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' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs submit this Reply to Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment:

I.PLAINTIFFS FACE A SUBSTANTIAL RISK OF HARM AT DONALDSON.

A. Violence at Donaldson Is Not An "Occasional" Occurrence.

Contrary to Defendants' assertion, Plaintiffs have not alleged that prisoners are subject to "occasional" acts of violence at Donaldson Correctional Facility. (Defs' Br., Doc. No. 106 at 30). Rather, Plaintiffs have documented a pervasive and longstanding pattern of assaults, many of which were committed with knives and many of which resulted in serious injuries. Attached to this brief as Exhibit 1 is an updated Summary Chart listing injuries sustained by men at Donaldson and reflecting additional documentation produced by Defendants on

March 1 and March 8, 2010.[1] Defendants claim that Plaintiffs list only 20 incidents involving "serious physical violence or injury" in 2009. (Doc. No. 106 at 31). Exhibit 1, which summarizes the Department's own records, speaks for itself.[2] It shows 109 assault incidents in 2009 and 96 assault incidents in 2008.[3] It further shows 32 assaults with stabbing weapons in 2009 and 34 assaults with stabbing weapons in 2008. It further shows that 10 men were transported to hospitals for medical treatment following assaults in 2009 and 18 men were transported to hospitals for medical treatment following assaults in 2008. Finally, the Chart lists numerous serious injuries sustained by prisoners due to assaults, including: collapsed or punctured lungs (11/11/06, 6/23/08, 12/24/08, 8/17/09); a lacerated liver (1/29/07); loss of vision (5/18/08); loss of hearing (12/12/08); fractured jaws (8/2/07, 10/29/08); a fractured arm (6/6/08); a slashed throat (5/13/07); eye trauma (3/1/09); head trauma

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[1] See Summary Chart (revised 3/15/10) (**Ex. 1**).

[2] Warden Hetzel claims the number of "serious incidents" has decreased. (Doc. No. 106 at 24). The number of recorded inmate assaults has actually increased from 2008 to 2009. While the number of off-site medical visits did decrease from 2008 to 2009, this does not absolve Defendants of liability. See Ramos v. Lamm, 639 F.2d 559, 573, n. 18 (10th Cir. 1980) ("Merely because the current level of violence and illegal activity is statistically lower than in past years does not mean that the present situation meets minimum constitutional standards.").

[3] Multiple men were injured in some of these incidents. See Ex. 1.

(5/7/07, 1/28/09); trauma to the face (1/9/10, 1/26/10 (nose "bit off"[4])); stabbing injuries (1/18/09, wound to chest, 1/30/09, wound to face, 2/2/09, wound to leg, 2/28/09, wound to chest, 3/30/09, wound to face, 4/1/09, wound to neck, 4/26/09, wounds to chest and face, 7/13/09, wound to chest, 8/17/09, wounds to chest, 11/20/09, multiple wounds);[5] and other injuries.

B. The Department's Systematic Underreporting of Violence at Donaldson Is Relevant to this Case.

1. *Underreporting in ADOC Monthly Statistical Reports:*

Defendants argue that the Department's longstanding practice of underreporting violent incidents at Donaldson had "nothing to do with Plaintiffs' claims." (Doc. No. 106 at 28). Yet, Defendants relied on their erroneous reports *in this litigation*, misinforming the Court, for example, that there were only "43 assaults" at Donaldson in 2008.[6] Contrary to Defendants' claim, (Doc. No. 106 at 26), Plaintiffs do not pretend to know the reasons for the Department's failure to report accurate information about assaults at Donaldson.

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[4] See Second Reynolds Decl. ¶ 8 [Ex. 22 to Doc. No. 104].

[5] This list is not exhaustive. See Ex. 1.

[6] See Hetzel Afft., Apr. 16, 2009 [Doc. No. 33-2] at 5 (relying on "statistical data prepared by ADOC's research and planning division" and reporting 43 assaults in 2008). Defendants' failure to track the level of violence at Donaldson after being placed on notice of dangerous conditions at the prison must be considered in determining the reasonableness of Defendants' response to the risk of harm. See infra § II.

