

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' RESPONSE TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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When Plaintiffs filed this lawsuit in February 2009, over 500 men at Donaldson Correctional Facility were triple-bunked in overcrowded cell blocks in which officers were often absent, over 620 men were packed into open dorms, often supervised by just two roving officers, applications of excessive force on inmates went largely uninvestigated, inmate-on-inmate assaults with knives occurred roughly once every ten days, and men were regularly rushed to the hospital with serious injuries. Today, while some improvements have been made, Donaldson is still a dangerous institution at which Plaintiffs are at risk of harm.

To give just a few examples from the past four months, in February 2010, a group of inmates left their assigned cell blocks, traveled across the prison, and attacked an inmate in an open dorm on the other side of the prison.¹ In January 2010, one inmate was stabbed, another's nose was bitten off,² and a third was taken to the emergency room after being found with a "bloody face."³ In December 2009, an officer brandished a knife at Plaintiff Gregory Wynn and threatened to "cut [him] from ear to

¹ See Jackie Decl., Feb. 24, 2010, ¶ 6 (**Ex. 7**).

² See Duty Post Log, Jan. 26, 2010 (Hetzel 26481) (stating that two inmates were involved in a "physical altercation," that one inmate was "stabbed," and that the stabbing victim "bit off [the other inmate's] nose.") (**Ex. 2**).

³ See Incident Report, Jan. 9, 2010 (Hetzel 26706), (Hetzel 26710) (stating swollen eye was "size of a large egg") (**Ex. 3**).

ear,"⁴ and another man was found unconscious from a beating in L-dorm.⁵ In addition, in November 2009, Plaintiff James Taylor was threatened by inmates armed with knives after an officer disclosed to the inmates that Taylor had "snitched" on them.⁶

While Defendants have reduced the population by 150 men and made other, modest improvements, the serious problems at Donaldson are far from fixed:

- 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." (Martin Depo. 449:6-9, 448:15-16).
- Donaldson has "a significantly higher level of violence than you see in a . . . safe operation." (Martin Depo. at 97:21-23, 98:1). Donaldson has roughly half the inmates as Mississippi State Prison, but more than twice the number of stabbings. (Martin Supp. Decl. ¶ 10) (**Ex. 1**).
- 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." (Martin Depo. 319:21, 334:16-17).
- There is a "significant problem" with staff use of force at the prison and a failure to conduct investigations into force used against prisoners. (Martin Depo. at 46:9-10).

⁴ See Wynn Decl., Feb. 2, 2010, ¶ 4-7 [Ex. 9 to Doc. No. 92]. See also Duty Post Log, Dec. 19, 2009 (Hetzl 25335) (**Ex. 4**) (stating that Wynn alleged an officer pulled a knife on him). Plaintiffs' counsel requested documents related to this incident in a Request for Production on January 6, 2010, a letter on February 5, and second letter on February 22. No incident or investigative report has been produced.

⁵ See Incident Report, Dec. 29, 2009 (Hetzl 26675) (stating inmate was found "unresponsive" with "right eye swollen shut") (**Ex. 5**).

⁶ See Taylor Decl., Feb. 24, 2010, ¶ 5-10 (**Ex. 6**).

Given Defendants' position that no risk of harm exists or ever existed at Donaldson, the constitutional violations identified by Plaintiffs will not likely be addressed without court-ordered relief. Plaintiffs' motion for summary judgment should be granted and Defendants' motion should be denied.

RESPONSE TO DEFENDANTS' STATEMENT OF FACTS

I. ADDITIONAL FACTS

A. DEFENDANTS' FAILURE TO DOCUMENT CRITICAL INCIDENTS

Defendants maintain that the level of violence at Donaldson is acceptable in light of the fact that the prison houses maximum security inmates. (Defs' Br. at 53). In support thereof, they cite to Plaintiffs' chart, summarizing Defendants' Incident Reports, and showing "only" 151 assaults from April 2008 to September 2009. (Id. at 41).⁷ Defendants do not address the fact that many of these incidents describe knifings that left numerous men with serious, permanent injuries. (See Doc. No. 102 at 6-20).⁸ Nor do they acknowledge that their Incident

⁷ Defendants claim that "Plaintiffs prepared a chart detailing what they believed to be the number of violent incidents at Donaldson." (Defs' Br. at 41). Plaintiffs' chart does not document Plaintiffs' "belief," but rather summarizes *the Department's own Incident Reports*.

⁸ On February 9, 2010, Plaintiffs filed an updated version of Plaintiffs' Chart documenting injuries to Donaldson inmates from 2006-2009. (See Ex. 1 to Doc. No. 92).

Reports under-represent the true level of violence at Donaldson because the Department does not document many incidents. To give just a few examples:

- A Duty Post Log dated December 19, 2009 states that a doctor sutured the wounds of a man who was “involved in an altercation earlier in the day with another inmate.”⁹ The Department did not produce an incident report concerning this incident.
- In April 2009, Christopher Benjamin was slashed with a razor across the face.¹⁰ He has a scar on his face from his ear to his nose and had to go to the hospital for medical treatment.¹¹ The Department did not produce an incident report concerning this incident.
- In October 2008, Christopher McCullough was assaulted.¹² Medical records submitted to this Court show that both sides of his jaw were fractured, requiring him to have surgery at UAB Hospital.¹³ The Department did not produce an incident report concerning this incident.
- On March 19, 2008, ██████████ ██████████ was involved in an altercation with inmate R.F.¹⁴ According to an ADOC disciplinary report sent to Plaintiffs’ counsel by an inmate, R.F. “had to be taken to [an] outside hospital and admitted for 12 days due to seriousness of injuries.”¹⁵ The

⁹ See Duty Post Log, Dec. 19, 2009 (Hetzl 25335) (**Ex. 4**).

¹⁰ See Benjamin Decl. [Ex. 3 to Doc. No. 48] at ¶ 12.

¹¹ See Benjamin Depo. [Ex. 28 to Doc. No. 81] at 61:1-12.

¹² See McCullough Decl., May 18, 2009, ¶ 8 (**Ex. 8**).

¹³ See C. McCullough UAB Medical Records, Oct. 29, 2008 (**Ex. 9**) (to be filed under seal) (noting surgery performed on Oct. 29, 2008 for “left mandibular angle fracture and right parasymphyseal mandible fracture”).

¹⁴ See ██████████ Decl., Feb, 24, 2010, ¶ 6 (**Ex. 10**) (filed under seal). This inmate asked that his Declaration be filed under seal to protect his safety.

¹⁵ See Attach. A to ██████████ Decl. (**Ex. 10**) (filed under seal).

Department did not produce an incident report concerning this incident.

- On August 2, 2007, Hoover Reynolds was assaulted, causing a fractured jaw.¹⁶ On August 3, 2007, Mr. Reynolds underwent surgery at UAB Hospital.¹⁷ The Department did not produce an incident report concerning this incident.

Defendants have also underreported allegations of unnecessary force by officers:

- Gregory Wynn and Joseph Burns both stated that the same officer brandished a knife at them.¹⁸ The Department did not produce an incident report concerning either incident.
- Bernard Jemison alleges that officers used unnecessary force on him on June 10, 2009¹⁹ and November 25, 2009.²⁰ The Department did not produce an incident report concerning either incident to Plaintiffs in this case, even though

¹⁶ See Reynolds Decl., Jan. 26, 2010 [Ex. 29 to Doc. No. 92] at ¶ 4, 8.

¹⁷ See H. Reynolds UAB Medical Records, Oct. 6, 2007 (**Ex. 11**) (filed under seal) (noting surgery performed on Oct. 6, 2007 for "left body of mandible comminuted fracture" and noting second surgery performed on Dec. 18, 2007).

¹⁸ See supra n. 4; Burns Decl., Jan. 26, 2010, ¶ 6 (**Ex. 12**).

¹⁹ See Incident Report, June 10, 2009, filed in Jemison v. Allen, 2:09-CV-01185-VEH-HGD (N.D. Ala.) on Nov. 19, 2009. (**Ex. 14**). The June 10, 2009 incident report states that no force was used on Jemison. See id. Jemison, however, alleged that an officer forced his knee into Jemison's back, injured his arm, then "slammed him to the floor, yanked him to his feet and shoved him out of the cell." See Special Report, **Ex. 14**, p. 4. See also Body Chart (Ex. 14) (noting "redness" to the "inner left arm, and chest, neck and collar bone" and "bilateral cuffed area," scratches, and complaints of numbness in arm.).

²⁰ See Jemison Decl., Feb. 24, 2010, ¶ 11 (**Ex. 13**).

