

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

JOHN HICKS, et al.,)	
)	
Plaintiffs,)	
)	
v.)	CIVIL ACTION
)	No. 2:09-cv-155-WKW
)	
GARY HETZEL,)	
Warden of Donaldson)	
Correctional Facility, et al.,)	
)	
Defendants.)	
)	

**PLAINTIFFS' REPLY TO DEFENDANTS' SUPPLEMENTAL
RESPONSE TO MOTION FOR CLASS CERTIFICATION**

Plaintiffs acknowledge that, once sued, defendants have made some improvements in several areas. This Circuit has often noted, however, that corrective action after a lawsuit is filed is a typical and commendable occurrence, but it does not negate the past. See LaMarca v. Turner, 995 F.2d 1526, 1541-42 (11th Cir. 1993) (reforms enacted after filing of suit challenging prison violence did not preclude injunctive relief).¹ Moreover, the problem here is far from fixed.

¹ "Voluntary cessation of a challenged practice rarely moots a federal case," City News and Novelty, Inc. v. City of Waukesha, 531 U.S. 278, 284 n.1 (2001), and a defendant who voluntarily ceases challenged conduct "bears the formidable burden of showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," Friends of the Earth, Inc. v. Laidlaw Env'tl. Serv. (TOC), Inc., 528 U.S. 167, 189-92 (2000); see also Sierra Club v. EPA, 315

- Donaldson has an “armed population” of prisoners with a level of “serious lethal weaponry” that “exceeds” what expert witness Steve Martin has “seen in any institution in recent memory.” (See Martin Depo. at 448-49; Ex. 1 (photographs of some of the knives, shanks, and ice picks recovered at Donaldson in 2008 and 2009)).
- Donaldson has “a significantly higher level of violence than you see in a . . . safe operation.” (Martin Depo. at 97-98).
- The number of security personnel at the prison is wholly “inadequate,” requiring defendants to stretch staffing to fill crucial posts “to a point that compromises security.” (Id. at 319, 334).
- There is a “significant problem” with staff use of force at the prison and a failure to conduct investigations into force used against prisoners. (Id. at 46).

In such cases, class relief is often necessary.²

F.3d 1295, 1303 (11th Cir. 2002) (“Where a defendant voluntarily ceases challenged conduct, the case is not moot because nothing would prevent the defendant from resuming its challenged action.”). This Circuit has almost never found that voluntary cessation moots a controversy, especially where the changes occur in the midst of litigation. See Shelly v. MRI Radiation Network, P.A., 505 F.3d 1173, 1186 (11th Cir. 2007) (collecting Eleventh Circuit and Supreme Court case law); see also Jensen v. Clarke, 94 F.3d 1191, 1200-01 (8th Cir. 1996) (holding injunction in prisoners’ rights case was appropriate despite defendants’ post-complaint actions); Madrid v. Gomez, 889 F. Supp. 1146, 1281 n.230 (N.D. Cal. 1995) (“[d]efendants’ recent policy changes relating to the use of force did not moot plaintiffs’ request for injunctive relief [because they were] litigation-inspired [and] transitory rather than permanent.”).

² See generally Jensen v. Clarke, 94 F.3d 1191, 1193-94, 1200-01 (8th Cir. 1996) (affirming district court’s grant of an injunction to class of present and future prisoners housed in the state’s maximum security prison to remedy defendants’ failure to protect prisoners from a substantial risk of serious harm); Hoptowit v. Ray, 682 F.2d 1237, 1249-51 (9th Cir. 1982) (affirming part of district court’s injunctive order enjoining officer use of “unnecessary physical force” against class of