Plaintiffs do know that the Department significantly underreported the number of assaults at the prison at a time when the level of violence there was under public scrutiny and that underreporting continued after this case was filed.[7] Plaintiffs put Defendants on notice of the underreporting problem in April 2009,[8] but it was not until eight months later that the Department took steps to remedy the problem.[9]

2. *Underreporting of Incidents at the Facility Level*: The underreporting problem, moreover, is deeper than a mere failure by the Department's research department to count its Incident Reports. Many assaults are not being documented by officers at the facility level. Plaintiffs have already presented the Court with testimony from numerous men who stated that officers failed to document assaults they reported.[10] To give one, more recent

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[7] See Pls' Mot. Summ. J. [Doc. No. 102] at 23; Summary Chart [Ex. 11 to Doc. No. 92] (showing that in March 2009, the Department reported "0" fights and assaults, when Incident Reports revealed two knifings, three other assaults with weapons, and seven assaults/fights without weapons).

[8] See Pls' Reply in Supp. of Mot. for Expedited Disc., Apr. 17, 2009, [Doc. No. 35] at 5.

[9] See Allen Depo. [Ex. 13 to Doc. No. 92] at 63:9-23, 64:12-16, 65:1-3 (stating that investigation began after newspaper articles appeared in December 2009); DeLoach Depo. [Ex. 12 to Doc. No. 92] at 49:17-23, 50:1, 51:1-23, 52:1-19 (same).

[10] See e.g. [redacted] Decl. [Ex. 10 to Doc. No. 104] ¶ 7, 10-18 (stating he reported two assaults to officers but that the assaults were not documented); Perdue Decl. [Ex. 22 to Doc. No. 92] ¶ 7-9 (stating he reported excessive force by officer, but

example, Kenneth Adair twice approached prison officials to report he was in danger of being assaulted by inmates, but he was directed to return to his dorm in general population.[11] He was then hit in the face and slashed with a razor.[12]

Finally, Defendants claim Plaintiffs' counsel "received a copy of every single incident report that involves violent incidents at Donaldson." (Doc. No. 106 at 30). As set forth in Plaintiffs' Response to Defendants' Motion for Summary Judgment (Doc. No. 104 at 5-8), there is a dispute of fact as to whether Defendants produced all discoverable incident reports.[13]

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his report was not investigated); Jones Decl. [Ex. 1 to Doc. No. 48] ¶ 9-15 (stating an officer told him to report an assault as an accident); Magwood Decl. [Ex. 28 to Doc. No. 92] ¶ 7 (stating an officer advised him to report an assault as an accident. See also Pls' Resp. to Defs' Summ. J. Mot. [Doc. No. 104], p. 5-10.

[11] See Adair Decl. ¶ 3-12 (**Ex. 5**).

[12] See id. at ¶ 10.

[13] Plaintiffs also identified earlier incidents for which reports were not disclosed under the Open Records Act. See Letter from Attorney Sarah Geraghty to Attorney John Smith, Feb. 22, 2010 (**Ex. 12**). The incidents listed in Exhibit 12 that are dated from April 2008 to the present should have been produced in Hicks v. Hetzel. The incidents listed in Exhibit 12 that are dated prior to April 2008 were sought under the Open Records Act. The incidents dated January 2010 were sought both in discovery in this matter and under the Open Records Act.

C. The Experiences of Prisoners Other Than The Named Plaintiffs Are Relevant To This Case.

Defendants claim that testimony from persons other than named Plaintiffs is irrelevant. (Doc. No. 106 at 26). On the contrary, other prisoners' experiences are relevant because: (1) Plaintiffs sought class certification, and (2) the testimony of other prisoners provides evidence of the dangerous environment in which Plaintiffs live. To that end, Plaintiffs attach as Exhibit 11 a chart summarizing all declarations submitted by prisoners throughout the course of this case.

II. PLAINTIFFS HAVE PRESENTED SUFFICIENT EVIDENCE TO SHOW THAT DEFENDANTS HAVE NOT RESPONDED REASONABLY TO THE SUBSTANTIAL RISK OF HARM AT DONALDSON CORRECTIONAL FACILITY.

A. This Court Must Consider Defendants' Response to the Risk of Harm *Both* at the Time the Complaint Was Filed and at the Present Time.

Defendants incorrectly state that the reasonableness of their response must be assessed *only* at the time of summary judgment. (Doc. No. 106 at 4). Farmer makes it clear that the reasonableness of Defendants' response must by analyzed *both* at summary judgment and at the time the Complaint was filed.[14] The fact is that, despite repeated and explicit pre-litigation warnings regarding unacceptable conditions at Donaldson, Plaintiffs had to file this lawsuit before the Department made

[14] Farmer, 511 U.S. at 845 (deliberate indifference analysis "should be determined in light of the prison authorities' current attitudes and conduct . . . at the time suit is brought and persisting thereafter.").

any meaningful response to the risk of harm. Defendants cannot run an unconstitutional operation, make a few, modest improvements at the eleventh hour preceding summary judgment, and emerge victorious from litigation – especially where a substantial risk of harm to inmates still exists.[15]

B. Defendants' Response To the Dangerous Conditions at Donaldson Came at the Eleventh Hour, Post-Lawsuit, and Has Not Been Sufficient to Abate the Substantial Risk of Harm.