Defendants filed a report describing the June 10, 2009 incident in a separate lawsuit.²¹

- Donald Phillips claims that officers beat him with batons while he was unresisting and restrained in handcuffs on May 15, 2009.²² The Department did not produce an incident report concerning this incident.
- Christopher McCullough claims that on April 20, 2009, an officer punched him in the face without cause.²³ No report was produced concerning this incident.

Beyond that, a number of men who notified officers of injuries they sustained from assaults did not have their injuries documented, or were advised by officers to report the injuries as "accidents." In June 2009, inmate ██████ ██████ was assaulted.²⁴ Bleeding from the mouth, he approached an officer to report the incident, but ██████ was not taken to the infirmary for a body chart.²⁵ A month later, ██████ was assaulted again.²⁶ He again approached an officer, bleeding, to report the

²¹ See supra n. 19.

²² See Cmplt., Phillips v. Allen, 2:09-cv-1443-JHH-HGD (N.D. Ala. July 22, 2009) (alleging that after he was assaulted, he was taken to the infirmary for a body chart, received a disciplinary report, and wrote to the warden about the incident). Plaintiffs have no record of this incident.

²³ See McCullough Decl., May 18, 2009, ¶ 4 (Ex. 9).

²⁴ See ██████ Decl. ¶ 10-11 (Ex. 10).

²⁵ Id. at ¶ 10-11.

²⁶ Id. at ¶ 13-16.

incident.²⁷ He was sent back to his cell.²⁸ Plaintiffs did not receive an Incident Report for either incident.

██████' testimony is similar to that of Larry Jones, who received 34 stitches after being slashed by an inmate wielding a razor.²⁹ When Jones approached an officer, bleeding, the officer told him to report the matter as an accident.³⁰ Damon Magwood, who was hospitalized after being assaulted in August 2009, was also advised by an officer to report an accidental injury.³¹

Threats of assault by other inmates are similarly undocumented by Defendants, as demonstrated by the recent experience of Plaintiff Taylor. Defendants' brief claims:

If any inmate acts out, or is destabilizing or disruptive [in the southside dormitories], he will be classified upward and assigned back to the cell blocks. . . . Plaintiff Taylor agrees that . . . Donaldson administrators are doing the best they can to put level-headed inmates in the southside dorms, which is the least restrictive environment, housing inmates least prone to violence or to act out. (Defs' Br. at 21, 21-22).

²⁷ Id. at ¶ 16.

²⁸ See id.

²⁹ See Jones Decl. [Ex. 1 to Doc. No. 48] at ¶ 7-11.

³⁰ As of December 2009, Defendants still had not investigated Mr. Jones's allegations, see Defs' Resp. to Pls.' First Interrogs., No. 6 [Ex. 8 to Doc. No. 94], even though Mr. Jones testified to the officer's conduct in a sworn declaration on May 12, 2009 and in his deposition on August 27, 2009. See Jones Depo. [Ex. 17 to Doc. No. 81] at 85:5-23, 1-16; Jones Decl. [Ex. 1 to Doc. No. 48] at ¶ 7-11.

³¹ See Damon Magwood Decl. [Ex. 28 to Doc. No. 92] at ¶ 7.

But, in November 2009, Taylor told a lieutenant that a number of inmates in his dorm were selling contraband, extorting payment from inmates, and assaulting inmates.³² Not only were the inmates in question permitted to remain in Taylor's dorm, but the lieutenant told the other inmates that Taylor had reported them, putting Taylor in an extremely dangerous situation.³³ For five weeks, Taylor was stalked by inmates who threatened him and brandished knives at him.³⁴ The inmates in question remained in Taylor's dorm until they assaulted an officer.³⁵ Although Mr. Taylor reported this matter,³⁶ no documentation was provided to Plaintiffs.

B. INMATE-ON-INMATE ASSAULTS WITH WEAPONS

Stabbing incidents should be infrequent occurrences in a well-run and appropriately staffed prison.³⁷ At Donaldson, however, there were at least 34 documented stabbings with

³² See Taylor Decl., Feb. 24, 2010 ¶ 6 (Ex. 6).

³³ See id. ¶ 7-10.

³⁴ See id. ¶ 8, 11-12.

³⁵ See id. ¶ 14.

³⁶ See id. ¶ 6, 9.

³⁷ See Martin Supp. Decl., Feb. 20, 2010, ¶ 4 (**Ex. 1**).

weapons in 2008 and at least 29 stabbings in 2009.³⁸ This amounts to an average of one stabbing every 10.7 days in 2008 and one stabbing every 12.6 days in 2009. Plaintiffs' Motion for Summary Judgment documents the punctured lungs, head injuries, and other traumatic injuries caused by armed inmates at Donaldson.³⁹ According to Steve Martin:

By any measure with which I am familiar, 34 stabbing incidents in one year is an exceedingly high number of very serious violent incidents and is indicative of a confinement setting that can fairly and objectively be described as unacceptably dangerous. Indeed, I cannot think of a single correctional facility that I have inspected or monitored in recent years that has anywhere near the number of stabbings with weapons as Donaldson Correctional Facility. This is true even though I have inspected or monitored numerous maximum security facilities during this period.⁴⁰

To provide further support for this opinion, Mr. Martin reviewed 2009 assault data from Mississippi State Penitentiary (MSP), Mississippi's maximum security prison.⁴¹ Mr. Martin found that Donaldson has less than half the population of MSP, yet more than two times the assaults with weapons.⁴²

³⁸ See Summary Chart, Ex. 1 to Doc. No. 92, p. 14-47; Martin Supp. Decl., ¶ 4 (Ex. 1).

³⁹ See Ex. 1 to Doc. No. 92.

⁴⁰ See Martin Supp. Decl. ¶ 4.

⁴¹ See *id.* at ¶ 8.

⁴² See *id.* at ¶ 10.

Data from California further demonstrates that the rate of assaults with weapons at Donaldson is extraordinarily high. In 2007, the California Department of Corrections reported the rate of “stabbing assault type incidents” per 100 inmates at each of its prisons.⁴³ No prison in California had a rate of stabbing incidents that even approached Donaldson’s rate.⁴⁴ *Indeed, the rate of stabbing at Donaldson in 2008 (2.30 per 100 inmates) was ten times higher than the stabbing rate for California prisons in 2006 (0.26 per 100 inmates).*⁴⁵

In their Brief, Defendants cite a report Mr. Martin submitted in his capacity as a court-appointed expert in Carruthers v. Jenne, Civil Action No. 76-6086-CIV-HOEVELER (S.D. Fla), a case involving conditions at the Broward County Detention Department in Florida. (Defs’ Br. at 62). Mr. Martin’s Carruthers report stated that, from January 2001 to September 2001, the assault rate at the Broward Detention

⁴³ See Cal. Dep’t of Corr. and Rehab., Rate of Stabbing Assault Type Incidents Per 100 Average Daily Institution Population (ADP) by Institution, 1997-2006, Sept. 2007, p. 16-17 (**Ex. 23**).

⁴⁴ See id. This is true even though courts have found conditions in California’s prisons to be below minimum constitutional standards. See Coleman v. Schwarzenegger, 2009 WL 330960, *1 (E.D. Cal. 2009) (noting “severe overcrowding” creating a “state of emergency” within the California system).

⁴⁵ Compare Ex. 23 and Martin Supp. Decl. ¶ 9 (Ex. 1).

Department was 9.5 assaults per 100 inmates, a rate that “compare[d] favorably” with jails of comparable size.⁴⁶

In the same report, however, Mr. Martin noted “modest levels of inmate-on-inmate assaults involving weapons” and “modest levels of assaults resulting in serious injuries” at the Jail.⁴⁷ To put the Carruthers data in perspective, Mr. Martin examined assault data for Broward County’s Main Jail, a facility housing 1,400 inmates, including high security inmates.⁴⁸ Mr. Martin found a total of one assault committed with a weapon between January 2001 and September 2001.⁴⁹ *Accordingly, Donaldson had twice as many stabbings in one month as the Broward County Main Jail had in nearly one year.*⁵⁰

C. UNDERSTAFFING

Defendants’ insistence that Donaldson is adequately staffed is contrary to the Department’s own statistical reports, staffing study, staffing rosters, and its employees’ sworn

⁴⁶ See Martin Supp. Decl. ¶ 12 (**Ex. 1**).

⁴⁷ See id. ¶ 13.

⁴⁸ See id. at ¶ 14.

⁴⁹ See id.

