**IN THE DISTRICT COURT OF THE UNITED STATES FOR THE**

**MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION**

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| **EDWARD BRAGGS, et al.,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | **CIVIL ACTION NO.** |
| **v.** | ) | **2:14cv601-MHT** |
| | ) | **(WO)** |
| **JEFFERSON S. DUNN, in his official capacity as Commissioner of the Alabama Department of Corrections, et al.,** | ) | |
| | ) | |
| **Defendants.** | ) | |

**PHASE 2A CLASS CERTIFICATION**

**In Phase 2A of this case, with which this opinion is concerned,**

**is proceeding on two parallel tracks consisting of ADAP's claims and the individual named plaintiffs' claims.**

**In August 2016, more than two years after this case was filed and after extensive discovery, the individual plaintiffs formally moved for certification of a Phase 2 class, while ADAP pursued its claims separately as an association whose constituents include the mentally ill prisoners in ADOC's custody.[3]**

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**of and non-accommodation of physical disabilities. See Dunn v. Dunn, -- F.R.D. --, 2016 WL 4718216 (M.D. Ala. Sept. 9, 2016) (Thompson, J.). The claims in Phase 2B, which are set to go to trial after the Phase 2A claims (should they survive summary judgment), involve Eighth Amendment claims related to medical and dental care.**

**3. As the court explained to the parties during the briefing process, it will, at this time, decide the motion only as to the Phase 2A claims, although the motion was filed for both Phase 2A and Phase 2Plaims3 f**

policies and practices in ADOC facilities." Pls.' Reply Br. (doc. no. 890) at 57.[4]

The first claim plaintiffs seek to bring on behalf of this class is that defendants are violating the

4. Defendants note that plaintiffs initially sought certification of a class of all prisoners subject to defendants' mental-health care policies and practices. Plaintiffs have clarified that they seek certification of a narrower class, limited to prisoners with serious mental illnesses. Because there is some case law to suggest that healthy prisoners cannot raise Eighth Amendment health care claims, the court will employ the class definition limited to prisoners (current or future) with serious mental illness, in an exercise of its discretionary authority to "reshape the boundaries and composition of the class" based on a "determination that reformulating the class will better serve the purposes of Rule 23 and the underlying policies of the substantive law than would denying certification altogether." Shelton v. Bledsoe, 775 F.3d 554, 564 (3d Cir. 2015) (quoting Tobias Wolff, Discretion in Class Certification, 162 U. Pa. L. Rev. 1897, 1925 (2014)). In doing so, the court notes that the effect of this choice of a narrower class definition on the progress of the case and on any eventual relief will be virtually nil. Plaintiffs' Eighth Amendment claim does not concern the adequacy of mental-health care being provided to prisoners who are not seriously mentally ill. (Plaintiffs do contend that defendants fail to recognize many prisoners' serious mental illnesses. The interests of class members in this category will be addressed at trial, because one of the practices plaintiffs challenge is (continued...)

**Eighth Amendment by failing to provide constitutionally adequate**

**F.R.D. 513, 522-23 (D. Ariz. 2013) (Wake, J.) (certifying a state-wide class of prisoners challenging systemic deficiencies in both medical and mental-health care). Although the court agrees that plaintiffs have brought only one Eighth Amendment "claim," this claim--as it has been formulated by plaintiffs--turns on evaluating the risk of harm posed by particular policies and practices. The court will need to ensure, therefore, that these policies and practices are common to the class, and that representatives have been put at risk by them. Defendants, for their part, seek to atomize the claims of plaintiffs by focusing on the minutiae of unimportant distinctions, failing to see the forest for the trees (and leaves).**

**The court is thus left with the task of reaching an appropriate middle ground, and defining the policies and practices at issue in a way that recognizes themes articulated in the allegations and the voluminous quantity of record evidence the court has reviewed, while ensuring that defendants are not left to face a**

**singular amorphous contention that the mental-health care**

**In addition, plaintiffs seek to raise on behalf of the class due-process claims related to involuntary medication. These, too, require some disaggregation. Plaintiffs seek to challenge three discrete policies or practices:**

**(1) Denying substantive due process to prisoners subject to involuntary-medication orders by beginning or continuing to require them to be medicated absent a recent finding that they pose a danger to themselves to others.**

**(2) Denying procedural due process to prisoners subject to involuntary-medication orders by failing to provide them adequate notice of hearings and other protections provided for in the applicable regulation.**