Plaintiffs respond as follows to the arguments on p. 7-12 and 15-16 of Defendants' brief [Doc. No. 106]:[16]

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[15] See e.g. Smith v. Arkansas Dep't of Corr., 103 F.3d 637, 645-648 (8th Cir. 1996) (upholding grant of injunction to prisoners housed in violent open barracks, where prison officials had made some improvements, but still had not increased staffing); LaMarca v. Turner, 995 F.2d 1526, 1541-1542 (11th Cir. 1993) (rejecting warden's argument that the district court erred in granting injunctive relief, despite the fact that, at the time of the order, defendant had "improved" prison conditions); Coleman v. Schwarzenegger, Plata v. Schwarzenegger, 2009 WL 2430820, *11, 16 (E.D. Cal/N.D. Cal. Aug. 4, 2009) (finding injunctive relief necessary despite the fact that "substantial changes" in the medical care system were made because "fundamental unconstitutional deficiencies" remained); Rouser v. White, 630 F. Supp.2d 1165, 1203-1204 (E.D. Cal. 2009) (denying defendants' motion for summary judgment on prisoner's free exercise of religion claim seeking injunctive relief, where defendants "tendered some evidence of a change in their policies," but where plaintiff "tendered evidence that these policies have not accomplished [the] goal" of remedying the constitutional violation).

[16] Defendants argue that Mr. Taylor conceded that he did not know of "any condition alleged in this lawsuit that Warden Hetzel has not attempted to correct." (Doc. No. 106 at 6). Mr. Taylor is an inmate confined to a prison. Before his deposition, he had never met Warden Hetzel (Taylor Depo. 265:9-10), had only seen him on "a couple of occasions" during

Overcrowding: The Defendants argue that Donaldson is not overcrowded. But when this lawsuit was filed, the Department's own website reported Donaldson's "occupancy rate" as 176.5%.[17] In November 2009, the occupancy rate was 157.5%.[18] While there is no constitutional rule against prisons exceeding their designed capacity, the Department crammed into Donaldson nearly *double* the inmates appropriate for its facility. Defendants' promises in legal briefs that they have no future plans to increase Donaldson's population do not moot Plaintiffs' claim on this matter.[19]

Taylor's five years at Donaldson (265:15-18), and had no way of knowing (at that stage in the case) the specific actions that Warden Hetzel had or had not taken in response to the substantial risk of harm to Donaldson inmates.

[17] See ADOC Statistical Report, Feb. 2009, p. 3 (http://www.doc.state.al.us/reports.asp) (defining "designed capacity" as "original architecture design plus renovations" and defining "occupancy rate" as "month end population" divided by "designed capacity").

[18] See ADOC Statistical Report, Nov. 2009, p. 3 (http://www.doc.state.al.us/docs/MonthlyRpts/2009-11.pdf).

[19] See Atlanta Journal and Constitution v. City of Atlanta Dep't of Aviation, 277 F.3d 1322, 1323 n.1 (11th Cir. 2002) ("The City may not 'moot' an issue by making promises in legal briefs that it has ceased the activity in question," particularly when it continued to deny that any constitutional violation existed); Jager v. Douglas County Sch. Dist., 862 F.2d 824, 833-34 (11th Cir. 1989) (in non-moot case, cessation came only "[u]nder the imminent threat of the [plaintiffs'] lawsuit").

Overcrowding/Lack of Visibility in Open Dorms: When Plaintiffs' expert inspected Donaldson, all open-bay dorms[20] were so spatially dense with double-bunking that there were virtually no unobstructed sight lines, making it impossible for roving officers to monitor prisoners' activities.[21] Dorms M and N, housing 260 men, are still configured in this manner.[22]

In October 2009, the Department changed the configuration in K, L, and O dorms, such that the double bunks were moved to the perimeter wall, leaving one-man bunks in the middle of the dorm.[23] According to Mr. Martin, the reconfiguration of K, L, and O dorms improved visibility.[24] Mr. Martin states, however, that "[t]his reconfiguration alone was not sufficient to achieve a basic level of safety for inmates and officers in the dorms."[25] Contrary to Defendants' claim (Doc. No. 106 at 9), there is an urgent need to reduce the population in the open dorms:

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[20] Defendants erroneously state that Mr. Malec is the only named Plaintiff assigned to an open dorm. (Doc. No. 106 at 8, 12, n. 12). Plaintiff Taylor has been housed in L dorm since at least November 2009. See Taylor Decl., Feb. 24, 2010, ¶ 5 [Ex. 6 to Doc. No. 104].

