of the Inmate Class are permitted to receive incoming mail from members of the Family Members and Friends Class only in the form of postcards (the "Postcard-Only Mail Policy"). Complaint at ¶¶ 2 (D.E. 10).

Every current and future inmate of the Manatee County Jail is subject to Defendants' Postcard-Only Mail Policy that is the subject of this lawsuit. Complaint at ¶¶ 30-34 (D.E. 10). While a class certification briefing schedule was set by this Court, the matter was *sua sponte* dismissed, without the opportunity for the presentation of evidence and despite the pendency of a motion for disqualification, prior to the filing of Plaintiffs' Motion for Class Certification. Order Granting Motion to Set Class Certification Briefing Schedule (D.E. 24); Order of Dismissal (D.E. 28).

ARGUMENT

Article III of the Constitution "limits the jurisdiction of the federal courts to the consideration of 'Cases' and 'Controversies.'" *Mingkid v. U.S. Att'y Gen.*, 468 F.3d 763, 768 (11th Cir. 2006). An action is moot "when it no longer presents a live controversy with respect to which the court can give meaningful relief," or if the parties, "lack a legally cognizable interest in the outcome." *Id*; *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Courts have often referred to this concept as the "personal stake" requirement. *See, e.g., United States Parole Commission, et al. v. Geraghty*, 445 U.S. 388, 396 (1980); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 755 (1976).

As this Court correctly points out, the general rule in the Eleventh Circuit regarding this "personal stake" requirement is that a transfer or a release of a plaintiff from prison will moot that individual plaintiff's claim for injunctive and declaratory relief. *See Smith v. Allen*, 502 F.3d 1255, 1267 (11th Cir. 2007). Both the Eleventh Circuit and the Supreme Court have consistently held, however, that this general rule does not apply when the plaintiff either brings his claims for injunctive and/or declaratory relief on behalf of a similarly situated class of persons, or when the plaintiff seeks to enjoin an act that was authorized or part of a custom or policy. *Sosna v. Iowa*, 419 U.S. 393 (1975); *31 Foster Children v. Bush*, 329 F.3d 1255, 1266 (11th Cir. 2003); *Church v. City of Huntsville*, 30 F.3d 1332, 1338-39 (11th Cir. 1994). Both exceptions to the general rule in our circuit are applicable to the case at bar.

The Supreme Court has addressed the "personal stake" requirement in the class-action context. In *Sosna v. Iowa*, the Court held that mootness of a named plaintiffs' individual claim after a class had been certified did not render the action moot. *Sosna*, 419 U.S. at 400. The Court reasoned that "even though appellees … might not again enforce the Iowa durational residency requirement against [the class representative], it is clear that they will enforce it against those persons in the class that appellant sought to represent." *Id*. In such a case, an Article III case or controversy may still exist "between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Id*. at 402. If class certification has been denied or has yet to be decided, a named plaintiff retains standing to litigate the class certification issue, despite the status of his or her personal claim. *Id*. at 404; *Wade v. Kirkland*, 118 F.3d 667, 669 (9th Cir. 1997) (named prisoner plaintiff has standing to litigate outstanding class certification issue despite transfer from county jail and mootness of individual claims).

It is indisputable that Defendant officials will continue to enforce the challenged provisions of the Postcard Only Mail Policy against the members of the Inmate Class and the Family Members and Friends Class, and that an Article III case or controversy exists between Defendants and these class members. While neither of these classes were ever formally certified by this Court, that is only because this case was *sua sponte* dismissed prior to the date set by the Court for the filing of Plaintiffs' Motion for Class Certification. Plaintiffs brought this action on behalf of themselves, the Family Members and Friends Class, and the Inmate Class, put forth detailed factual class action allegations in the First Amended Complaint, and clearly retain standing to litigate the class certification issue that has been properly raised. *Sosna*, 419 U.S. at 404. ("We therefore hold that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim … [t]he proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined.").

Moreover, the Supreme Court and the Eleventh Circuit have recognized an exception to the "personal stake" requirement in cases where a plaintiff's claims are "capable of repetition, yet evading review." *Doe v. Kearney*, 329 F.3d 1286, 1293 (11th Cir. 2003) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11 (1975)). In such cases, a named plaintiff may litigate the class certification issue – and if certified, the substantive issues of the case on the class's behalf – despite loss of his personal stake in the outcome of the litigation. *Id*.; *Geraghty*, 445 U.S. at 398. While the "capable of repetition, yet evading review" doctrine was initially developed outside the class-action context, it has been applied in the class action context to claims which "are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Id*. at 399.