**(3) Denying substantive and procedural due process to prisoners who are not subject to involuntary-medication orders by coercing consent.**

**For the reasons set forth below, the court will certify two classes, as follows.**

**With respect to plaintiffs' Eighth Amendment challenge to the eight policies and practices enumerated above, the court will certify a class of "all persons with a serious mental-health disorder or illness who are now, or will in the future be, subject to defendants' mental-health care policies and**

**practices in ADOC facilities, excluding the work release centers and Tutwiler Prison for Women." Plaintiffs (and defendants) have agreed that prisoners at the work release centers should be excluded from the class definition; the court will explain below, in the context of its discussion of commonality, why it has also decided to exclude the female prisoners at Tutwiler.**

**With respect to plaintiffs' challenge to the policy or practice of denying procedural due process to prisoners subject to involuntary medication orders by failing to provide them adequate notice of hearings and other protections provided for in the applicable regulation, the court will also certify a class of "all persons with a serious mental-health disorder or illness who are now, or will in the future be, subject to defendants' formal involuntary medication policies and practices." The court has decided, in an exercise of its discretion to manage this litigation, not to certify for class-wide litigation plaintiffs'**

**substantive due-process challenge to the policy or practice of requiring involuntary medication without a recent finding of dangerousness--which turns at least in significant part on an inherently individualized determination--or their challenge to the policy or practice of obtaining consent through coercion. However, the individual plaintiffs who have brought these claims will proceed to trial; ADAP, through its associational standing, may represent the interests of unnamed prisoners who are subject to these policies and practices.**

## II. Evidentiary Burden

**In Wal**

**or fact, etc." 564 U.S. at 350. A court should only certify a class if it "is satisfied, after a rigorous analysis that the prerequisites of Rule 23(a) have been satisfied." Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013).[5]**

**The Supreme Court has been clear that what the party seeking certification must "affirmatively demonstrate," and what the court must find, is that the requirements for class certification are met--not that the class will prevail on its claims. As the Court put it in**

offer evidence to show--for purposes of certification--is that there exists a common question, the answer to which will be "apt to drive the resolution of the litigation." Wal-Mart, 564 U.S. at 350.

## III. Daubert

The parties have raised Daubert objections to each other's experts. For purposes of the Phase 2A pretrial motions, however, the only objections that must be resolved are those to plaintiffs' mental-health expert, Dr. Kathryn Burns.[6] Although the court has carefully

6. Defendants have also raised Rule 26 objections to the report offered by Dr. Burns. The court addressed these objections (like those plaintiffs made regarding defendants' expert reports) by requiring both parties' experts to supplement their reports with additional citations in order to facilitate the court's review. The outstanding objections to the 50-page report offered by Dr. Burns do not hold water.

In some cases, defendants' objections are to opinions which Dr. Burns, as a highly-experienced mental-health practitioner and administrator of a state prison system's mental-health services, has plainly based on her own experience, such as her opinion that certified registered nurse practitioners "have less training, knowledge, skill and judgment, which is why (continued...)

**considered all of the evidence in the record, it need not resolve plaintiffs' objections to defendants'**

**reports of plaintiffs' other Phase 2A experts, Dr. Craig Haney[7] and Eldon Vail.[8]**

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**7. Although defendants have not raised any Daubert objections to Dr. Haney, their expert does criticize his reliance on statements by prisoners he interviewed in reaching his conclusion. However, Dr. Haney's reliance on these statements was reasonable in light of the fact that he considered them among other sources of information, including observations, documents produced by defendants and MHM, testimony of ADOC and MHM employees, and medical records. The court notes that other courts have recognized that experts' "consideration of [] inmates' declarations and grievances as one of several sources informing his opinion is a valid methodology and does not render his opinion inadmissible." Gray v. Cty. of Riverside, 2014 WL 5304915, at *20 (C.D. Cal. Sept. 2, 2014) (Phillips, J.) (discussing evidence regarding prison medical care, as part of a class-certification evaluation).**

**Also, Dr. Haney explained in his deposition that the medical records he reviewed were in "disarray" and "weren't helpful in conveying information" because they were "very difficult to read" and "had a lot that was**

**suspect, Dr. Haney found that the self-reports of numerous prisoners corroborated each other and were supported by other evidence; he appropriately relied on this evidence to reach the broader conclusions on which this case will turn. See Haney Report (doc. no. 868-4) at 28-**