Citing to an unreported Kentucky district court case, Turner v. Grant County Det. Ctr., 2008 WL 821895 (E.D. Ky. Mar. 25, 2008), defendants argue that plaintiffs prior to certification must demonstrate: (1) rampant violence, (2) caused by defendants in each instance, (3) that is unconstitutional under the deliberate indifference standard. But a review of precedent from this Circuit belies the notion that plaintiffs must prove the merits before certifying a class.³ This Court,

prisoners); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1981) (upholding finding of Eighth Amendment violation where prisoner class alleged failure to protect from violence); Gates v. Collier, 501 F.2d 1291, 1308-10 (5th Cir. 1974) (granting relief to class of prisoners alleging unconstitutional conditions, including inadequate protection from violence); Skinner v. Uphoff, 2002 WL 1906763 (D. Wyo. 2002) (provisionally certifying class of prisoners subject to risk of inmate-on-inmate assault); Ruiz v. Johnson, 154 F. Supp. 2d 975, 991-94, 999-1000 (S.D. Tex. 2001) (holding that defendants "fail[ed] to provide reasonable safety to inmates against assault and abuse" and extending injunction in class action suit); Madrid v. Gomez, 889 F. Supp. 1146, 1155, 1280-82 (N.D. Cal. 1995) (appointing special master in a prisoner class action suit challenging "a broad range of conditions and practices," including excessive force); Fisher v. Koehler, 692 F. Supp. 1519, 1521, 1565-66 (S.D.N.Y. 1988) (granting relief to class of all present and future inmates in city custody challenging conditions of confinement on "many grounds" including "rampant violence between inmates and between staff and inmates"); LaMarca v. Turner, 662 F. Supp. 647 (S.D. Fla. 1987) (granting relief to certified class of inmates challenging prison violence); Doe v. Lally, 467 F. Supp. 1339, 1342, 1355-56 (D. Md. 1979) (directing state to consult with experts to protect class of prisoners from violence).

³ See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) ("[a district court cannot conduct] "a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."); Morrison v. Booth, 763 F.2d

moreover, repeatedly has granted relief to classes that suffered from the same supposed maladies that defendants claim exist here:

- Laube v. Haley, 234 F. Supp. 2d 1227, 1230 (M.D. Ala. 2002) (granting preliminary injunction to female prisoners who alleged overcrowding, inadequate supervision in open dorms, inadequate inmate classification, inmate violence, the availability of weapons, inadequate ventilation, and extreme heat during the summer); Laube v. Campbell, 333 F. Supp. 2d 1234 (M.D. Ala. 2004) (approving proposed agreement settling same class action);
- Austin v. Hopper, 15 F. Supp. 2d 1210, 1224-25 (M.D. Ala. 1998) (finding that a class of "all present and future Alabama inmates who have been or may be assigned to work in chain gangs" satisfied Rule 23);
- Bradley v. Harrelson, 151 F.R.D. 422, 426-27 (M.D. Ala. 1993) (finding class certification was appropriate in action seeking injunctive relief with respect to delivery of mental health services to persons in Alabama prisons);
- See also Order Granting Class Certification, Leatherwood v. Campbell, Civil Action No. CV-02-BE-2812-W (N.D. Ala. Jan. 24, 2004) (certifying class of "all HIV and AIDS infected male inmates, who are now or will be in the future, confined at the Limestone Correctional Facility in Harvest, Alabama");
- See also Order Granting Preliminary Injunction, Maynor v. Morgan, Civil Action No. 01-0851 (N.D. Ala. Apr. 17, 2001) (granting preliminary injunction to class of people detained in jail who alleged unconstitutional conditions of confinement and medical care).

1366, 1371 (11th Cir. 1985) ("Plaintiffs need not prove the merits of their claims at this stage"); Culpepper v. Inland Mortg. Corp., 189 F.R.D. 668, 670 (N.D. Ala. 1999) ("That the named plaintiffs must demonstrate the basis for class certification does not entail that the named plaintiffs must prove the merits of the substantive claims of the proposed class.").

In certifying these classes, this Court has never required plaintiffs to prove the merits of the case in the context of the numerosity analysis, as defendants now ask the Court to do. Plaintiffs' motion should be granted.

ADDITIONAL FACTS PERTINENT TO CLASS CERTIFICATION

Steve Martin gave candid testimony both about positive developments at Donaldson and conditions that still threaten prisoners' safety. In their brief, however, defendants cherry-pick only those comments where Martin gave due credit for improvement, ignoring Martin's unequivocal assessment that the status quo at Donaldson is wholly inadequate and exposes plaintiffs to a serious risk of harm. Defendants' description of conditions at pages 5-6 of their brief, in particular, mischaracterizes Martin's testimony on the following subjects:

A. Contraband Control

According to defendants: "Martin . . . opined that DCF was making 'a legitimate effort to control contraband.'" (Defs' Br. at 5). Mr. Martin actually stated: "I should have been more precise in - in what I was giving them credit for, which is detection versus control." (Martin Depo. at 451). He further testified that although cell searches are being done:

[W]hat's really more critical is how [inmates] are accumulating that amount of contraband in that amount of time. (Id. at 253).