Directly applicable to the case at hand, the Supreme Court has held that claims involving jail inmates fall squarely into this "capable of repetition, yet evading review" exception to the "personal stake" requirement:

> Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided … before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detailed under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly 'capable of repetition, yet evading review.'

Gerstein, 420 U.S. at 110 n. 11.

In *Gerstein*, a group of Florida jail inmates brought a class action lawsuit challenging pre-trial detention conditions. *Id*. at 106-07. In determining whether the named plaintiffs' claims were moot for the purposes of certifying the class, the Court held that the status of the named plaintiffs' individual claims were irrelevant given the inherently transitory nature of pretrial custody and the certainty of a class of persons who would be subject to the defendant jail's policies. *Id*. at 110 n. 11. ("It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain.").

As in *Gerstein*, Plaintiffs here represent a class of Florida jail inmates who have challenged pre-trial detention conditions. As noted repeatedly by the *Gerstein* Court, the fact that the named Plaintiffs in the case at bar have been released from custody since bringing their constitutional claims over six months ago is unsurprising given the rapid turnover in jail populations and the temporary reality of pretrial detention. *Id*. To require that the named Plaintiffs here maintain a "personal stake" in the litigation throughout its entirety would ignore the plainly established exception to the general rule regarding mootness set forth by *Gerstein*,

and would ensure that Defendants' Postcard-Only Mail Policy would be forever insulated from judicial review.

This law establishes that Plaintiffs' claims are not moot, because (1) they have brought injunctive and declaratory relief claims on behalf of a class of persons similarly situated and are entitled to litigate the class certification issue, and (2) their status as jail inmates at the time of filing make their claims "capable of repetition, yet evading review," and thus an exception to the general rules regarding mootness. As such, Plaintiffs need not rely on any reasonable expectation of being again personally subjected to the unconstitutional conditions complained of in order to defeat mootness, as argued by the plaintiffs in the cases cited by this Court. *See* D.E. 37, *citing Spencer v. Kemma*, 523 U.S. 1, 15 (1998); *McKinnon v. Talladega County, Ala.*, 745 F.2d 1360, 1363; *Romano v. Rambosk*, Case No. 2:06-cv-375-FtM-29DNF, 2010 WL 2732005 (M.D. Fla. July 9, 2010).

In *Spencer v. Kemma*, for instance, the plaintiff, who did not seek to represent a class, challenged the Order of Revocation of his parole. 523 U.S. at 5. Although the plaintiff had been released from prison at the time his petition was filed, he argued that the Order of Revocation could be used to increase his sentence in a future sentencing proceeding. *Id*. at 15. The Court rejected this argument, based primarily on *Los Angeles v. Lyons*, 461 U.S. 95 (1983), and its progeny, holding that plaintiff's argument was contingent upon him "violating the law, getting caught, and being convicted," which under *Lyons* was insufficient to confer Article III standing. *Spencer*, 523 U.S. at 5. Similarly, in *Romano v. Rambosk*, a plaintiff, proceeding alone after his release, was found not to have standing to bring claims that the Collier County Jail failed to accommodate his disability, despite his argument that he may someday be returned to the Jail. *Romano v. Rambosk*, 2010 WL 2732005 at *3.

In *Lyons*, like the above cited cases, the Court held that the plaintiff did not have standing to seek injunctive relief because he failed to establish a "real and immediate" threat that he would again violate the law, get caught, and then be subjected to a chokehold by police. *Lyons*, 461 U.S. at 105. Because the conduct challenged by Lyons was episodic, occurring only when individual police officers decided to use a chokehold, rather than a routine procedure or policy, authorized for use at every traffic stop, Lyons' claim that he was likely to be subjected to a chokehold at a traffic stop was too speculative to satisfy standing requirements. *Id*. at 108.