**Rule of Evidence 702, courts are to "engage in a rigorous three-part inquiry," considering "whether: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." Id. (citation and internal quotation marks omitted). The proponents of the expert testimony (here, plaintiffs) bear the burden of establishing that these three requirements are met. See id.**

**Ordinarily, "[t]he safeguards outlined in Daubert are less essential in a bench trial"; a judge need not gatekeep for herself. M.D. v. Abbott**

Circuit and others have held that when a court relies on expert testimony to find that a Rule 23 requirement has been met, the court must conduct a Daubert analysis and conclude that the expert's opinions satisfy its standard. Sher v. Raytheon Co., 419 F. App'x 887, 890-91 (11th Cir. 2011); see also In re Blood Reagents Antitrust Litig., 783 F.3d 183, 187 (3d Cir. 2015); Ellis v. Costco Wholesale Corp , 657 F.3d 970, 982 (9th Cir. 2011). Some courts have noted, however, that the Daubert analysis conducted for purposes of class certification may be narrower than that conducted for purposes of a trial on the merits, because "the inquiry is limited to whether or not the expert reports are admissible to establish the requirements of Rule 23." Fort Worth Employees' Ret. Fund v. J.P. Morgan Chase & Co., 301 F.R.D. 116, 126 (S.D.N.Y. 2014) (Oetken, J.).

Assessing an expert's qualifications is generally the most straightforward of these tasks. Defendants do not challenge Dr. Burns's qualifications, and as discussed below, the court finds that she is

exceedingly well-qualified to opine on the matters she addresses in her report.

As for the court's assessment of an expert's methodology, the court is to determine "whether the reasoning or methodology underlying the testimony is ... valid and ... whether that reasoning or methodology properly can be applied to the facts in issue."[9] Daubert, 609 U.S. at 592-93. The traditional factors a court may consider, where appropriate, are "(1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular [expert] technique; and (4) whether the technique is generally accepted in the [expert] community." Frazier, 387 F.3d at 1262. However, the court of appeals has emphasized that,

9. Notably, this is not an all-or-nothing inquiry. "Even if a part of an expert's testimony is based on unreliable methodology, the court should allow those parts that are reliable and admissible." Lohr v. Zehner, 2014 WL 3175445, at *1 (M.D. Ala. July 8, 2014) (continued...)

**latitude to determine" (internal citations omitted)); Ruiz v. Johnson, 37 F. Supp. 2d 855, 889-92 (S.D. Tex. 1999) (Justice, J.), rev'd on other grounds and remanded sub nom. Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001) (explaining that an expert's evaluation of the quality of the medical care provided by a prison system is "not the type of testimony that necessarily implicates Daubert's requirement of scientific**

**As for helpfulness, "the court must ensure that the proposed expert testimony is relevant to the task at hand, ... i.e., that it logically advances a material aspect of the proposing party's case." Allison v. McGhan Med. Corp., 184 F.3d 1300, 1312 (11th Cir. 1999) (citations and internal quotation marks omitted). Additionally, for expert evidence to be helpful to the finder of fact, it must offer insight "beyond the understanding and experience of the average citizen." United States v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985). Although the relevance standard for expert evidence is higher than the liberal admissibility policy set forth in Rules 401 and 402, see Allison, 184**

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**qualifications, and the risks posed by relying on them to serve assessment and treatment functions), she does not rely solely or even primarily on her experience; she also explains at some length the ways her preexisting views regarding the effects of reliance on underqualified and unsupervised providers were borne out by the evidence she gathered during her inspections and in reviewing documents. Moreover, the court concludes that, to the extent that Dr. Burns relies on her own experience in reaching these conclusions, she has adequately explained why her experience supports her opinions in this case.**

**F.3d at 1309-10, Daubert itself makes clear that a court can deem expert evidence sufficiently helpful to be admissible but nonetheless conclude that it is insufficient to create a genuine dispute of material fact for purposes of summary judgment. 509 U.S. at 595-96; see also Hirsch v. CSX Transp., Inc., 656 F.3d**