⁵⁰ See id. at ¶ 16.

testimony.⁵¹ The Alabama Department of Corrections has the lowest officer-to-inmate ratio of any state,⁵² and of all Alabama prisons, Donaldson is most in need of additional officers.⁵³

As of January 2010, there were still 68 authorized, vacant security positions at Donaldson.⁵⁴ A Staffing Study commissioned by Defendant Allen, moreover, found that Donaldson needed nearly 100 more officers than are currently authorized.⁵⁵ In other words, in July 2009, Donaldson was operating with roughly half its recommended security complement.⁵⁶

The Department's claim that Donaldson is adequately staffed is further undermined by a 2006 Report in which Commissioner Allen: (1) discussed state-wide "staff shortages" in Alabama

⁵¹ See Defs' Br. at 34 ("It is Commissioner Allen's position that all ADOC facilities are 'adequately staffed' and have been since he became Commissioner (and probably before that))."

⁵² See Bureau of Justice Statistics, *Census of State and Federal Correctional Facilities, 2005*, Oct. 2008, NCJ 222182.

⁵³ See Assoc. Comm'r DeLoach Depo. [Ex. 12 to Doc. No. 92] at 99:23-23, 100:1-13.

⁵⁴ See DeLoach Depo. 22:9-17; Lt. Raybon Depo. [Ex. 12 to Doc. No. 81] at 71:21 ("[W]e are short staffed.").

⁵⁵ See Comm'r Allen Depo. 79:11-23, 80:1-9 [Ex. 13 to Doc. No. 92] (stating Commissioner Allen commissioned a study to determine the staffing level "really needed at each facility"); ADOC Staffing Study [Ex. 13 to Doc. No. 81]. See also Martin Report [Ex. 1 to Doc. No. 81] at 8 (relying on ADOC July 2009 Statistical Report, which showed that Donaldson had 224 actual security staff at the time).

⁵⁶ See Martin Report [Ex. 1 to Doc. No. 81] at 8.

prisons; (2) observed that officer-to-inmate ratios in Alabama were far lower than in other states; (3) acknowledged it was "not uncommon" for one officer to supervise "up to 250-300 medium or higher level prisoners for an extended period;" and (4) stated the "problem is getting worse."⁵⁷

Indeed, at Donaldson, the staffing shortage did get worse. In May 2006, the officer-to-inmate ratio was 1 to 7.⁵⁸ When this lawsuit was filed in 2009, the ratio was 1 to 10.5.⁵⁹ Of course, these ratios reflect the *total* number of correctional staff employed, but only about a quarter of these officers are on duty at one time.⁶⁰ Accordingly, on October 28, 2009, Warden Gordy stated that, for the preceding two months, the staffing level had been "steady" at between 40-43 officers per shift.⁶¹ On the

⁵⁷ See Comm'r Allen, Dep't of Corr. Action Plan, Prepared for Gov. Bob Riley, May 18, 2006, p. 2 (**Ex. 15**).

⁵⁸ See ADOC Statistical Report, May 2006, p. 10 (**Ex. 16**).

⁵⁹ See ADOC Statistical Report, Feb. 2009, p. 15 (**Ex. 17**). Defendants claim the inmate-to-staff ratio is "5.6 to 1," (Defs' Br. at 26), but this ratio includes *all* staff, including laundry workers, clerical workers, and the like, who, in many cases, do not enter housing areas. See Martin Depo. 328:17-23, 329:1-8 ([I]'m not going to embrace that a chaplain has a significant role in my security operation. . . . [H]e's not - he's not a security person, and I'm not going to look at him as one.).

⁶⁰ See Lt. Raybon Depo. [Ex. 12 to Doc. No. 81] at 17:12-15.

⁶¹ See Gordy Depo. 25:6-16, 27:1-5, 19-23, 28:1-4. The "40-43" figure included cadets, see id. at 180:7-10, and supervisory personnel such as lieutenants and captains. Id. at 162:1-11.

day of Mr. Martin's inspection in September 2009, there were also 43 officers for 1,545 inmates. Sometimes, fewer officers are on duty. To give just one example, on March 21, 2009, there were 30 officers⁶² to supervise approximately 1,600 inmates in a prison with five open dorms, six cell blocks, thirteen separate segregation units, a death row cell block, and an infirmary.⁶³

The parties' experts disagree on whether the staffing plan described at pages 28-31 of Defendants' brief is minimally adequate to provide a basic level of security.⁶⁴ Moreover, Defendant's own Staff Rosters show the *true* number of officers on duty is far fewer than Defendants represent in their Brief. (Defs' Br. at 28-31). Indeed, Staff Rosters show many dates on which *no* officer was assigned to a particular dorm.⁶⁵ Beyond

⁶² See Gordy Depo. 29:20-23, 30:1-11; Duty Post Log, Mar. 21, 2009 (Hetzl 3748, 3756) (**Ex. 19**).

⁶³ See Defs' Br. at 4 [Doc. No. 94] (listing cell blocks).

⁶⁴ Cf. Martin Report, p. 8-11 with Stalder Report, p. 13.

⁶⁵ See Duty Post Assignment Roster ("Roster"), A-Night, Aug. 2, 2009 (Hetzl 17287) (showing 2 rovers in south side dorms); Roster, B-Day, Sept. 4, 2009 (Hetzl 25638) (showing no M or N dorm rovers); Roster, A-Day, Sept. 13, 2009 (Hetzl 25656) (showing no B-Block rover, no D-Block rover, and no K dorm rover); Roster, A-Night, Sept. 13, 2009 (Hetzl 25657) (showing no B-Block rover, no D-Block rover, and no K dorm rover); Roster, B-Day, Sept. 15, 2009 (Hetzl 25661) (showing no D-Block rover, and no N or K dorm rovers); Roster, A-Night, Sept. 16, 2009 (Hetzl 25662) (showing no B Block rover, no D Block rover, and no L dorm rover); Roster, A-Day, Sept. 17, 2009 (Hetzl 25665) (showing no B-Block rover, no D-Block rover, and no K or L dorm rovers); Roster, B-Night, Sept. 18, 2009, (Hetzl 25667)

that, Plaintiffs filed sworn declarations from inmates stating: (1) the staffing level in the open dorms is not what Defendants say it is; (2) there continue to be long periods of each day during which no officers are present in the dorms.⁶⁶

D. OVERCROWDING

The Department packed 100 more men into Donaldson from 2007 to 2009.⁶⁷ In January 2009, a month before this lawsuit was filed, moreover, the Department "elevated" Donaldson's "operational capacity" from 1,782 to 1,942. (Def's Br. at 16, n. 13). Defendants quarrel with Plaintiffs' claim that, in February 2009, Donaldson housed 1,709 men in a prison with a

(showing no B-Block rover, only 1 of 3 rovers in C/D Block, and no K dorm rover); Roster, A-Night, Sept. 26, 2009 (Hetzl 25683) (showing no B-Block, no D-Block rover, and no K dorm rover); Roster, A-Day, Sept. 27, 2009 (Hetzl 25685) (showing no B-Block rover, no D-Block rover, and no L or K dorm rovers); Roster, A-Night, Sept. 27, 2009 (Hetzl 25686) (showing no B-Block rover, no D-Block rover, and no L or K dorm rovers); Roster, A-Day, Oct. 23, 2009 (Hetzl 25737) (showing no B-Block rover, no D-Block rover, and no N or L dorm rovers); Roster, A-Night, Oct. 24, 2009 (Hetzl 25740) (showing no B-Block rover, no D-Block rover, and no K dorm rover); Roster, B-Night, Oct. 26, 2009 (Hetzl 25744) (showing no B-Block rover, no D-Block rover, and no N or M dorm rovers); Roster, A-Night, Oct. 28, 2009 (Hetzl 25747) (showing no N or K dorm rovers) (**Ex. 18**).

⁶⁶ See Taylor Decl., Feb. 24, 2010, ¶ 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. 92], ¶ 8 (stating there are at least 7 hours in each 24-hour period during which there are no officers in K-dorm).

⁶⁷ See Inmate Population Chart [Ex. 20 to Doc. No. 92] (summarizing population data in the Monthly Statistical Reports published on the Department's website).

“designed capacity” of 968. (Id. at 17). Defendants’ website, however, lists Donaldson’s “designed capacity” as 968, defines “designed capacity” as “original architectural design plus renovations,” and reports the prison’s February 2009 “occupancy rate” as 176.5%.⁶⁸ Defendants reduced the population at Donaldson only after this lawsuit was filed.⁶⁹ There remains a dispute of fact as to whether Donaldson remains overcrowded at its current population of 1,549.⁷⁰

E. EXCESSIVE FORCE

Defendants claim that Mr. Martin “viewed as positives Donaldson’s discipline of officers and its systemic review and investigation of uses of force.” (Defs’ Br. at 43). Mr. Martin took precisely the opposite position.⁷¹ He has been highly critical of the staff’s use of batons as an offensive weapon

⁶⁸ See ADOC Statistical Report, Feb. 2009, p. 3 (<http://www.doc.state.al.us/reports.asp>) (**Ex. 17**).

