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

LOUIS HENDERSON, DANA HARLEY, DARRELL ROBINSON, DWIGHT SMITH, ALBERT KNOX, JAMES DOUGLAS, ALQADEER HAMLET, and JEFFERY BEYER on behalf of themselves and of all those similarly situated,	)	
Plaintiffs,	)	
v.	)	**Case No.: 2:11-CV-224-MHT**
KIM THOMAS, BILLY MITCHEM, FRANK ALBRIGHT, BETTINA CARTER and EDWARD ELLINGTON,	)	
Defendants.	)	

THE STATE'S THIRD SUPPLEMENTAL RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Defendants KIM THOMAS, BILLY MITCHEM, FRANK ALBRIGHT, BETTINA CARTER and EDWARD ELLINGTON (collectively the "State") respectfully submit this Third Supplemental Opposition to the Motion for Class Certification (Doc. No. 2) filed by Plaintiffs LOUIS HENDERSON, DANA HARLEY, DARRELL ROBINSON, DWIGHT SMITH, ALBERT KNOX, JAMES DOUGLAS, ALQADEER HAMLET, and JEFFERY BEYER ("Named Plaintiffs"). As grounds for this Third Supplemental Opposition, the State submits the following:

INTRODUCTION

The revolving door of Named Plaintiffs continue even now, less than five (5) months before the trial date. Since its inception, a total of seven (7) individuals have appeared and then disappeared as Named Plaintiffs.[1] On April 20, 2012, another individual, Bonita Graham, joined the growing ranks of former Named Plaintiffs by voluntarily moving for the dismissal of her claims on the morning of the State's second attempt to complete her deposition. (See Doc. No. 115). The voluntary dismissal of Bonita Graham again underscores the fundamental problem with Named Plaintiffs' Motion for Class Certification (Doc. Nos. 2 and 3)—of the eight (8) remaining Named Plaintiffs, not a single Plaintiff possesses standing to bring the majority of the claims alleged in the Second Amended Complaint. **More specifically, the list of current Named Plaintiffs do not include *one HIV-positive female inmate* housed at Julia Tutwiler Prison for Women.** Pursuant to the long-standing, clearly established law set forth below, Named Plaintiffs cannot pursue any set of claims on behalf of any HIV-positive inmates at Julia Tutwiler Prison for Women.

[1] Former Plaintiffs April Stagner and Roosevelt James voluntarily dismissed their claims on April 11, 2011. (See Doc. Nos. 23, 24, and 26). On May 11, 2011, Former Plaintiff Ashley Dotson voluntarily dismissed her claims. (See Doc. Nos. 32 and 33). Former Plaintiffs John Hicks, Melinda Washington, and David Smith voluntarily dismissed their claims on September 29, 2011. (See Doc. Nos. 57, 58, and 59). Most recently, former Plaintiff Bonita Graham voluntarily dismissed her claims on April 20, 2012. (See Doc. No. 115).

SUPPLEMENTAL NARRATIVE STATEMENT OF MATERIAL FACTS

On March 14, 2012, counsel for the State traveled to the Julia Tutwiler Prison for Women ("Tutwiler") in Wetumpka, Alabama, for the deposition of Ms. Bonita Graham. After almost two (2) hours of questioning, counsel for Named Plaintiffs unilaterally terminated her deposition because the witness became upset for reasons unrelated to the questions that were being asked by counsel for the State. Ms. Graham's deposition was subsequently rescheduled for April 20, 2012.[2]

On April 20, 2012, defense counsel again traveled to Tutwiler for the continuation of Ms. Graham's deposition. Before the deposition even began, Ms. Graham again became upset for reasons that are still unknown to counsel for the State. After counsel for Named Plaintiffs requested that the deposition be terminated, the parties contacted Magistrate Judge Capel to address the matter. Judge Capel ordered the parties to immediately proceed with Ms. Graham's deposition, despite her purported emotional disposition. Shortly thereafter, counsel for Named Plaintiffs informed counsel for the State that Ms. Graham would submit a voluntary dismissal of her claims as she no longer wanted to participate in the lawsuit. Later that same day, Named Plaintiffs filed a Notice of Voluntary

[2] Undersigned counsel understands that Plaintiffs' counsel met with Ms. Graham on a number of occasions prior to the April 20, 2012, reconvening of her deposition. Prior to reconvening her deposition, undersigned counsel also engaged in extended discussions with Plaintiffs' counsel to ensure Ms. Graham's every conceivable comfort at her deposition, including the provision of cigarettes, the specific location of the deposition, the availability of restrooms of Ms. Graham's choosing, and an acceptable place for Ms. Graham to receive her lunch.