**separate." Morris, 455 F. Supp. 2d at 1332 (quoting Rudd v. General Motors Corp., 127 F. Supp. 2d 1330, 1336 (M.D. Ala. 2001) (Thompson, J.)). In this section of the opinion, the court will address only Rule 702 admissibility. Later in this opinion, it will address the role that this evidence plays in establishing compliance with Rule 23. Finally, in the court's simultaneously issued opinion on summary judgment, it has addressed at some length why this evidence creates material disputes of fact as to the merits of plaintiffs' claims.**

**health expert, Dr. Patterson, has himself recently recognized her to be a "top nationally recognized expert[] in the field of correctional mental health." Rep. on Suicides Completed in the California Dep't of Corr. and Rehab. at 1, Coleman v. Brown, No. 2:90-cv-520 (E.D. Cal. March 13, 2013), ECF No. 4376. She currently serves as the Chief Psychiatrist of the Ohio Department of Rehabilitation and Correction (as she did for a period of four years in the late 1990s). She has also long been familiar with the provision of mental-health care in Alabama's prisons, as she served**

did not see enough firsthand ( of 15 major facilities, 102 prisoners), and that she (admittedly) did not randomly select prisoners to interview.[12] In other prison cases, a number of courts have rejected Daubert attacks on experts (offered by both plaintiffs and defendants) on the grounds that their samples were non-random, and that they did not consider enough prisoners at enough facilities in order to extrapolate conclusions about the system as a whole. In Ruiz, 37 F. Supp. 2d at 890-92, the court rejected the

12. Defendants also note that Dr. Burns criticized an audit conducted by MHM on the grounds that it involved only 10 facilities, and the non-random review of the records of 144 prisoners. This, they say, undermines her own findings as well. But the court is not convinced that this criticism substantially undercuts her conclusions; plaintiffs have taken the entirely reasonable position that, because the purpose of an audit (to track changes in the quality of care being delivered over time) fundamentally differs from that of an expert inspection (to aid the court in determining whether deficiencies in the mental-health care system create a substantial risk of serious harm to mentally ill prisoners), different methodologies are appropriate. In any event, even if Dr. Burns's criticism of MHM's methodology were applicable to her own work as an expert, it would hardly establish that (continued...)

defendants' arguments that "in the absence of statistical proof of violations ..., the plaintiffs have not and cannot show system-wide violations," explaining that although "[s]tatistical procedures can increase the court's confidence in making inferences from a given set of data, ... this is an issue of weight, rather than admissibility of a given methodology. Statistical models are simply not the only method for making general inferences from specific data."

As for non-random sampling, as the court put it in the context of the claims in Ruiz, "[t]he fact that 30 records show excessive use of force does not change because the records were selected non-randomly." Id. at 891. See also Coleman v. Wilson, 912 F. Supp. 1282, 1303 (E.D. Cal. 1995) (Karlton, J.) (rejecting a similar objection to expert declaration that the defendants contended were "unreliable insofar as they

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the methodology she did employ was not sufficiently reliable to survive a Daubert challenge.

**are based on medical files 'pre-selected' by plaintiffs' counsel"). Another court recently discussed at some length the use of non-random sampling by prison experts. In Dockery v. Fisher, 2015 WL 5737608, at *5 (S.D. Miss. Sept. 29, 2015) (Barbour, J.), the court recognized that non-randomized qualitative research methods are both "accepted and mainstream in the scientific community," and, in the view of some experts, "more applicable to a proper evaluation of the delivery of health care at a prison." The court quoted plaintiffs' expert as explaining that "[w]hen sampling from people (patients, staff) and documents in qualitative research, random samples are to be avoided. Instead, the gold standard for sampling is 'judgment sampling' or 'purposeful sampling.' Instead of using random number generators to select samples, a judgment sample is chosen based on the expertise and judgment of a subject matter expert with knowledge of the system or process being assessed. The goal is to obtain a sample which is as broad, rich, and**

**representative of the diversity of operational conditions as possible. ... Judgment samples are appropriate because ensuring that all potential observational units in a population and sampling time frame have equal probability of selection is often not the most desired or beneficial strategy. Rather, we look to the subject matter experts to guide which areas, times of day, or segments of the population are most important to study and understand." Id. at *6 (citation and internal quotation marks omitted). The court also recognized the potential merit of defendants' arguments against this methodological approach, but concluded that this went to the weight to be given the expert evidence, rather than its admissibility. Id.; see United States v. Monteiro, 407 F. Supp. 2d 351, 366 (D. Mass. 2006) (Saris, J.) ("It may well be that other methods ... may prove to be the best method of analysis. However, Daubert and Kumho Tire do not make the perfect the enemy of the reliable;**