⁶⁹ See Hetzel Fourth Aff. p. 3-4.

⁷⁰ Compare Martin Report, p. 7-8 (stating the prison’s safe operating capacity is *significantly below* the authorized bed count of 1,654) and Martin Depo. 66:19-20 (stating population should be reduced in open dorms for safe operation) with Stalder Depo. at 136:9-12 (stating bed count of 1,654 is acceptable). See also Defs’ Br. at 17 (listing population as 1,549 as of January 2010).

⁷¹ See Martin Supp. Decl. ¶ 17, 19 (describing Martin’s expertise in the area of application of force in a confinement setting and finding evidence of “excessive force producing serious injuries” at Donaldson) (**Ex. 17**).

(Martin Depo. 53:4-5), and stated the process for investigating use of force incidents is "not fully functioning," (id. at 371:15-17), resulting in "very few investigations" of use of force, (id. at 372:3-4). He further stated:

[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 53:2-12).

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 46:6-11).

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 investigatedHow does a report explain multiple head injuries when there's no hard impact strikes ever referenced in that report? (Id. at 383:5-10, 384:1-4).

After reviewing more recent incident reports, Mr. Martin concluded that the Department made no progress in this area:

[R]ecords show that officers frequently strike inmates with batons in situations where the use of such high impact weaponry is not indicated. Virtually all of the recent incident reports I reviewed required some level of additional inquiry or investigation, but none was made.⁷²

Plaintiff Wynn's recent experience illustrates the Department's failure to document and investigate allegations of

⁷² See Martin Supp. Decl. ¶ 19.

unnecessary force. On December 20, 2009, Mr. Wynn reported that an officer shoved him, brandished a knife, and threatened to "cut him from ear to ear."⁷³ On December 19, 2009, prisoner Joseph Burns reported the same officer threatened him with a knife.⁷⁴ Despite the seriousness of these allegations, neither incident was documented in an incident or investigative report.⁷⁵

In his Supplemental Declaration, Mr. Martin summarized Incident Reports containing additional evidence of unnecessary force and a failure to investigate allegations of abuse:⁷⁶

- **Terry Mitchell:** On August 4, 2009, force was used on Mitchell, an inmate with mental illness. (See Hetzel 21552-21557). Mitchell was struck with a baton while lying, handcuffed, in a prone position on the floor. Martin noted: "**[t]he use of a baton strike on an unarmed and cuffed inmate in a prone position absent a serious threat of bodily harm merits investigation.**" There is no evidence of an investigation.⁷⁷
- **Jarvis Taylor:** On November 10, 2009, force was used on Taylor after he allegedly "attempted to strike" an officer.

⁷³ See supra n. 4.

⁷⁴ See Burns Decl. ¶ 6; Duty Post Log, Dec. 19, 2009 (**Ex. 4**) (stating Burns alleged an officer pulled a knife on him).

⁷⁵ See supra n. 4.

⁷⁶ The summaries listed below are cited in Mr. Martin's Supplemental Declaration, ¶ 19 (Ex. 1). The underlying Incident Reports are on file with Plaintiffs' counsel and can be provided to the Court upon request.

⁷⁷ See Martin Suppl. Decl. p. 9; see also, Bernard Jemison Decl. p. 1-3 (Ex. 13) (describing officer striking inmate repeatedly with baton while inmate was on the ground and not resisting).

(See Hetzel 22101-22111). The incident report concluded “[n]o . . . inmate sustained injury during the incident.” (Hetzel 22105). **The body chart, however, noted a laceration to Taylor’s head with a “moderate amount of bleeding,” and noted that staples were needed to close the wound.** There is no evidence that this incident was investigated, notwithstanding the possible use of lethal force without cause by the officer.⁷⁸

- **Henry Russell:** On September 6, 2009, force was used on Russell after he was caught with a cell phone. (See Hetzel 21798-21808). Martin noted that “[n]o effort was made to interview the inmate, even though the inmate told medical staff that he had been ‘assaulted’ by officers.” (See Hetzel 21801). No effort was made to reconcile the officer’s statement that Russell “came at” him with the fact that Russell was struck “across the back” with a baton.⁷⁹
- **Keundre Johnson:** An incident report dated April 21, 2009 documents an “alleged assault” on Keundre Johnson. (See Hetzel 17760-17762). A 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. (Id. at 17762). No investigative report was completed. Warden Gordy stated that he looked into the incident and concluded that the injuries were “self-inflicted.” See Gordy Depo. at 104:3-11.”⁸⁰
- **Ricardo Swift:** In two earlier incidents, on June 5 and June 6, 2008, officers struck Swift in the arm with batons while Swift was inside a locked segregation cell, with his arm extended outside the tray door. (See Hetzel 11100, 11152). Neither incident was investigated, even though, on June 11, 2008, Swift was sent to UAB hospital where he had orthopedic surgery to repair a dislocated and fractured arm. See UAB Medical Records [Ex. 25 to Doc. No. 81].

⁷⁸ Id.

⁷⁹ See Martin Suppl. Decl. ¶ 19(c).

⁸⁰ See Martin Suppl. Decl. ¶ 19(d), ¶ 21 (noting that “investigative findings should be documented in writing”).

The Department claims that allegations of excessive force are investigated (Defs' Br. at 43), but in nearly all cases, the "investigations" to which the Department refers consists of faxing a copy of a report to the Department's central office, with no evidence of follow-up.⁸¹ Mr. Martin further found that Donaldson officials routinely fail to interview men who report that excessive force has been used on them and fail to document the results of any use of force investigations.⁸²

Associate Commissioner DeLoach had not read Mr. Martin's expert report at the time of his deposition,⁸³ but he nonetheless concluded that Mr. Martin's findings pertaining to use of force at Donaldson had "no basis."⁸⁴ In so concluding, Mr. DeLoach relied on two factors: (1) inmates had not approached him and reported that they were being beaten during his guided tours of Donaldson; and (2) he had not received complaints from inmates' families.⁸⁵ The Department has no plans to take any steps in response to Mr. Martin's findings on use of force.⁸⁶

⁸¹ See Martin Suppl. Decl. ¶ 21.

⁸² See Martin Supp. Decl. ¶ 20-21 (Ex. 1).

⁸³ DeLoach Depo. [Ex. 12 to Doc. No. 92] at 86:23, 87:1-5.

⁸⁴ Id. at 90:13, 91:18-19.

⁸⁵ Id. at 95:6-13.

⁸⁶ Id. at 90:2-13.

F. CONTROLLING INMATE MOVEMENT

In 2008, inmates could "sneak out of their block" and go to the south side dorms "every day."⁸⁷ As of February 2010, inmates are *still* able to leave their assigned cell blocks in large numbers and wander about the prison without authorization.⁸⁸

Defendants imply that Steve Martin approved of the Department's success in controlling inmate movement. (Defs' Br. at 35). Mr. Martin actually stated:

Well, let me be real clear to what I believe is positive in terms of this issue control -- controlled movement. . . . They count. They have secure barriers. They have fixed officer stations at -- at points where they should have them. So the structure is there. How well they're able to predictably, consistently implement and operate within that structure is an entirely different question. The answer to the first is they have the structure if the other components were in place to do that. But if you have, as I think I cited in the report, 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

⁸⁷ See Cooper Depo. [Ex. 14 to Doc. No. 81] at 74:15-23, 75:1-5 ("Q: [H]ow often would you have inmates coming in from other areas of the prison to be present or hang out in [the] south side? A: Every day."). See also Martin Depo. 181:20-23, 182:1-5 ("[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 security flaw in controlled movement at a maximum security prison.")

⁸⁸ Malec Decl. Feb. 2, 2010 at 2, ¶ 10; Rhinehart Decl. Feb. 24, 2010, ¶ 8 (Ex. 7) (stating inmates in cellblocks are able to travel to the prison's open dorms every day); Taylor Decl, ¶ 16 (stating that, at times, there are 20-30 men from the cellblocks in his dorm) (Ex. 6).

[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.*⁸⁹

While the use of wristbands is an effort to control inmate movement (see Defs' Br. at 35), wristbands are "just a security device or means to assist a live correctional officer" and are "rendered useless" without adequate staffing.⁹⁰

G. PHYSICAL CONDITIONS

Physical conditions at Donaldson - including leaking roofs, sewage and plumbing problems, vermin, and other conditions - exacerbate tensions among prisoners and contribute to an unsafe environment. As Commissioner Allen acknowledged, "[m]ajor facility infrastructure problems including roofing leaks [and] inadequate sewage capacity . . . are common throughout the [Alabama prison] system."⁹¹ At Donaldson, the roofs in several

⁸⁹ Martin Depo. 180:2-4, 8-23; 181:1-6, 22-23, 182:1-5.