[21] See Martin Report, p. 7.

[22] See Defs' Resp. to Pls' First Interrogs., Jan. 19, 2010, [Ex. 8 to Doc. No. 94], p. 11.

[23] See id.

[24] See Third Martin Decl. ¶ 6 (**Ex. 7**).

[25] See id. at ¶ 7.

> Without a reduction in the population of the open-bay dorms and an officer on post in each dorm at all times, the security of the inmates housed in those dorms continues to be severely compromised.[26]

Understaffing: Defendants claim to have 54 officers on duty per shift (Doc. No. 106 at 18), but Defendants' records show they are not able to consistently staff the prison at this level. Duty post *rosters* (on which officers sign in to report for duty) show numerous occasions on which there is no roving officer assigned to certain open dorms.[27] Duty post *logs* (documenting incidents during a shift) show occasions on which the manning level was far below 54 officers. To give just a few examples, on March 21, 2009, there were 30 officers to supervise approximately 1,600 inmates in a prison with five open dorms, six population cell blocks, thirteen segregation units, a death row cell block, classrooms, a chapel, dining halls, and an infirmary.[28] On December 9, 2009, there were just 36 officers.[29]

While Plaintiffs are pleased to see that Defendants have, on paper, recently assigned an officer to be physically present

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[26] See id. at ¶ 9.

[27] See Pls' Resp. Br. [Doc. No. 104] p. 16, n. 65 (summarizing Duty Post Rosters showing occasions on which officers were not present to supervise certain dorms).

[28] See Gordy Depo. 29:20-23, 30:1-11; Duty Post Log, Mar. 21, 2009 (Hetzel 3748, 3756) [Ex. 19 to Doc. No. 104].

[29] See Duty Post Log, Dec. 9, 2009 (Hetzel 25146) (stating night shift was operating with 36 staff members, including the radio and shift clerk positions) (**Ex. 10**).

in each open-bay dorm (Doc. No. 106 at 12), in reality, there is often *no officer present* in the open dorms.[30] Charles Malec, James Taylor, Alvin Daniels, and Clark Davis report that there are long periods each day during which no officer is present in their dorms.[31] Mr. Malec, moreover, counted the officers working the open dorms from September to October 2009; he observed fewer officers than the number Defendants claim to have.[32]

Defendants point out that, in addition to "roving" officers, there are two cubicle officers assigned to supervise

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[30] Smith v. Arkansas Dep't of Corr., 103 F.3d 637, 642 (8th Cir. 1996) (finding correctional officials were not "currently meeting their constitutional duty to reasonably protect inmates in the open barracks from danger" where they failed to comply with a state-issued report recommending that at least *two* officers be present inside open-bay dorm housing 86 inmates).

[31] See Taylor Decl., Feb. 24, 2010 [Ex. 6 to Doc. No. 104], ¶ 15 (stating there are at least **12 hours in each 24-hour period** during which no officers are present in L dorm); Malec Decl., Feb. 2, 2010, [Ex. 10 to Doc. No. 102], ¶ 8 (stating there are at least **7 hours in each 24-hour period** during which there are no officers in K dorm); Daniels Decl. ¶ 3 (stating there are **10 hours per day** during which there are no officers present in N dorm) (**Ex. 4**); Revised Davis Decl. ¶ 4, 5 (stating officers are not consistently present in L dorm on the weekends and officers sleep in the dorms at night) (**Ex. 3**).