**an expert need not use the best method of evaluation, only a reliable one.").**

**In another recent case about the adequacy of prison health care, Jama v. Esmor Correctional Services., Inc., 2007 WL 1847385, at *26-27 (D.N.J. June 25, 2007) (Debevoise, J.), the court rejected a Daubert challenge to an expert on the grounds that he had reviewed only the 78 medical request forms submitted by the nine plaintiffs, who were among 1600 detainees housed at the facility at issue. Plaintiffs argued that his use of "convenience" rather than random sampling was unreliable and that "his sample size [was] too small to generate reliable statistics," but the court agreed with defendants that these challenges went to the weight of his evidence rather than to its admissibility. The court and others recognized that this sort of sampling is particularly reasonable when it is part of a multifaceted review that considers not only the records and statements of individuals but also other sources such as deposition transcripts and other**

documents that allows an expert to "draw general conclusions." Id.; see also Parsons, 2014 WL 3721030, at *4.

Defendants cite a number of cases for the proposition that because Dr. Burns cited in her report

**make up a significantly larger and more representative**

explaining that they did not, on their own, suffice to support the inference that such a policy existed. With respect to all of Dr. Burns's opinions, by contrast, she cites other evidence to establish the existence of a policy or practice (such as statements by prison mental-health practitioners or internal documents). In some cases, the existence of the policy or practice is effectively undisputed; for example, defendants do not disagree that a certain number of practitioners with certain qualifications provide mental-health care to prisoners. What they dispute, and what Dr. Burns cites these prisoners to show, is that these policies and practices place prisoners at a substantial risk of serious harm.[14]

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14. Another one of defendants' citations, Henderson v. City and County of San Francisco, 2006 WL 3507944, at *10 (N.D. Cal. 2006) (Walker, J.), is distinguishable for the same reasons. In that case, plaintiffs were attempting to show that a sheriff had a practice of "routinely exonerat[ing] deputies of wrongdoing." Plaintiffs had presented "almost no evidence" of this fact, but were given an opportunity to file a supplemental brief based on new discovery. They submitted 18 grievances selected by the plaintiffs (continued...)

**The court will address the remainder of defendants' case law--offered in support of their contention that Dr. Burns lacks a sufficient basis for her conclusions--more briefly. Although Lloyd Noland Hosp. & Clinic v. Heckler, 762 F.2d 1561, 1568 (11th Cir. 1985), recognized the obvious point that a "sample size**

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**from more than 200 filed by prisoners over a one-year period in which over 6,000 prisoners were housed in the facility; the grievances described only 14 alleged incidents, and in five of those cases, the prisoners were satisfied with the responses they had received. This left nine complaints about "any kind of force," much less unjustified force. The court quite reasonably concluded that this was insufficient, on its own, to create a dispute of material fact as to the "existence of a pervasive custom of excessive force."**

**The first key difference between Henderson and this case is that in Henderson, the court was presented with (a few) examples of documents plaintiffs simply asserted reflected excessive force, whereas here, far, far more voluminous evidence has been filtered through the expert judgment of Dr. Burns and resulted in her opinions. Moreover, even the facts on which Dr. Burns relied are easily distinguishable from the evidence deemed insufficient in Henderson: for one thing, Dr. Burns considered numerous different forms of evidence, including interviews, record reviews, inspections of facilities, internal documents, and testimony by mental-health care providers and administrators; for another, she considered facts regarding far more individuals--over a hundred, in fact.**

**[may be] too small" to draw certain conclusions from it, the issue in that case was worlds away: whether the Secretary of Health and Human Services had improperly relied on a study--which stated that "no broad conclusions can be drawn about the nature and extent of medical malpractice in this country" on the basis of the study--to reach a conclusion as to that very issue. Moreover, defendants suggest no basis for comparing the suitability of the sample size in the study at issue (or, indeed, what that sample size was) to that employed by Dr. Burns.**

**Dukes v. Georgia, 428 F. Supp. 2d 1298, 1317 (N.D. Ga. 2006) (Forrester, J.), stands for the similarly unremarkable proposition that an expert may lack "sufficient data and information" to reach a conclusion. But the expert at issue in that case does not appear to have sampled anything; he simply speculated, without much basis, about whether a lab technician should have identified a strain of yeast. The case is hardly on point. Gilliam v. City of**