⁹⁰ See Martin Depo. at 454:22-23, 455:1-9.

⁹¹ Commissioner Allen, *DOC Action Plan to Gov. Bob Riley*, May 18, 2006 at 12; see also C. Benjamin Depo. 69:1-9, 15, 21-23, 70:1, 71:2-6, 13-22 (complaining about the "filthiness" of E, F, and W blocks); T. Mosley Decl., July 2009, ¶ 9 [Ex. 29 to Doc. No. 81] (stating showers in S block are "filthy and covered in mold"); K. Johnson Depo. 109:11-19 (describing cells as "nasty"); **Officer R. Cooper Depo. 102:8-23, 103:1-5, 18-23, 104:1 (stating that with 4 toilets for over 120 men in the open dorms, "[i]t does stay nasty"; and "[i]t's dirty[,] [i]t's unclean.")**.

dorms leak heavily when it rains, flooding living areas and causing injuries.⁹² Sewage backs up into cell blocks,⁹³ and, as Officer Cooper testified, the plumbing malfunctions, limiting the number of showers, sinks and toilets available for use.⁹⁴

⁹² **Officer Cooper Depo. 67:12-13, 107:5-10, 108:18-23, 109:1-3 (stating he needed surgery after he injured his knee by slipping on water that leaked from R,S,T,U block; stating "there's been a lot of inmates and a lot of people that's injured" due to slick surfaces caused by leaks); C. Malec Decl. ¶ 10 ("[F]looding is a problem [in K dorm]; when it rains, the water comes under the doors and floods the dorm"); C.P. Crowe Depo. 61:4-14, 62:2-5, 16-22, 63:1-8 ("[v]irtually every time it [rains it] leaks in 4 block barring maybe the lightest and briefest of showers."); C. Benjamin Depo. 85:1-2, 86:11-15, 87:9-23 (stating that it leaked in the dayroom of G block and that every time it rained it leaked over the sink in cell E-3); S. Burke Depo. 117:21-23, 118:1-2 (stating that every time it rained it leaked "real bad" in 4 block); L. Jones Depo. 97:10-20; 107:5-17 (stating that about once a month his bed would be wet from rain; stating that when it rained, his cell in R block flooded about a quarter of an inch deep); J. McDonald Depo. 59:8-11 (stating it "poured" inside his cell in D block when it rained); K. Johnson Depo. 114:7-12, 115:1-10 (stating that each time it rains water leaks into A block); C. Benjamin Depo. 84:22-23, 85:1-3 ("[it leaks] through the ceiling [in the dayroom of G block] every time it rains.").**

⁹³ S. Burke Depo. 117:15-20 (stating sewage would back up in 2 block); B. Jessie Depo. 193:5-16 (stating sewage would back up in A block); G. Wynn Depo. 298:20-23, 312:1-6 (stating the drain in the dayroom in the cell block backed up once per month); J. Taylor Depo. 135:9-12 ("We had sewage backup through the drain holes in the floor" in G dorm and the blocks).

⁹⁴ Officer Cooper Depo. 102:19-23, 103:1-5, 18-23, 104:1 (stating that if one of the four toilets for 120 men went out of order, "[i]t can be nasty at times and unsanitary at times"; Malec Depo. 32:10-13 (stating toilets overflow in the dorms and it may take three or four days for them to be fixed); B. Jessie Depo. 193:20-23, 194:1-9 (stating that toilets in the blocks would back up); J. Taylor Depo. at 106 (stating that there is

Roaches and other vermin are common throughout the facility.⁹⁵

These conditions create an unsafe living and working environment and exacerbate tensions between prisoners.

II. PLAINTIFFS' EXPERIENCES

A. GREGORY WYNN

1. Inmate-on-inmate assaults: Within two weeks of his arrival at Donaldson in 2006, Plaintiff Wynn "witnessed a guy being chased around the cell block with a knife." (Id. at 127:10-14). Since then, Wynn has seen many stabbings. (Id. at 27, 222, 226, 234), and knows many men who sustained serious injuries from assaults at Donaldson, including: one who had his neck lacerated (id. at 357: 1-17), one who was confined to a wheelchair (id. at 358: 21-23, 359: 1-11), one who was blinded in one eye (id. at 359: 12-22); and two men whose lungs were punctured. (Id. at 360: 11-23, 361:1-3). Wynn stated that *when this lawsuit was filed, there were about three stabbings per week.* (Id. at 350: 3-10). Wynn has been punched in the face by an inmate (id. at 135:2-4), and had a fight that "basically dealt with the overcrowding, lack of space in the cells." (Id. at 136: 1-15).

sometimes insufficient water pressure to flush toilets or operate sinks).

⁹⁵ See T. Mosley Decl., p. 8 (stating there is a roach infestation in S unit, there was a "roach nest" in cell 18, and he frequently sees roaches in his cell and shower area); C. Benjamin Depo. 69:1-4; 77:4-14 (stating he sees roaches every night); B. Russell Depo. 116:16-23; 117:1-6 (stating his cell is "infested" and he sees roaches every day); J. Taylor Depo. 146:15-22; 147:1-4; 148:10-23; 149:1-6 (stating roaches get into boxes in which prisoners keep food items and hygiene products); S. Burke Depo. 125:22-23, 126:1-7 (stating he kills 8-9 roaches per day in his segregation cell); C. Malec Decl., p. 11 (stating he has seen rats "on the tray stacks in the dining hall" and "running out of the back of the kitchen"); C. Benjamin Depo. 80:12-23; 81:1 (stating there are rats in W block).

Wynn further stated that officers have failed to report inmates' injuries from assaults. (Id. at 239: 20-23, 240: 1-11). Officers, including supervisory personnel, have encouraged inmates to settle disputes through fighting.⁹⁶

2. Excessive force: Wynn twice had officers use unnecessary force on him. In March 2008, Officer Jenkins maced Wynn in the face, shoved him to the ground, put his knee in Wynn's back, maced him again while he was in a prone position on the ground, and punched him in the head. (Id. at 145: 2-14, 151:20-23, 152: 1-3).⁹⁷ On December 20, 2009, Officer Drake brandished a knife at Wynn and threatened to cut him from ear to ear. (See supra n. 4). Wynn has also witnessed excessive force on other inmates. In January 2008, Wynn saw Officer Battles "jump on" a guy and "beat him up pretty bad." (Id. at 158:1-7). He saw Battles hitting the man with sticks and stomping on him." (Id. at 164:9-22). Wynn has twice seen Officer Willis use unnecessary force. In 2006, he saw Officer Willis hit a man with a stick, unprovoked. (Id. at 171: 10-19). Wynn also saw Willis "flipping benches," and then watched as Willis grabbed an inmate and shoved him against the wall. (Id. at 179:11-19). Wynn has witnessed numerous other incidents of excessive force, including one where "there was a lot of blood on the corridor hallway." (Id. at 186:3-9). He remembered another incident wherein he saw officers "repeatedly hitting the guy with sticks, stomping him" (id. at 194: 4-5), and saw "one of the officers pick [the inmate] up, throw him back on the ground." (Id. 194:5-9). Wynn has written complaints to the Warden, but did not get a response. (Id. at 205:5-7, 318:9-18).

3. Physical conditions: Wynn reported that the drains in the dayroom overflow sewage about once per month (id. at 312: 1-6), and broken toilets sit for weeks with feces and urine in them. (Id. at 283: 22-23, 284: 1-3). When it

⁹⁶ Wynn reported that a captain at Donaldson: "[came] in the block and give a speech about he's tired of the violence, you know, he's tired of reports coming up to the front desk, he's tired of having to send the guys to the infirmary. If you have a problem with somebody, take them in the cell and beat the sh-- out of them." (Wynn Depo. at 244:4-11).

⁹⁷ See Incident Report, March 25, 2008 (Hetzl 750-753)Ex. 1); Wynn Depo. [Ex. 5 to Doc. No. 81] at 143:10-146:3.

rains, water pours into the dayroom, leaving large puddles, with water remaining for days. (Id. at 284: 4-10). Inmates are provided with watered-down cleaning supplies (id. at 292: 19-22), and the lack of sanitation gave him boils and skin irritations. (Id. at 294: 6-12). Wynn testified to unsanitary conditions in shower areas (id. at 283: 4-9), and noted the dining area has "all types of stains, leaks, and puddles of stagnant water always sitting around." (Id. at 283: 10-14). The dining hall ceiling leaks into inmates' food. (Id. 300: 5-9, 315:2-8).