Unlike *Lyons* and the cases cited by the Court, however, where – as here – a named plaintiff seeks injunctive relief on behalf of a class of persons for acts that were authorized or part of a custom or policy, courts have often found that the case was not moot despite the fact that the named plaintiff's individual claims had expired. *See, e.g., 31 Foster Children v. Bush*, 329 F.3d 1255, 1266 (11th Cir. 2003); *Church v. City of Huntsville*, 30 F.3d 1332, 1338-39 (11th Cir. 1994); *Haney v. Miami-Dade County*, Case No. 04-20516-CIV-Jordan/Brown, 2004 WL 2203481 at *7-8 (S.D. Fla. Aug. 24, 2004); *Mack v. Suffolk County*, 191 F.R.D. 16 (D. Mass. 2000). In these cases, "where the threatened acts that will cause injury are authorized or part of a policy, it is significantly more likely that the injury will occur again." *31 Foster Children*, 329 F.3d at 1266 (holding that foster care children had standing to seek injunctive relief challenging systemic deficiencies in the system despite lack of personal harm where challenged acts were authorized by policy or custom); *City of Huntsville*, 30 F.3d at 1338-39 (holding that homeless persons had standing to seek an injunction against the City of Huntsville, despite lack of current controversy, where plaintiffs challenged City's policy regarding homelessness); *Haney*, 2004 WL 2203481 at *7-8 (holding that women who had been strip searched at the Miami-Dade

County Jail, and subsequently released, had standing to seek injunctive relief, prior to class certification, "for acts that were authorized or part of a policy.").

Indeed, the Court in *Lyons* specifically indicated that the plaintiff may have enjoyed standing to bring injunctive relief claims had he suggested that the officers' use of the chokehold was authorized by policy or custom, instead of the random or unauthorized act of a third party. *See Lyons,* 461 U.S. at 106 (plaintiff may have had standing if he had alleged "that the City ordered or authorized police officers to [perform illegal chokeholds]").

Similarly, Plaintiffs challenge a routine policy and procedure of the Defendant Sheriff that is enforced against every current, past and future person who is incarcerated at the Manatee County Jail, and affects every family member and/or friend of each individual who is incarcerated at the Manatee County Jail. Unlike the plaintiffs' claims in *Lyons*, *Spencer*, and *Romano*, Plaintiffs' claims here do not rely on speculative, random, or unauthorized third-party actions that would have to occur to be again subject to Defendants' unconstitutional policy. Since Plaintiffs have challenged Defendants' policy and practice of censoring all mail that does conform to the Postcard-Only Mail Policy, "there is a substantial likelihood that the plaintiffs and others similarly situated will be injured in the future." *Haney*, 2004 WL 2203481 at *8.

Finally, any suggestion that Plaintiffs should have brought damages claims in order to avoid mootness in this matter is misplaced. The constitutional harms which have been alleged in this case – ongoing violations of the First Amendment rights of both prisoners and the free world persons who wish to correspond with them – is an injury that qualifies as "irreparable injury." "Irreparable injury" is distinguishable from mere injury, in that irreparable injury cannot be adequately compensated through the award of money. *United States v. Jefferson County*, 720

F.2d 1511, 1520 (11th Cir. 1983); *Ray v. School District of DeSoto County*, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987).

In the context of the First Amendment, the Supreme Court and Eleventh Circuit have uniformly held that the "loss of First Amendment freedoms, even for brief periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006); *S.D. v. St. Johns County School Dist.*, 632 F. Supp. 2d 1085, 1096 (M.D. Fla. 2009). The denial of these First Amendment rights – rights which are so vital to those individuals who are incarcerated – cannot be later undone by a monetary remedy. *See Jefferson County*, 720 F.2d at 1520.

CONCLUSION

Because Plaintiffs bring their claims for injunctive and declaratory relief on behalf of a similarly situated class of persons, Defendants' unconstitutional "postcard-only" mail policy is capable of repetition yet evading review, and Plaintiffs seek injunctive relief for acts that were authorized or part of a policy, Plaintiffs have standing to seek the injunctive and declaratory relief on behalf of the proposed class sought herein, and this case is not moot.

Accordingly, Plaintiffs respectfully request that this Court return Plaintiffs' Motion for Reconsideration and Recusal (D.E. 31) to the docket, vacate its *sua sponte* Order of Dismissal (D.E. 28), enter an Order of Recusal from any further proceedings, and direct the Clerk to transfer this matter to another judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 25, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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