[32] Defendants claim that Malec does not know the staffing level of the open dorms to which he is not assigned. (Doc. No. 106 at 12). It is possible, however, to count the number of officers as they arrive at the open dorms at shift change from the vantage point of the south side "blacktop." Defendants further argue that Malec's staffing information is not current (id. at 12), but Malec's declaration, dated February 2, 2010, reports there are still 7-8 hours each day during which there are no officers physically present in K dorm. See Malec Decl. ¶ 8 [Ex. 10 to Doc. No. 92].

the 620 men in the open dorms. (Doc. No. 106 at 11). Mr. Martin opined that the presence of the cubicle officers does not make up for the absence of officers actually *inside* the dorms:

> While there is one cube officer overseeing K and L dorms and one cube officer overseeing M and N dorms, these cube officers, on their own, simply cannot provide a basic level of security in the open dorms. The cube officers: (a) each supervise 260 men; (b) supervise all of these men simultaneously in two separate dorms; and (c) supervise these 260 men from a raised cubicle from which it is physically impossible to see into each dorm at the same time. In addition, the cube officers can never leave their posts to respond to any incidents that may occur.[33]

Next, Defendants claim that "the number of vacancies has no direct bearing on the adequacy of staffing" since vacancies can be "compensated for" by the use of strategic deployment and overtime. (Doc. No. 106 at 13). Mr. Martin disagrees:

> Although, in theory, it is possible for prison administrators to use overtime and the reassignment of personnel to compensate for an inadequate level of correctional staff, in practice, the high number of vacancies at Donaldson makes it extremely difficult, if not impossible, to do so without compromising security. . . .
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> [A]t the current manning level, nearly all officers are assigned to fixed posts, meaning posts that must be filled by a correctional officer at all times, limiting the ability of prison officials to move officers to other posts without leaving a necessary post vacant for some time. Finally, as reflected in the Department's Incident Reports, the large number of assaults that have resulted in injuries at Donaldson from 2006 to 2009, the high volume of contraband recovered at Donaldson over the past year, and the unauthorized movement of inmates from the blocks to the south side dorms, all indicate that there is an inadequate level of staffing at Donaldson that has not been

[33] Third Martin Decl. ¶ 8.

> compensated for by the use of overtime or the reassignment of personnel.[34]

Plaintiffs have shown that the level of staffing at Donaldson is inadequate to provide a basic level of safety. In the alternative, there is a dispute of fact on the question of staffing, precluding summary judgment for the Defendants.[35]

Controlling Inmate Movement: Defendants mischaracterize Officer Cooper's testimony regarding the large number of inmates able to leave their cell blocks and travel across the prison to reach the open dorms. (Doc. No. 106 at 15-16). Defendants claim that Officer Cooper said these inmates "were out of their assigned cell blocks *by permission*." (Doc. No. 106 at 16) (emphasis added). Actually, when Cooper was asked how so many inmates escaped their cell blocks, he explained that the prisoners would: "lie" about where they were going (Cooper Depo.

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[34] Third Martin Decl. ¶ 12.

[35] See Millennium Partners, L.P. v. Colmar Storage, LLC, 494 F.3d 1293, 1297, 1301 (11th Cir. 2007) (affirming district court's denial of summary judgment where court found that "conflicting expert testimony . . . presented genuine issues of material fact that should be decided at trial."); Greason v. Kemp, 891 F.2d 829, 835 (11th Cir. 1990) (denying summary judgment where parties presented conflicting expert opinions regarding whether the medical treatment provided to prisoner-plaintiff was grossly inadequate); Waldrop v. Evans, 871 F.2d 1030, 1035 (11th Cir. 1989) (holding that conflicting expert opinions precluded summary judgment where one expert opined that medical treatment provided to prisoner-plaintiff was "reasonable" and the other expert opined that the treatment decisions were "cruel and inhuman").

76:1-5), "run out" when the only two officers assigned to the blocks were "doing something else" (id. at 77:15-19), or otherwise "figure out ways to sneak out." (Id. 76:13-14). Defendants offer no evidence, moreover, to refute prisoners' testimony that Donaldson inmates are *still* able to escape their cell blocks in large numbers.[36]

Grievance Procedure: Plaintiffs did not allege the absence of a grievance procedure in their Complaint because they did not know before discovery that Donaldson has absolutely no process for logging or tracking prisoners' complaints about security or conditions.[37] Neither were Plaintiffs aware in February 2009 that Wardens "trashed" inmate complaints on these matters.[38] Defendants contend that the absence of any mechanism for inmates to report threats to their safety has caused no injury. (Doc. No. 106 at 16). But evidence shows that the absence of a

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[36] See Malec Decl. ¶ 10 [Ex. 10 to Doc. No. 92] (stating he regularly observes inmates assigned to the cell blocks "hang[ing] out" in his dorm); Taylor Decl. [Ex. 6 to Doc. No. 104] (stating there are inmates from the cell blocks in his dorm every other day, sometimes 20-30 inmates at once); Davis Decl. ¶ 7 (Ex. 3) (stating "I see people 'out of pocket' from the cell blocks inside L dorm at least once a day" and stating that on weekends, there are at least 10-20 such inmates in L dorm).