B. CHARLES MALEC

1. Inmate-on-inmate assaults: Plaintiff Malec is housed in K dorm (Malec Depo. 22:7-9), where "[e]verybody's packed in so tight that you can't hardly move around." (Id. at 70: 8-11). In July 2008, an inmate sliced Malec's face with a razor while he was asleep. (Id. at 63, 80:13-19). He woke up covered in blood (id. at 84:4-7), and it was seven to ten minutes before an officer responded. (Id. at 85:9-13). No officers were present in the dorm at the time of the incident. (Id. at 87:11-13, 90:2-4).

2. Lack of security in K dorm: Malec reported that officers are present in his dorm at count time and for shakedowns, but "[t]he rest of the time the dorm's empty, there's no officers in there." (Id. at 67:7-18). Malec also stated that inmates come from the blocks to the back of K dorm to fight because there is no security in that area. (Id. at 72: 5-14). Inmates who come from the blocks "just flow in and out at will" (id. at 77: 10-16), and sleep in K dorm "all the time." (Id. at 92:3-7). Malec stated that fights between inmates would decrease if officers were present in the dorms. (Id. at 90:22-23, 81:1-2).

3. Physical conditions: In K dorm: about 6 out of 10 sinks are malfunctioning (id. at 34: 12-15), toilets are clogged and often backed up (id. at 37:4-12, 16-21), and only 4 of 8 showers are working. (Id. at 40: 13-14). In addition, Malec stated that the dorm leaks when it rains (id. at 50: 3-11, 55-56), and there is visible mold present throughout the dorm (Id. at 57: 6-16).

C. JAMES TAYLOR

1. Inmate-on-inmate assaults: Plaintiff Taylor is assigned to L dorm.⁹⁸ In 2006, he was stabbed by a prisoner with an inmate-made knife.⁹⁹ The man who stabbed him had “escaped” from his cellblock. (Taylor Depo. at 429:20-23, 430:1-15. In his Affidavit, Taylor described an “environment of lawlessness” at Donaldson that “hinders those who do sincerely want to conduct themselves better and lead better lives. (Taylor Afft. at 4). Taylor noted that Plaintiff Malec and another man, Carlos Miller, were “randomly attacked” in the open dorms and observed that “[a]ny inmate at this facility could fall victim to the same type of violence.” (Taylor Afft. at 10). He stated: “Violence may be (and ‘is’) on the decline here. But, the ‘ingredients’ and ‘recipe’ for violence is still present here. And this is because the despairing conditions are still present.” (Taylor Afft. p. 15-16).

2. Excessive force: When asked to give an estimate of how many times he witnessed excessive force on inmates, Taylor stated: “Numerous. I can’t count.” See Taylor Depo. at 227: 14-21.

3. Physical conditions: Taylor echoed other inmates’ reports of seeping sewage,¹⁰⁰ leaking roofs,¹⁰¹ and roaches.¹⁰²

⁹⁸ See Taylor Decl., Feb. 24, 2010, at ¶ 5-10 (**Ex. 6**).

⁹⁹ See Incident Report, Sept. 6, 2006 (ADOC I 351-54); Taylor Depo. [Ex. 11 to Doc. No. 81] at 295:13-297:18.

⁴ See Taylor Depo. at 136:5-17.

⁵ See id. 327:16-23, 328:1.

⁶ See id. at 148:13-17.

LEGAL ARGUMENT

The Eighth Amendment imposes a duty on Defendants to “protect prisoners from violence at the hands of other prisoners,” Farmer v. Brennan, 511 U.S. 825, 833 (1994), and to refrain from “[t]he use of excessive physical force against a prisoner.” Wilkins v. Gaddy, __ U.S. __, 2010 WL 596513, * 1 (Feb. 22, 2010). To show that Defendants violated their duty to protect prisoners from assault, Plaintiffs must prove: (1) they are incarcerated under conditions imposing a risk of serious harm; (2) Defendants knew of the risk; and (3) Defendants failed to respond reasonably to the risk.¹⁰³ Here, Plaintiffs have proven all three elements through depositions, declarations, expert testimony, and the Department’s own records.

I. PLAINTIFFS ARE SUBJECT TO A SERIOUS RISK OF HARM.

A. THE RISK OF INMATE-ON-INMATE ASSAULT AT DONALDSON CONSTITUTES A SUBSTANTIAL RISK OF SERIOUS HARM.

Defendants argue that Plaintiffs are not subject to a serious risk of assault, but rather to the “ordinary” risk of harm inherent in being incarcerated. (Defs’ Br. at 53). In

¹⁰³ See Farmer, 511 U.S. at 833 (discussing deliberate indifference standard in inmate-on-inmate assault case); Valdes v. Crosby, 450 F.3d 1231, 1237 (11th Cir. 2006) (discussing deliberate indifference standard for supervisory personnel in excessive force case and holding that supervisory liability may be found when there is a causal connection between the inactions of supervising officials and excessive force against inmates).

support of this argument, Defendants suggest that fewer assaults occurred at the Broward County Detention Department in Florida than at Donaldson. (See id.). This argument is misleading and lacks merit because it is based on Defendants' failure to document many assaults at Donaldson. See supra, Facts, § I(A). Moreover, Defendants take the Broward County statistics out of context, failing to acknowledge that assaults with serious injuries rarely occurred in that jail.¹⁰⁴ Relying solely on Defendants' Incident Reports, Donaldson had twice as many stabbings *in one month* as the Broward County Main Jail had in nearly one year.¹⁰⁵ In addition, Donaldson has less than half the population of Mississippi's maximum security prison, yet more than two times the assaults with weapons.¹⁰⁶ And the rate of stabbing at Donaldson in 2008 was ten times higher than the stabbing rate for California prisons in 2006.¹⁰⁷

The seriousness of injuries sustained from inmate-on-inmate violence at Donaldson far surpasses that sustained by inmates in other cases in which the Eleventh Circuit found a substantial risk of harm to inmates.¹⁰⁸ At Donaldson, numerous men have

¹⁰⁴ See Martin Supp. Decl. ¶ 13-14 (Ex. 1).

¹⁰⁵ See id. ¶ 16.

¹⁰⁶ See id. ¶ 10.

¹⁰⁷ Compare Ex. 23 and Martin Supp. Decl. ¶ 9 (Ex. 1).

sustained traumatic injuries, including punctured lungs, loss of vision, loss of hearing, broken bones, lacerations, head injuries, and stab wounds. (See Ex. 1 to Doc. No. 92).

Plaintiffs have shown a serious risk of harm from assault.

B. THE RISK OF EXCESSIVE FORCE BY OFFICERS AT DONALDSON CONSTITUTES A SUBSTANTIAL RISK OF SERIOUS HARM.

Plaintiffs have produced eye-witness and expert testimony showing there is a pattern of excessive force by Donaldson's officers. Plaintiff Wynn was assaulted by an officer who drew a knife on him in 2009, and was also assaulted by an officer in 2008.¹⁰⁹ Billy Jessie was handcuffed and beaten so severely that he is now hearing impaired.¹¹⁰ Ricardo Swift's arm was broken,

¹⁰⁸ See Marsh v. Butler County, 268 F.3d 1014, 1033, n.12, 1034 (11th Cir. 2001) (a serious risk of harm existed where two prisoners were injured, even in the absence of numerous previous assaults); Hale v. Tallapoosa County, 50 F.3d 1579, 1583 (11th Cir. 1995) (a serious risk of harm existed where inmate violence "require[d] medical attention and even hospitalization on occasion") (emphasis added); LaMarca v. Turner, 995 F.2d 1526, 1533 (11th Cir. 1993) (a serious risk of assault was established where plaintiffs presented evidence of four rapes, one attempted rape, one assault, and one stabbing); Gates v. Collier, 501 F.2d 1291, 1308-09 (5th Cir. 1974) (plaintiffs were subject to a serious risk of harm where they proffered evidence of 27 assaults with weapons); Laube v. Haley, 234 F. Supp. 2d 1227, 1236 (M.D. Ala. 2002) (granting preliminary injunction motion on "failure to protect" claim where there were numerous fights and two incidents of serious violence).

¹⁰⁹ See supra n. 4; Statement of Facts, § II(A).