And he continued:

[A]t Donaldson, you have serious, serious lethal weaponry. . . . [T]hat's an armed population. They have deadly weaponry within reach of many of those cells. I haven't seen that in the institutions I've been in in the past couple of years . . . at that level. (Id. at 449).

[T]he instances I've seen and the frequency of [serious weaponry] in Donaldson exceeds that that I've seen in any institution in recent memory (Id. at 448).

[T]hey're not stemming the flow of it. And as long as they don't stem the flow of it, there's going to be trafficking, there's going to be debt, there's going to be violence. (Id. at 255).

[T]hat their interdiction program is reasonable does not constitute a basis to conclude that it is a safe facility. . . . [I]t's not unlike saying if you're taking on a lot of water in a boat and you have a small bucket and you're using the bucket to throw that water out, it's kind of academic if no matter how fast you're pouring that water out but you're taking on more than you're pouring out, the real issue is can you fix the gaping hole. (Id. at 365).

Some of it is a function of not having enough officers to do the job. (Id. at 451-52).

B. Controlled Movement

According to defendants: "Martin observed at DCF enforcement of the kind of 'controlled movement' that is 'essential in a . . . maximum security prison.'" (Defs' Br. at 6). In fact, Martin was troubled by "a number of examples where inmates were able to leave one secure area and perpetrate a serious assault on another inmate in another secure area" (Martin Depo. at 184). He stated:

[I]f you have . . . instances where inmates can move substantial distances from one secure area to another without detection and actually perpetrate violence, that's the antithesis of controlled movement. That . . . is a failed, flawed system. (Id. at 180-81).

Martin further expressed grave concern about Officer Cooper's sworn testimony that in 2008, as many as one hundred inmates at a time were able to leave their cell blocks and move across the prison, undetected, to the south side living unit:

[T]hat as many as a hundred inmates may be out of place over in those south dorms from the cell blocks at one time is absolutely astonishing to me. It - it represents a - a huge, huge flaw in controlled movement at a maximum security facility. (Id. at 181-82).

[I] quite frankly, am astonished . . . that you would refer to Donaldson . . . [a]nd it indeed is, in your system, a maximum security prison. To have that number of inmates across multiple security barriers able to go to a less secure area - from a more secure area . . . [I]t's just directly related to safety. (Id. at 185-86).

While agreeing that the use of identifying wristbands was a positive step to control inmate movement, Martin added that wristbands are "just a security device or means to assist a live correctional officer" and are "rendered useless" without adequate staffing. (Id. at 454-55).

C. Violence

According to defendants: "Martin commended DCF staff's efforts directed toward supervising inmates and preventing violence." (Defs' Br. at 6). Martin actually testified, however, that Donaldson has "a significantly higher level of

violence than you see in a . . . safe operation.” (Martin Depo. at 97-98). He further stated:

Substantively, in the six months of reports that I reviewed, October [2008] to April [2009], there are very high levels of serious weaponry involved violence with sophisticated shanks and weaponry that could harm and kill other inmates. . . . [That] comes from the actual incident reports. That doesn't comport with what you're reporting. (Id. at 141).

[T]he most critical thing I've seen in this case in terms of violence is the frequency of serious lethal weaponry in your prison and its frequent use in the prison (Id. at 498-99).