Dismissal as to Plaintiff Bonita Graham pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i) (Doc. No. 115).

With the dismissal of Ms. Graham from this lawsuit, there are now only eight (8) Named Plaintiffs remaining. None of the Named Plaintiffs are currently housed at Tutwiler.

SUPPLEMENTAL ARGUMENT

As a threshold matter, Named Plaintiffs must first establish that they have individual standing to bring the claims alleged in the Second Amended Complaint. Article III of the United States Constitution imposes a threshold requirement that "those who seek to invoke the power of federal courts must allege an actual case or controversy." O'Shea v. Littleton, 414 U.S. 488, 493 (1974). The Supreme Court has held that "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." Id. at 494 (dismissing a class action on standing grounds when the named plaintiffs made general allegations of racial discrimination but did not identify specific injuries caused by these particular defendants). Consistent with these principles, federal courts have held that "[s]tanding is one of the keys necessary to open the door to the federal courthouse. Rule 23 merely provides a procedural doorstop which holds the door open for qualified class members, once it has been opened by the

person or persons initially seeking entry." Matte v. Sunshine Mobile Homes, Inc., 270 F. Supp. 2d 805, 826 (W.D. La. 2003) (quoting Chevalier v. Baird Sav. Ass'n, 66 F.R.D. 105, 109 (E.D. Pa. 1975)); Henry v. Circus Circus Casinos, Inc., 223 F.R.D. 541, 544 (D. Nev. 2004) (same). Simply put, "any analysis of class certification must begin with the issue of standing." Griffin v. Dugger, 823 F.2d 1476, 1482 (11th Cir. 1987). See also Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000) ("[I]t is well-settled that prior to the certification of a class, and technically speaking before undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise **each class subclaim**."); Rivera v. Wyeth-Ayerst Laboratories, 283 F.3d 315, 319 (5th Cir. 2002) ("[s]tanding is an inherent prerequisite to the class certification inquiry."); Brown v. Sibley, 650 F.2d 760, 771 (5th Cir. Unit A, July 1981) (stating that the "constitutional threshold [of standing] must be met before any consideration of the typicality of claims or commonality of issues required for procedural reasons by Fed. R. Civ. P. 23").

In the context of a class action seeking injunctive relief, "[w]hen a named plaintiff in a class suits attempts to obtain an injunction due to the likelihood of future injury, that injury must be suffered personally by the named plaintiff . . . ." William B. Rubenstein, 1 Newberg on Class Actions § 2:7 (5th Ed.); see also Johnson v. Bd. of Regents, 263 F.3d 1234, 1265 (11th Cir. 2001) ("[T]o have

standing to obtain forward-looking relief, a plaintiff must show a sufficient likelihood that he will be affected by the allegedly unlawful conduct in the future."). That is, "potential future injuries to class members do not provide standing for the named plaintiff to seek injunctive relief." Id. Therefore, "a plaintiff who has suffered an actual injury but is unlikely to suffer further injury in the future may have standing to bring an individual or class claim for damages but be unable to seek equitable relief even if other class members are likely to suffer future injury." Id. (citing James v. City of Dallas, Tex., 254 F.3d 551 (5th Cir. 2001)).