¹¹⁰ See Incident Report, Dec. 12, 2008 (Hetzl 3908-4012) [Ex. 1 to Doc. No. 92].

requiring surgery.¹¹¹ Bernard Jemison, Christopher McCullough, Torresco Hoskins, and Earnest Walker have also submitted sworn testimony regarding excessive force by officers.¹¹² The pattern of unnecessary force, moreover, is not new. In 2005, Sammy Duncan underwent surgery to remove a portion of his crushed testicle after an officer - the same one who assaulted Wynn in 2008 - struck him repeatedly between the legs with baton.¹¹³ Also in 2005, Charles Agee died at the hands of officers.¹¹⁴

Plaintiffs' expert has been highly critical of officers' use of force at Donaldson and the near total failure to investigate allegations of excessive force. (See supra, Facts, § II(E)). Mr. Martin has special expertise in the area of applications of force by officers, has served as a federal court

¹¹¹ See Martin Decl. ¶ 19(e) (Ex. 1); Swift Incident Report, June 6, 2008, (Hetzl 11100) [Ex. 1 to Doc. No. 92] at 20.

¹¹² See B. Jemison Decl. ¶ 4-11 (Ex. 13) (stating he observed officers beating inmate Broadhead with batons while Broadhead was on the ground, and stating that an officer choked Jemison with a baton); C. McCullough Decl. ¶ 4-7 (stating an officer punched him in the face without cause); T. Hoskins Decl. ¶ 4-9 (**Ex. 20**) (stating that officers kicked a wheel-chair bound inmate in the head); E. Walker Decl. ¶ 5, 8 (stating that in February 2010, he needed 7 stitches after being slammed into wall, without cause, by an officer); J. Taylor Depo. 226:7-23, 227:14-21 (stating an officer shoved him without cause, and that he had personally witnessed officers use excessive force "numerous" times). See also, Facts, § I, ¶ A (summarizing Plaintiff Wynn's eye-witness accounts of excessive force by officers).

¹¹³ See Martin Supp. Decl. ¶ 25(b) (Ex. 1).

¹¹⁴ See Ex. 26 to Doc. No. 92 (Agee autopsy).

monitor in such cases, and has opined that the situation at Donaldson warrants referral to the Civil Rights Division of the United States Department of Justice.¹¹⁵

Defendants seek summary judgment on Plaintiffs' excessive force claim on the grounds that: (1) one incident of excessive force was investigated in the past two years (Defs' Br. at 43), (2) Warden Hetzel does not "recall" any other incidents of excessive force in 2008 or 2009, (see id.), and (3) the Associate Commissioner stated in his deposition that he "will not tolerate any abuse." (Id. at 47).

The fact that Defendants cite to one use of force investigation - the matter involving inmate Billy Jessie - does not weigh in Defendants' favor, but rather supports Plaintiffs' argument that allegations of abuse are rarely investigated. Moreover, Warden Hetzel's protestation that he "recalled no prior complaints about [Officer] Battles" (Defs' Br. at 43) is troubling since undersigned counsel specifically warned Warden Hetzel in writing (before the Jessie incident) that Battles allegedly assaulted another inmate.¹¹⁶ Both officers involved in the Jessie incident had a history of misconduct.¹¹⁷

¹¹⁵ See Martin Supp. Decl. ¶ 27 (Ex. 1).

¹¹⁶ See Letter from Attorney S. Geraghty to Attorney T. Knee (copied to Warden Hetzel), May 12, 2008 [Ex. 23 to Doc. No. 81] at 3 (warning that Officer Battles allegedly slammed an inmate against the wall, kned him in the stomach, and punched him

Defendants next state that Warden Hetzel “recalled no complaints about excessive force in the first seven months of 2009,” (Defs’ Br. at 43), yet numerous men complained of excessive force during this period.¹¹⁸

Finally, Defendants cite Mr. DeLoach’s testimony that he takes complaints of inmate abuse “seriously” as evidence that summary judgment should be granted. (Defs’ Br. at 47). Mr. DeLoach’s subjective opinion is not evidence. Moreover, Mr. DeLoach based his opinion solely on his general feeling that if inappropriate force was being used at Donaldson, inmates would

repeatedly in the head and eye, while referring to the inmate with expletives).

¹¹⁷ See Hetzel Depo. 141:16-17, 20-22 (stating disciplinary action was imposed on Sgt. Freeman for extorting store items from inmates); Warden Edwards Depo. 113:10-23; 114:1-14; 119:1-23; 120:1-11 [Ex. 22 to Doc. No. 81] (stating Sgt. Freeman previously resigned after he was alleged to have participated in extortion, but was rehired); Wynn Depo. 158:1-7; 163:2-10; 164:1, 11-17; 199:19-23; 200:1-23; 201:8-21 (stating he witnessed Officer Battles grab an inmate by his throat and slam him against a door, and witnessed Sgt. Freeman confiscate contraband from an inmate and sell it back to the inmate); Jessie Depo. 171:1-23; 172:1-23; 173:1-23; 174:23; 175:1-23; 176:1 (stating that he witnessed Officer Battles bring marijuana and cell phones to an inmate and witnessed Battles use excessive force against an inmate).

¹¹⁸ See, e.g., K. Johnson Depo. 300-04 [Ex. 18 to Doc. No. 81]; (alleging excessive force in April 2009); B. Jemison Decl., Feb. 24, 2010, ¶ 11 (Ex. 13) (alleging excessive force in June 2009); Cmpl’t., Phillips v. Allen, 2:09-cv-1443-JHH-HGD (N.D. Ala. July 22, 2009) (alleging excessive force in May 2009); C. McCullough Decl., May 18, 2009, ¶ 4 (Ex. 9) (alleging excessive force in April 2009).

have told him about it.¹¹⁹ Defendants' unsupported claims that they investigate allegations of abuse are not sufficient to grant them summary judgment, where Plaintiffs have provided evidence of a serious risk of harm from excessive force.

C. THE COMBINATION OF SIGNIFICANTLY INADEQUATE SUPERVISION, OVERCROWDING, AND SUBSTANDARD LIVING CONDITIONS EXACERBATES VIOLENCE AT THE PRISON AND DEPRIVES INMATES OF THEIR RIGHT TO BE PROTECTED FROM A SERIOUS RISK OF HARM.

Defendants argue that Plaintiffs must show that each condition complained about - overcrowding, heat, sanitation, etc. - is sufficiently egregious to violate the Eighth Amendment on its own. (Defs' Br. at 54). However, "[s]ome conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone . . . when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need." Wilson v. Seiter, 501 U.S. 294, 304 (1991). In Laube, 234 F. Supp. 2d at 1245, this Court found that overcrowding, understaffing, and sanitation problems, when considered individually, did not violate the Constitution. The Court recognized, however, that these conditions, in combination, created an atmosphere in which inmates were placed at an unacceptable risk of assault. See id. See also Wilson v. Blankenship, 163 F.3d 1284, 1292 (11th Cir.

¹¹⁹ See DeLoach Depo. 95:6-13.

1998) (also examining the totality of conditions to determine existence of a constitutional violation).¹²⁰

At Donaldson, the following factors, in combination, create an excessive risk of violence:

First, overcrowding increases tensions and raises the risk of assault. See Doc. No. 102, § V(A). See also Laube, 234 F. Supp. 2d at 1236 (“The large number of inmates in Tutwiler has increased the risks to inmate safety”).

Second, there are too few officers to supervise prisoners. See Doc. No. 102, § V(B). The Eleventh Circuit has found that failing to provide adequate supervision in correctional facilities creates a risk of serious harm. See Hale, 30 F.3d at 1581 (finding risk of harm where only one jailor was on duty when prisoner was assaulted); Laube, 234 F. Supp. 2d at 1233 (“In an overcrowded open dorm, where weapons are readily available . . . adequate staffing is an absolute necessity.”).

Third, the prevalence of weapons adds to the risk to inmates’ safety. See Doc. No. 102, § V(C).¹²¹ In Laube, this

¹²⁰ See also Hamm v. DeKalb County, 774 F.2d 1567, 1575–76 (11th Cir.1985); United States v. Terrell County, 457 F.Supp.2d 1359, 1367 (M.D. Ga. 2006).

¹²¹ See also Marsh, 268 F.3d at 1033, n.12, 1034 (widespread possession of weapons by inmates was a factor that weighed in favor of finding risk of serious harm); Gates, 501 F.2d at 1308 (injuries inflicted with weapons weighed in favor of finding Eighth Amendment violation).

Court held that 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.” Laube, 234 F. Supp. 2d at 1236. At Donaldson, by contrast, inmates are frequently stabbed.¹²² Knives and ice picks are readily available to inmates, even in segregation areas. See Doc. No. 102, § V(C).

Fourth, Donaldson inmate have been able to leave their assigned cellblocks and roam about the prison, sometimes for the purpose of assaulting other inmates. See Doc. No. 102, § V(D). The Eleventh Circuit held that failure to control inmate movement in a prison weighs in favor of finding a serious risk of harm.¹²³

Fifth, there is significant trafficking in contraband at Donaldson. See Doc. No. 102, § V(E); LaMarca, 995 F.2d at 1532 (serious risk of harm established where “[i]nmates carried knives and openly used drugs.”).