[37] See Warden Edwards Depo. [Ex. 22 to Doc. No. 81] at 87:13-15 (stating that he will "trash" unsigned complaints); 88:3-19 (stating that he sometimes throws away signed complaints).

[38] See id.

mechanism for reporting such matters is, in fact, hindering inmates' safety and causing injury.[39]

C. Comparison to Holman Correctional Facility

The Department attempts to defend conditions at Donaldson based on the fact that Donaldson is a maximum security prison. (Doc. No. 106 at 2). Yet Holman Correctional Facility in Atmore, Alabama, is also a maximum security prison (and even houses a 175-man death row), but it does not have the chaotic and violent environment that Donaldson has long had. To provide further context for their allegations, Plaintiffs summarize herein recently obtained declarations from men who were at Donaldson, but who are now at Holman:[40]

[39] See, e.g., Adair Decl. ¶ 3-12 (Ex. 5) (stating that his verbal reports to officers that he feared for his safety were ignored, causing him to be attacked with a knife); Perdue Decl. ¶ 9 [Ex. 22 to Doc. No. 92] (stating he attempted to report officers for "choking" him, but that a prison official balled up his written complaint and threw it in his cell); [redacted] Decl. [Ex. 10 to Doc. No. 104] (stating he approached officers, bleeding after assaults, on two occasions, but that his injuries were not documented); Taylor Decl. [Ex. 6 to Doc. No. 104] (stating he verbally reported that certain inmates were threatening him and other prisoners, but that his complaints were ignored). **There is no documentation of any of these inmates' complaints.** See Defs' Resp. to Pls. Third Req. for Prod., No. 6 [Ex. 20, 21 to Doc. No. 92] (producing only three inmate letters pertaining to issues raised in this case from February 2009 to the present).

[40] Mr. Turnland was transferred from Donaldson to Holman in October 2008; Mr. Benjamin was transferred to Holman in early 2010. See Turnland Decl. ¶ 2; Third Benjamin Decl. ¶ 2.

SCOTT TURNLAND DECLARATION (Ex. 9)		
	Donaldson Correctional Facility	*Holman Correctional Facility*
Stabbings	"[S]aw five or six stabbings every month" (¶ 3)	"[Saw] or been around about six stabbings in a year and a half" (¶ 3)
Staffing	"[N]o one patrolled anyone." (¶ 2)	"[A]n officer stays in the dorm all the time. They can't leave their post." (¶ 4)
Contraband Searches	Officers did not do random "shakedowns" on every shift. (¶ 5)	Officers do random "shakedowns" on every shift. (¶ 5)
Use of Batons	"At Donaldson, the officers beat people with batons all the time." (¶ 7)	**"I have never seen an officer use a baton at Holman." (¶ 7)**
Use of Force	"At Donaldson, they just came and hit you in the head. And they didn't quit until you stopped moving." (¶ 6)	"When there is an incident at Holman, the officers come restrain you." (¶ 6)

CHRISTOPHER BENJAMIN DECLARATION (Ex. 8)		
	Donaldson Correctional Facility	*Holman Correctional Facility*
Fights	Saw 6-7 fights per month (¶ 5)	Saw 2-3 fights since being transferred to Holman; fights were not "as bad" as at Donaldson (¶ 7)
Weapons	Saw a weapon once per day, even in the segregation area (¶ 4)	**Since arriving at Holman "I have not seen one weapon." (¶ 7)**
Drugs	Regularly saw drugs, even in segregation area (¶ 6)	Has not seen any drugs at Holman (¶ 7)

D. Defendants' Attempts to Distinguish Laube Are Misplaced.

Although Laube v. Haley, 234 F. Supp. 2d 1227 (M.D. Ala. 2002) was decided on a preliminary injunction motion rather than summary judgment, the fact remains that the risk of harm to men at Donaldson is far greater than it ever was to female prisoners in Laube. Defendants try to distinguish Laube by arguing there were "visibility problems" for officers supervising women at Tutwiler. (Doc. No. 106 at 18). But nearly 260 men at Donaldson are housed in M and N dorms where spatially dense double-bunking contributes to exceedingly poor visibility for officers, and, until just a few months ago, K, L, and O dorms had the same problem.[41] Defendants next state Donaldson is different than Tutwiler because open dorms at Tutwiler were "completely unattended." (Doc. No. 106 at 19). But the same problem exists at Donaldson, where there are often no officers present in the open dorms, and where the two cubicle officers assigned to the open dorms cannot leave their posts and can only see one of the two dorms they supervise at a time.[42] Most significantly, the