D. Use of Force

Defendants contend that “Martin viewed . . . systematic review and investigation of uses of force . . . as positives.” (Defs' Br. at 6). On the contrary, Martin made it quite clear that he took precisely the opposite position. He was critical of the “staff's use of batons” as an offensive weapon (Martin Depo. at 41), and stated that the process for investigating use of force incidents is “not fully functioning or functioning as it should,” (id. at 371), resulting in “very few investigations” of use of force, (id. at 372).⁴ He further stated:

⁴ Inmate Keundre Johnson's experience corroborates Martin's opinion in this regard. Johnson stated that in April 2009, two officers entered his segregation cell, pushed, choked, and punched him, and struck him with batons. (Johnson Decl., Ex. 4 to Doc. No. 48). Mr. Johnson's body chart showed: abrasions with purple discoloration and scabbing on the face, four reddened marks on the chest, purple discoloration in the costal (rib) area, and purple discoloration on the arm. (Bates No. 17762). No use of force incident report was created. Although

[I]f you look at . . . the number of instances in Donaldson, they're using [batons] basically as an offensive weapon under the guise of . . . it being necessary. That's what needs to be reviewed, investigated, and policed. And I'll assure you, based on the number of instances I reviewed, it is not in any fashion, in my view, being properly - properly managed. (Id. at 53).

I'm hard pressed to identify something I would call substantial and concrete efforts to reduce [unnecessary violence by staff]. Because I think you've got a significant problem, quite frankly, based on the documents I reviewed --. (Id. at 46).

[I] saw . . . quite a number of - of incidents in which I would suggest should have resulted in some level of either preliminary investigation if not full-blown investigation and did not see any evidence that any of those were being done. (Id. at 372).

Contusions on the forehead and back of head, behind the right ear on the neck. The officer's report offered no explanation for these injuries. I found no evidence this matter was ever investigated How does a report explain multiple head injuries when there's no hard impact strikes ever referenced in that report? (Id. at 383-84).

[I]t takes a pretty extreme egregious incident to - to merit investigation at Donaldson. (Id. at 378).

I don't think I do [agree] that those incident reports are adequately and substantively reviewed. . . . (Id. at 370).

I think I'm on pretty firm ground to conclude that at least for that time period [October 2008 - May 2009], somebody was not paying attention to the application and proper administration of force at Donaldson. (Id. at 379).

Johnson complained about the assault to correctional officials, no investigative report was completed. Warden Gordy stated in deposition that he looked into the incident and concluded, without memorializing it in writing, that the injuries were "self-inflicted." (Defendant Warden Gordy Depo. at 104) (Ex. 3).

E. Overcrowding and Understaffing

Defendants state: "Martin agrees that he has seen efforts and actual success in reducing population." (Defs' Br. at 5). Donaldson's population has decreased by about 200 men since mid-March 2009 (see Ex. 2),⁵ but Martin still expressed significant concern about overcrowding, understaffing, and the accompanying level of violence, especially in the south side units:

[I]t's an obvious, ongoing risk to . . . double bunk in that special density at that level with that staffing and those inmates in those dorms. I'm absolutely firmly convinced that as we continue to work with discovery, that we'll be able to prove that up. (Martin Depo. at 210-11).

[Y]ou're not going to get me to endorse double bunking at the level you have and as spacially dense as you're double bunking in those dorms As a corrections professional, I am not going to do it. (Id. at 218).

I certainly saw rosters in which there was not an officer assigned to each one of those [south side] dorms on a given shift which tells you, at any given time, one of those dorms is going to be without a floor officer (Id. at 440-41).

All one has to do is walk up to one of those dorms and stand at one end and have that person stand at one end and tell you what's going on at the other end. He can't do it. (Id. at 291).

[T]he advantage I have over your expert is the staffing study that was done for you at your request is much more in line with me than your own expert. (Id. at 223).

⁵ The population has not decreased from "a recent high in December of 2008." (Defs' Br. at 8, n.8). The population actually increased from December 2008 to mid-March 2009 and began to decrease thereafter. (See Ex. 2).

Indeed, Defendant Warden Gordy, one of Donaldson's three wardens, recently acknowledged continuing problems with overcrowding and understaffing in a letter to an inmate:

If real truth be told, most correctional professionals are hard working dedicated employees who come to work every day putting their life on the line inside these overcrowded and understaffed facilities The problem here is that ambulance chasing attorneys have infested the minds of the inmates here and may be encouraging the inmates to act out. (Gordy Depo. at 142, 143-44) (emphasis added).