The remaining eight (8) Named Plaintiffs have not and cannot establish standing as to any claim related to any policies, practices or procedures at Tutwiler. In their Second Amended Complaint, Named Plaintiffs make the following allegations regarding Tutwiler:

(1) Public disclosure of HIV-positive status by Tutwiler personnel (see Second Amended Complaint, at ¶¶ 32, 68-70);

(2) Exclusion of prisoners with HIV from the Tutwiler Faith-Based Honor Dorm (see id. at ¶¶ 34, 77);

(3) Segregation of prisoners with HIV at Tutwiler (see id. at ¶ 67);

(4) Disparate punishment at Tutwiler of prisoners with HIV (see id. at ¶¶ 72-74;

(5) Exclusion of prisoners with HIV from the Tutwiler medical

dormitory (see id. at ¶¶ 75-76);

(6) Exclusion of prisoners with HIV from the residential component of the Tutwiler substance abuse dormitory (see id. at ¶ 78); and

(7) Exclusion of Prisoners with HIV from Tutwiler Kitchen Jobs (see id. at ¶ 79);

To establish standing to bring any of the above-referenced claims, there must be at least one Named Plaintiff that will suffer one of these injuries in the future. See O'Shea, 414 U.S. at 495-96 ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."); Farm Labor Organizing Comm. v. Ohio State Highway Patrol, 95 F. Supp. 2d 723, 733 (N.D. Ohio 2000) ("[I]t is not enough that the unnamed class members, as a group, almost certainly will be subject to the practice in question: the named plaintiffs themselves must show that they are likely to become repeat victims.").

At the time that Named Plaintiffs asserted these claims, they had only two among them who was housed at Tutwiler—Dana Harley and Bonita Graham. (See Second Amended Complaint, at ¶ 32). Plaintiff Dana Harley became eligible for work release and was subsequently transferred to the Montgomery Women's Facility on March 9, 2012. On April 20, 2012, former Plaintiff Bonita Graham notified the Court of her voluntary dismissal from this lawsuit. (See Doc. No.

115). The dismissal of Ms. Graham resulted in the elimination of any Named Plaintiff asserting such claims.

In light of Ms. Graham's dismissal, the remaining Named Plaintiffs do not have standing to bring any claims whatsoever related to Tutwiler. None of the remaining Named Plaintiffs are currently housed at Tutwiler and there is no reason to believe they will be housed at Tutwiler in the future. As a practical matter, Named Plaintiffs cannot maintain that they possess standing to assert claims on behalf of the HIV-positive inmates at Tutwiler. For example, Named Plaintiffs adamantly insist that there are dramatic differences between the various housing facilities for both men and women within the ADOC system. (See generally Second Amended Complaint). Indeed, if the differences among the facilities are as dramatic as alleged by Named Plaintiffs, they must identify at least one Named Plaintiff at Tutwiler to assert a claim related to the alleged circumstances at Tutwiler.

Moreover, the Named Plaintiffs will not suffer the same injuries of any potential class members who are housed at Tutwiler. See Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000) ("[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." (quoting Gen. Telephone Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982))). The fact that other HIV-positive female inmates, now or in the

future, may be exposed to any alleged discrimination at Tutwiler is not sufficient for Named Plaintiffs to obtain respective relief that will not benefit them in conjunction with their individual claims. See Wooden v. Bd. of Regents of the Univ. Sys., 247 F.3d 1262, 1285 (11th Cir. 2001). Absent standing to bring such claims, the remaining Named Plaintiffs cannot satisfy the Rule 23(a) requirements of numerosity, typicality, commonality, or adequacy of the representative. See Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000) ("It should be obvious that there cannot be adequate typicality between a class and a named representative unless the named representative has individual standing to raise the legal claims of the class."). Accordingly, any and all claims alleging discrimination against and/or denial of access to programs, activities, and services of HIV-positive inmates at Tutwiler should be denied because Named Plaintiffs do not have standing to bring such claims either as individuals or on behalf of a purported class of all HIV-positive inmates within the custody of the ADOC, now or in the future. See Matte, 270 F. Supp. at 826 ("[A] plaintiff who lacks standing to sue a defendant may not acquire such status through class representation.").

CONCLUSION

For the foregoing reasons, KIM THOMAS, BILLY MITCHEM, FRANK ALBRIGHT, BETTINA CARTER and EDWARD ELLINGTON respectfully request that the Court deny Plaintiffs' Motion for Class Certification in its entirety.

Respectfully submitted this 15th day of May 2012.

/s/ William R. Lunsford
One of the Attorneys for the Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th of May 2012, I electronically filed the foregoing with the Clerk of the Court and this pleading will be served on all parties registered with the Court's ECF filing system.

/s/ William R. Lunsford
One of the Attorneys for the Defendants