[41] See supra n. 21, 22; Martin Report at 7 [Ex. 1 to Doc. No. 81] ("The open-bay dorms are so spatially dense with double bunking that unobstructed sight lines for the housing officer rovers are virtually non-existent."); Martin Depo. 291:14-19 ("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.").

[42] See Third Martin Decl. ¶ 8.

level of violence at Tutwiler never even approached the level of violence at Donaldson. See Laube, 234 F. Supp. 2d at 1236 (holding the plaintiffs established a risk of harm from assault where "two inmates were cut with disassembled razors" and "[a]nother inmate was threatened with broken mop and broom handles and locks placed into socks.").

III. PLAINTIFFS PRESENTED SUFFICIENT EVIDENCE THAT DEFENDANTS KNEW THAT PLAINTIFFS FACE A SIGNIFICANT RISK OF HARM.

Under Defendants' interpretation of Farmer v. Brennan, 511 U.S. 825 (1994), men housed at a facility at which inmates were entirely unsupervised and critically injured every day could not obtain relief, so long as the warden simply denied that he believed that such conditions posed a risk. That is not what Farmer teaches. Rather, Farmer held that the question of whether a defendant had "subjective knowledge" of a risk of serious harm can be proven by "circumstantial evidence" showing the serious risk was so obvious that the official must have known it existed. Id. at 842.

The pre-litigation correspondence between Plaintiffs' counsel and the Department demonstrates that the Department had knowledge of the allegations of serious harm to inmates. (See Pls' Mot. for Summ. J., Doc. No. 102, p. 56-57). Moreover, given the obvious injuries occurring, as well as the Department's own documentation of these injuries, it is

impossible to conclude that the Department did not know of the risk of harm. "[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Id. at 842.[43] In the alternative, the question of Defendants' subjective knowledge is a question of fact, making summary judgment for the Defendants inappropriate.

IV. DEFENDANTS' "UNCLEAN HANDS" ARGUMENT IS UNSUPPORTED BY EVIDENCE OR LAW AND SHOULD BE DISREGARDED.

Defendants argue that Plaintiffs should be denied injunctive relief because they have "unclean hands." (Doc. No. 106 at 34). This argument lacks merit for six reasons.

First, to the extent Defendants rely on recent, alleged fights involving Plaintiffs Wynn and Malec, both men have presented declarations denying wrongdoing in these incidents.[44] In January 2010, Mr. Wynn was cited for fighting an "unidentified inmate," when actually he was attempting to stop a fight that was taking place outside his cell in A block when no

[43] See also id. at 842-43 ("[I]f an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.") (internal quotations omitted).

[44] See Second Wynn Decl., Mar. 11, 2010 (**Ex. 6**); Third Malec Decl., Mar. 11, 2010 (**Ex. 2**).

officers were present.[45] Similarly, Mr. Malec's declaration states that on February 8, 2010, an inmate "started yelling . . . and threatening" him.[46] Mr. Malec walked away from the inmate, but was forced to defend himself when the inmate followed him and struck Malec on his head, causing his ear to bleed.[47] The Incident Report documenting this altercation shows an injury to Mr. Malec's ear, but no injury to the aggressor.[48] Defendants improperly base their accusations about these incidents and their theory that Wynn and Malec have "unclean hands" entirely on hearsay statements by Warden Hetzel, who was not present for either incident and has no personal knowledge of what occurred. (See Doc. No. 106 at 34).[49]

Second, Defendants state that Mr. Malec has unclean hands because "the only injury that Malec identified that he has sustained at Donaldson – a cut on his face – reportedly came as a result of Malec's own misconduct." (Doc. No. 106 at 34).

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[45] See Second Wynn Decl., ¶ 3-6 (stating he was trying "to prevent the men from injuring each other") (Ex. 6).

[46] See Third Malec Decl., ¶ 2 (Ex. 2).

[47] Id. p. 1, ¶ 2.

[48] See Body Chart (Hetzel 27002-27003) (filed under seal in support of Defs' Resp. to Pls' Mot. for Summ. J. [Doc. No 106]).