¹²² See Martin Supp. Decl. ¶ 3-4, 10, 16.

¹²³ See LaMarca, 995 F.2d at 1532 (inmates in general population were able to enter confinement area of prison); Marsh, 268 F.3d at 1028 (“[C]onditions in a jail facility that allow prisoners ready access to weapons, fail to provide an ability to lock down inmates, and fail to allow for surveillance of inmates pose a substantial risk of serious harm to inmates.”).

Sixth, there is no grievance procedure at Donaldson and no other system through which prisoners can report a fear of harm. See Doc. No. 102, § V(F). The absence of a grievance process increases the risk of harm to inmates.¹²⁴

Seventh, physical conditions - including leaking roofs, sewage and plumbing problems, vermin, and other conditions - exacerbate tensions among prisoners and contribute to an unsafe environment. See supra, Facts, § I(G).

The foregoing factors, in combination, have created an unreasonable risk of harm to Plaintiffs. See Laube, 234 F. Supp. 2d at 1245 (“[I]t is the combination of substantial overcrowding and significantly inadequate supervision in open dorms that deprives inmates of their right to be protected from the constant threat of violence”) (internal quotations omitted).

II. THE DEFENDANTS KNEW OF THE RISK OF SERIOUS HARM AT DONALDSON CORRECTIONAL FACILITY BEFORE THIS LAWSUIT WAS FILED.

Defendants knew as early as 2007 that: (1) Donaldson housed over 1,700 men in a facility built for 968; (2) hundreds of men were packed into three man cells, measuring 7 x 10 feet; (3) Donaldson was understaffed; (4) only two roving officers often supervised over 600 men in open dorms with poor visibility.

¹²⁴ See Tafoya v. Salazar, 516 F.3d 912, 920 (10th Cir. 2008) (defendant’s failure to implement a grievance procedure through which inmates could make complaints without fear of retribution supported deliberate indifference allegation).

(See Doc. No. 102, p. 55-57). Defendants also knew the number of assaults that took place, since the defendant-wardens reviewed incident reports in which assaults were documented.¹²⁵ Finally, Defendants knew about numerous complaints of excessive force by officers.¹²⁶

Defendants claim they did not actually “draw the inference” that an excessive risk of harm existed. (See Defs’ Br. at 62-64). Even if Defendants did not “draw the inference” on their own, however, Plaintiffs’ counsel put Defendants on notice of the excessive risk of harm to Donaldson inmates by their letters of March 15, 2007 and May 12, 2008.¹²⁷ Despite being on notice of the risk of harm to inmates, the Department increased Donaldson’s population by 100 men from 2007 to 2009, maintained a dangerously low officer-to-inmate ratio, and failed to

¹²⁵ Hetzel Depo. 12:18-22 (stating he reviews incident reports “daily”); Edwards Depo. 52:4-11 (“[A]ll the captains and all three wardens [at Donaldson] review all incident reports”); Hetzel Depo. 21:4-11; 22:9-20 (incident reports are discussed at daily morning meeting among Warden Hetzel and his “direct subordinates, captains and wardens”).

¹²⁶ See Agee Death Investigation Report, filed August 14, 2008, Bogus v. Dep’t of Corr., Civil Action No. 7:06-cv-1667-RDP (N.D. Ala.) (documenting death of Charles Agee after use of force) (discussed in Martin Supp. Decl. ¶ 25(b)). See also n. 127.

¹²⁷ In both letters, Plaintiffs’ counsel warned the Department about conditions at Donaldson. See Letter from Attorney S. Geraghty to Comm’r Allen, March 15, 2007 [Ex. 8 to Doc. No. 92] (warning about conditions at Donaldson and listing one death and over 30 assaults); Letter from Attorney S. Geraghty to Attorney T. Knee, May 12, 2008 [Ex. 23 to Doc. No. 81] (reporting nine alleged instances of excessive force and three stabbings).

investigate use of force incidents. See supra, Facts, § I(C), (D) and (E). Defendants are in the business of running a correctional system. Their responsibility is to draw obvious inferences from such facts and to respond to correspondence they receive which summarizes the facts for them and sets out the inescapable conclusion that there exists an unacceptable risk of harm to their inmates. Defendants may not bury their heads in the sand and maintain they were not aware of this risk when it was specifically brought to their attention nearly two years before this suit was filed.

III. THE DEFENDANTS' RESPONSE TO THE RISK OF HARM WAS NOT REASONABLE PRE-LITIGATION AND HAS NOT BEEN REASONABLE AFTER THIS LAWSUIT WAS FILED.

Once sued, Defendants made several improvements at Donaldson.¹²⁸ The Court of Appeals for this Circuit has often noted, however, that corrective action after a lawsuit is filed is a commendable occurrence, but it does not negate the past, or signal that conditions are in conformance with constitutional mandates. See LaMarca, 995 F.2d at 1541-42 (reforms enacted after filing of suit challenging prison violence did not preclude injunctive relief).¹²⁹ In determining the

¹²⁸ See Pls' Mot. Summ. J. [Doc. No. 102] at 46-48.

¹²⁹ "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

reasonableness of Defendants' response, moreover, the Court must look to Defendants' post-litigation actions *and* to Defendants' "conduct at the time suit is brought." Farmer, 511 U.S. at 845.

Before Plaintiffs filed suit, the Department did not reasonably respond to harm that was injuring Donaldson inmates on a weekly basis. When asked to list the steps the Department took to reduce violence at Donaldson in 2007, the Commissioner listed one step: the purchase of metal detection devices.¹³⁰ Associate Commissioner DeLoach further stated that the Department increased "shakedowns," or searches of inmates' persons and property, in 2007 and 2008.¹³¹ Neither measure stemmed the swell of violence at Donaldson.¹³² Numerous assaults with weapons causing serious injury occurred after these measures were implemented. (See id.)

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).

¹³⁰ See Allen Depo. at 26:11-23, 27:1-3. See also Gordy Depo. 215 (stating that the Department purchased metal detection devices); Lt. T. Raybon Depo. 134:2-4, 136:9-15 (stating that Donaldson modified its process for detecting metal objects).

¹³¹ See DeLoach Depo. 84-85; Gordy Depo. 214; Hetzel Depo. 176:1-6. But see Wynn Depo at 114:1-14 (stating that the increase in "shakedowns" was recent as of June 2009).

¹³² See Ex. 1 to Doc. No. 92.

Today, the risk of harm is far from alleviated, yet Defendants endorse the status quo. A stabbing occurred roughly every ten days at Donaldson in 2008 and every 12 days in 2009.¹³³ Yet, Defendants maintain that the environment at Donaldson is “not excessively conducive to violence.” (Defs’ Br. at 63). Warden Gordy even called the level of violence “acceptable.”¹³⁴

Defendants further endorse the status quo with respect to staffing. They give their blessing to a staffing plan, wherein, for large portions of every day, many of the 600 men in the open dorms are *unsupervised* by roving officers. See Facts, § I(C).

The Department has no plans to take steps in response to Mr. Martin’s findings on use of force.¹³⁵ Defendants also defend their system of maintaining and reporting statistics regarding violence as “basically accurate and sufficient” (Defs’ Br. at 59), even though the Department *significantly* underreported the level of violence at the prison to the public during every month between April 2008 and April 2009 except one.¹³⁶ In short,

¹³³ See Summary Chart, Ex. 1 to Doc. No. 92, p. 14-47; Martin Supp. Decl., Feb. 20, 2010, at ¶ 4 (**Ex. 1**).

¹³⁴ See Gordy Depo. 78:21-23 (“[D]o we have an excessive level of violence? By no means at all do we have an excess level of violence.”).

¹³⁵ See DeLoach Depo. 90:2-13.

¹³⁶ See Pls’ Mot. Summ. J. [Doc. No. 102] at 23; Summary Chart [Ex. 11 to Doc. No. 92] (showing that in March 2009, for example, the Department reported “0” fights and assaults, when

Defendants' post-litigation improvements are positive, but do not go nearly far enough to solve the intractable problems at the prison.¹³⁷

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 3rd day of March 2010.

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Incident Reports obtained in discovery revealed two knifings, three other assaults with weapons, and seven assaults/fights without weapons).

¹³⁷ See Hale, 30 F.3d at 1584 (sheriff's protestation that he was not deliberately indifferent because he "worked toward construction of a new jail" was insufficient to support summary judgment in his favor because a jury could find that he should have taken "interim measures" to reduce violence).

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Response to Defendants' Motion for Summary Judgment 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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