* * *

It is disingenuous to suggest that the conditions described in the Complaint are "ancient history." (Defs' Br. at 7).⁶ This statement is simply not borne out by the record. Moreover, given defendants' position that no risk of harm currently exists at Donaldson, the constitutional violations identified above will not likely be redressed without class-wide relief.⁷

⁶ Many of the commendable improvements to which defendants refer in their brief were made after this lawsuit was filed, including: (1) cessation of triple-celling in units A, B, C, D, X, and Y (Feb. to Apr. 2009); (2) reduction in population by approximately 200 men (Apr. 2009 to present); (3) implementation of wrist bands to control prisoner movement (spring 2009) (4) rearrangement of bunks in south side units to improve visibility (Oct. to Nov. 2009). But see La Marca, 995 F.2d at 1541-42 ("Subsequent events, such as improvements in the allegedly infirm conditions of confinement, while potentially relevant, are not determinative. When a defendant corrects the alleged infirmity after suit has been filed, a court may nevertheless grant injunctive relief unless the defendant shows that absent an injunction, the institution would not return to its former, unconstitutionally deficient state.").

⁷ See Madrid, 889 F. Supp. at 1281 ("Our assessment of defendants' current attitudes and conduct only reinforces our

LEGAL ARGUMENT

Plaintiffs respond to defendants' arguments as follows:

First, defendants take the position that in order to satisfy the numerosity requirement, plaintiffs must first prove unconstitutional conduct, causation, and injury as to each absent class member. There is no support for this approach in the case law. This is not surprising since such a standard would be impossible to meet. Indeed, there would be no need for the class action mechanism at all if plaintiffs had to prove the claims of each putative class member before certification. There is simply no requirement at this stage that plaintiffs "quantify[] . . . how many of the violent acts they contend occurred were the result of Defendants' deliberate indifference." (Defs' Br. at 9).⁸

view that injunctive relief is not only appropriate in this case, but perhaps indispensable, if constitutional dictates-not to mention considerations of basic humanity-are to be observed in the prison Throughout this litigation, defendants have . . . expended most of their energies attempting to deny or explain away the evidence of such problems. Even when defendants modify certain policies . . . , they do not argue that such changes evidence an intent to address the problems raised by this complaint; rather, defendants typically assert that they were precipitated by unrelated matters.").

⁸ See Faulk v. Home Oil Co., 184 F.R.D. 645, 654 (M.D. Ala. 1999) (finding numerosity satisfied where thirty-one job applicants were allegedly affected by discriminatory hiring policies); Ingles v. City of New York, 2003 WL 402565, at *4 (S.D.N.Y Feb. 20, 2003) (finding class of "all prisoners who are or will be confined in DOC institutions . . . not already subject to court order based on prior use of force litigation"

Second, defendants imply that the named plaintiffs are inappropriate class representatives because they do not fear violence at Donaldson. It is true that plaintiff Gregory Wynn did not admit fear to defendants' counsel during his deposition, which is unsurprising in a prison environment where to admit fear may invite abuse. He does, however, believe that he could be the victim of an assault at Donaldson at any time:

I know earlier I said I wasn't scared, but the thing is I still feel that I'm not scared, but it's still a possibility with this environment, I could be the one that get stabbed. I could be one get beat unconscious. (Wynn Depo. at 353).

Mr. Wynn further stated:

When I first came to this facility, the day I stepped into the block. A guy came to me and asked me did I want to buy a knife. . . . He goes . . . man, you're going to need it, man, this is West Jefferson, it's the bottom of the barrel. (Id. at 352).

Plaintiff Charles Malec, who was slashed down the side of his face with a razor while asleep on his bunk in K dorm, fears being the victim of violence again:

I try not to sleep at all when people are asleep, because I don't want to be asleep and somebody come by and cut me again while I'm asleep for no reason at all. So I try to stay awake as much as possible. (Malec Depo. at 149).

to be "sufficiently definite" in litigation challenging alleged pattern of excessive force); Anderson v. Garner, 22 F.Supp.2d 1379, 1384-85 (N.D. Ga. 1997) (finding numerosity satisfied and class definition appropriate where plaintiffs sought to certify a class of all state prisoners who may be subjected to shakedowns performed by tactical squad officers at the direction of defendants).