[49] See also Fifth Hetzel Aff. (Attach. 2, Doc. No. 106, at 7). Warden Hetzel's allegation that Wynn was in an unauthorized area (see Doc. No. 106 at 43) is similarly unsupported. Plaintiffs have no record of this alleged incident.

Defendants cite absolutely no evidence in support of this allegation, but rather refer again to an unsupported hearsay statement in Warden Hetzel's affidavit.[50] By contrast, both the Department's own incident report and Mr. Malec's sworn testimony show that an inmate Mr. Malec did not know slashed his face with a razor *while he was asleep on his bunk*.[51] The Warden's unsupported accusation of misconduct is not evidence upon which a denial of relief can be based.

Third, Defendants state that Plaintiff Taylor was found in possession of a cell phone. (Doc. No. 106 at 34). Actually, another inmate sitting at a table with Mr. Taylor was found in possession of a cell phone, not Mr. Taylor.[52]

Fourth, Defendants state Mr. Wynn's "own misconduct precipitated the use of force" by Officer Jenkins. (Doc. No. 106 at 34). Mr. Wynn admitted to and regretted using profane

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[50] See Fifth Hetzel Decl. p. 7 (stating he has "reason to believe" Malec's face was slashed due to "Malec's own actions," but declining to share what this "reason" is).

[51] See Malec Depo. 80:13-19; 81:1-82:15; Third Malec Decl., p. 2, ¶ 4 (Ex. 2); Incident Report, July 23, 2008 (Hetzel 12551).

[52] See Taylor Depo. 46:7-19 (stating he never had a cell phone taken from his person or property); 89:19-23, 90:1-23, 91:1 (stating he never took any photos with a phone); 213:20-23 (stating "I was basically placed in house arrest and moved off the south unit because I was sitting at a table with an inmate who had a phone.").

language toward Officer Jenkins.[53] However, Mr. Wynn's inappropriate language did not justify Officer Jenkins' decision to mace Mr. Wynn twice in the face and punch him in the head.[54]

Fifth, Defendants claim that Plaintiffs should be denied injunctive relief because they have refused to incriminate other prisoners with whom they have to live, side by side, each day. Throughout this case, numerous prisoners testified to the dangerous consequences that "snitching" may have in a prison environment.[55] There is no requirement that prisoners must jeopardize their safety in order to seek equitable relief.

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[53] See Wynn Depo. [Ex. 5 to Doc. No. 81] at 143:10-146:3.

[54] See Hudson v. McMillian, 503 U.S. 1, 6-7 (1992) (when prison officials "stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.").

[55] See, e.g., Russell Depo. 118:23-119:2 [Ex. 33 to Doc. No. 81] (stating that if an inmate gets labeled a "snitch," "you can get stabbed, you can get beat. If you get labeled a snitch you can die."); Malec Depo. 99:1-9 [Ex. 32 to Doc. No. 81] (declining to name inmates in K dorm whom he observed smoking crack cocaine, stating "it will put me in danger if they find out I told their names"); Mays Depo. 117:19-20 [Ex. 39 to Doc. No. 81] ("snitching is putting your own life in jeopardy").

Sixth, even assuming (without conceding) that Plaintiffs engaged in relatively minor misconduct in prison, it would be entirely contrary to the interests of justice to deny them relief needed to protect their physical safety on such grounds.[56]

CONCLUSION

Based on the foregoing brief, the facts and argument presented in Plaintiffs' Motion for Summary Judgment [Doc. No. 102], and the entire record in this matter, Plaintiffs respectfully ask the Court to grant their motion for summary judgment and deny Defendants' motion for summary judgment.

Respectfully submitted this 15th day of March 2010.

s/Sarah Geraghty

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[56] See Smith v. Arkansas Dep't of Corr., 103 F.3d 637, 644-645 (8th Cir. 1996) (affirming grant of injunctive relief to prisoner on failure to protect claim, despite the fact that plaintiff was not "a blameless victim" and despite evidence that "his own misdeeds" contributed to the likelihood that he could be harmed). See also McKennon v. Nashville Banner Publ., 513 U.S. 352, 360 (1995) (refusing to apply "unclean hands" defense in ADEA lawsuit despite evidence of plaintiffs' misconduct in the workplace, since, in the ADEA, "Congress authorizes broad equitable relief to serve important national policies.").

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Reply Brief on the parties by causing a true and correct copy thereof to be delivered by the Court's ECF filing system to counsel of record at the following addresses:

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