Third, defendants incorrectly assert that plaintiffs raised claims that require the application of different legal standards. (Defs' Br. at 17-18). Plaintiffs raised one legal claim: violation of the Eighth Amendment, and only one legal standard is applicable: whether defendants' conduct amounts to deliberate indifference. Defendants suggest that a different legal analysis applies to excessive force claims. (Defs' Br. at 19). But, of course, the deliberate indifference standard applies there too. Valdes v. Crosby, 450 F.3d 1231, 1237 (11th Cir. 2006) (deliberate indifference standard applies to supervisory personnel sued in excessive force case).

Fourth, defendants claim there is enormous variance in a prisoner's experience at Donaldson based upon where he is housed. (Defs' Br. at 19). Even if this were true - and the list of fights and assaults in Plaintiffs' Exhibit 2 to Doc. No. 48 shows that it is not - men at Donaldson are moved from unit to unit on a regular basis, exposing them to conditions throughout the facility:

PRISONER

NON-EXHAUSTIVE LIST OF HOUSING AREAS TO
WHICH PRISONER HAS BEEN ASSIGNED

Billy Jessie ⁹	A/B Block, Mental Health Dorm, Segregation, Southside Dorms "Q. Where else were your living areas? A. Every block all over the camp. I have been everywhere."
Charles Malec ¹⁰	K Dorm, A/B Block
James Taylor ¹¹	A Block, L Dorm, G Dorm, M/N Dorm, K Dorm
Gregory Wynn ¹²	X Dorm, Y Dorm, A Block, B Block, D Block
Brandon Russell ¹³	W Block, C Block, 6 Block "I have been assigned to every Block in this prison except Death Row Block and Five Block."
Coy Patrick Crowe ¹⁴	C Block, D Block, P Block, A/B Block
Jameth McDonald ¹⁵	D Block, M Dorm, G Block
Michael Mays ¹⁶	A Block, K Dorm

⁹ Billy Jessie Depo. at 44:17-20, 45:3-9, 47:10-23, 48:1-2.

¹⁰ Charles Malec Depo. at 22:9-11, 22:19-23.

¹¹ James Taylor Depo. at 108:2-4, 127:3-4, 127:6-7, 128:6-8,
129:11-14, 131:3-6, 132:20-23.

¹² Gregory Wynn Depo. at 90:20-22; 266-67.

¹³ Brandon Russell Depo. at 20:1-4, 20:18-23, 22:4-8, 22:23,
23:1-17, 23:18-23, 24:1.

¹⁴ Coy Patrick Crowe Depo. at 17:19-22, 19:2-3, 19:16-19,
20:1-3, 20:19-21, 23:1-3.

¹⁵ Jameth McDonald Depo. at 11:3-16, 13:15-17, 14:1-5.

¹⁶ Michael Mays Depo. at 81: 2-8, 91: 21-22.

Fifth, each class member need not have suffered an identical injury or have experienced the injury in the same prison unit. As Judge Thompson stated in an order certifying a class of state prisoners on chain gangs:

Though there certainly may be some factual differences between the individual class members and the nature and severity of their treatment on the chain gang, such individual differences do not defeat certification because there is no requirement that every class member be affected by the institutional practice or condition in the same way.

Austin, 15 F.Supp.2d at 1224-25. See also Appleyard v. Wallace, 745 F.2d 955, 958 (11th Cir. 1985) (factual distinctions between the claims of named plaintiffs and those of other class members do not defeat typicality). Courts, moreover, routinely certify prisoner class actions that involve numerous allegations and request relief that may impact class members to varying degrees. See, e.g., Bradley v. Harrelson, 151 F.R.D. 422, 426 (M.D. Ala. 1993) (certifying class of prisoners with mental illnesses and concluding that "though there certainly may be some factual differences between the individual class members and the nature and severity of their [mental] illness, such individual differences do not defeat certification because there is no requirement that every class

member be affected by the institutional practice or condition in the same way").¹⁷

Sixth, Turner v. Grant County Det. Ctr., 2008 WL 821895 (E.D. Ky. March 25, 2008), involved a request to certify for injunctive and monetary relief an oddly defined class of:

all persons . . . whom Defendants failed to protect from inmate assaults, threats, or the wanton and unnecessary infliction of physical and emotional pain and suffering as a consequence of Defendants' failure to properly classify such persons on admission to the Jail, or to protect them once admitted. 2008 WL 82195 at *2.

By contrast, plaintiffs here seek to certify a class, for injunctive relief only, of all inmates who are now or will in the future be incarcerated at Donaldson Correctional Facility. In this case, unlike in Turner, the class definition permits easy identification of members.¹⁸

¹⁷ See also Austin v. Penn. Dep't of Corr., 876 F. Supp. 1437, 1444 (E.D. Pa. 1995) (approving settlement agreement in prisoner class action challenging: excessive force, inadequate medical and mental health care, access to courts, discrimination against prisoners with HIV-AIDS under the Rehabilitation Act, among other deficiencies); Madrid v. Gomez, 889 F. Supp. 1146, 1154-55 (N.D. Cal. 1995) (granting relief in prisoner class action challenging "a broad range of conditions and practices that intimately affect almost every facet of their prison life," including the constitutionality of medical and mental health care, conditions of confinement in security housing unit, and excessive force).

¹⁸ Cf. Baby Neal v. Casey, 43 F.3d 48, 57 (3d Cir. 1994) ("[B]ecause they do not also involve an individualized inquiry for the determination of damage awards, injunctive actions 'by their very nature often present common questions satisfying Rule 23(a)(2).'" (quoting 7A Charles Alan Wright et al., Federal Practice and Procedure § 1763 at 247 (2d ed. 1986))).

Seventh, defendants fault plaintiffs for not setting forth a comprehensive description of relief sought in their Complaint, but it is unreasonable to expect plaintiffs to define the exact relief sought in a case challenging systemic failure to protect inmates before any discovery takes place.¹⁹ Plaintiffs received their first discovery documents in this case in July 2009 and their expert conducted his inspection in September 2009. Mr. Martin's expert report, plaintiffs' class certification brief, and Martin's deposition followed on September 28, October 23, and October 26, respectively. The parties have been diligently working through the discovery process, but some discovery, including the key depositions of the Commissioner and Associate Commissioner, remain to be completed before a comprehensive description of relief sought can be generated. Plaintiffs are working with Mr. Martin to define the precise contours of the requested relief and will supplement the record with this information.²⁰

¹⁹ This is especially true as defendants actively blocked plaintiffs' extensive pre-litigation efforts over two years to obtain information about the scope of the violence and other problems at Donaldson. See Allen v. Barksdale, 2009 WL 2997601 (Ala. Sept. 18, 2009) (ordering Department of Corrections to reverse its Open Records Act policy and produce certain incident reports concerning conditions at Donaldson).

²⁰ Relief sought will include increased staffing, particularly in the south side units and A, B, C, and D blocks, reconfiguring the double-bunked and spatially dense south side units, requiring that officials take photographs of inmates involved in

Finally, defendants do not address the mootness issue, which weighs heavily in favor of certification. All of the work done by the parties will be wasted effort if the named plaintiffs are transferred to another facility during the course of this litigation - a likely occurrence for any incarcerated person in any department of corrections. Both a named plaintiff (John Hicks) and other, injured, putative class members (Billy Jessie, Michael Mays) have been transferred or released since this suit was filed, mooting their claims for injunctive relief. Class-wide injunctive relief is necessary and appropriate in this case to ensure an effective remedy of the constitutional violations at issue. The class definition or status can be adjusted at any time by this Court if warranted by future developments.

CONCLUSION

Plaintiffs respectfully request that this Court certify, pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2), a class of all inmates who are now or will in the future be incarcerated at Donaldson Correctional Facility.

use of force incidents, and implementing a system to maintain and report accurate statistics regarding violence at Donaldson.

Respectfully submitted this 20th day of November 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Reply to Defendants' Supplemental Response in Opposition to Motion for Class Certification on the parties by causing a true and correct copy thereof to be delivered by the Court's ECF filing system to defendants' counsel of record at the following addresses:

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This 20th day of November 2009.

s/Sarah Geraghty

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