**Prattville, 667 F. Supp. 2d 1276, 1298 (M.D. Ala. 2009) (Fuller, J.), concluded that, even if an unqualified expert had been qualified, his testimony would not have been reliable for numerous reasons, including that he had not examined the autopsies of the individual about whose death he was testifying and had offered no data or explanation to support his theory as to the cause of death or to refute other theories. Again, not on point. Finally, in United States ex rel. Wall v. Vista Hospice Care, Inc., 2016 WL 3449833, at *12 (N.D. Tex. June 20, 2016) (Lynn, J.), the court was required to determine how many false claims had been submitted by physicians, which in turn required assessments of "individual physicians' judgment regarding individual patients." The court concluded (contrary to the view of at least one court in this circuit) that statistical sampling and extrapolation could not be used by experts to establish liability in such a case. Defendants apparently believe this case is relevant because mental-health care providers (obviously) exercise some**

judgment in caring for individual prisoners. This case is readily distinguishable, for two reasons: First, Dr. Burns has not engaged in statistical sampling or attempted to offer a precise quantitative assessment of whether specific instances of mental-health care were or were not adequate. Second, because it is the Commissioner and Associate Commissioner, not the mental-health practitioners who provide care, who are the defendants, this case does not turn on assessments of the case-specific "subjective clinical judgment" of mental-health staff, but rather on whether, in staffing, funding, and overseeing the operation of the mental-health care system, defendants have been deliberately indifferent to an objective risk of serious harm to mentally ill prisoners.

Defendants also cite a concurring opinion in EEOC v. Freeman, 778 F.3d 463, 469-70 (4th Cir. 2015) (Agee, J.), which expresses the judge's serious concern that the EEOC "continues to proffer expert testimony from a witness whose work has been roundly rejected in our

sister circuits." This expert had attempted to offer statistical evidence in support of a disparate impact theory. His work "contained a plethora of analytical fallacies": although he had a complete data set, he opted to "ignor[e]" years of relevant data from more than half of the years and locations at issue, resulting in "an egregious example of scientific dishonesty." Even within the subset of available data he did consider, he had "cherry-picked" the data that supported his conclusions. Dr. Burns, by contrast, is not endeavoring to offer statistical evidence, and opted for a sampling method that other courts have recognized as appropriate for an expert in her field, and that was especially reasonable in light of the restrictions on her ability to gather data.[15] She has

15. Plaintiffs' experts explained that, in contrast to their experience working on other similar cases, they had been provided an unusually limited level of access to information, and especially to medical records. See Haney Report (doc. no. 868-4) at 12 ("[A]lthough I had a wealth of information on which to rely and base my opinion--certainly enough information to reach and support the conclusions that are stated in (continued...)

considered all of the data she obtained in reaching her conclusions. Had Dr. Burns been provided access to, and had it been feasible to review, a dramatically larger sample, and had she then opted to base her assessments only on a small subset of those records and interviews, the concerns of defendants might be better founded.

With respect to defendants' contention that Dr. Burns did not tour all of defendants' facilities, the court agrees with another court recently to consider this very issue that "otherwise admissible testimony based on investigation of some facilities but not all is still probative to some extent and any limitation goes to the weight of the opinions." Parsons, 2014 WL

**allowed to complete, as well as the length of time they were allowed to spend in each facility and the number of prisoners whose records they were allowed to review and whose interviews they were permitted to conduct was circumscribed by defendants during the course of an extremely lengthy and contentious discovery mediation. See id. ("Defendants' strenuous objections to the burdensome nature of the multiple prison tours, [and]**

**As a last methodological point, defendants take issue with Dr. Burns's failure to review the entirety of the medical records of all of the prisoners she**

interviewed, and contend that this reflects a failure to confirm prisoners' self-reports. First of all, defendants concede that she did review the records of many of those she discusses specifically in her report. Furthermore, she may well have been able to reach reliable conclusions with respect to some issues without reviewing medical records. For example, to the extent that she disagreed with the classification of a severely mentally ill prisoner as an outpatient, she could well have both assessed the apparent severity of that prisoner's illness and determined that he was currently classified (and housed) as an outpatient without reviewing any documents. As another example, Dr. Burns described in her report observing prisoners who had been prescribed certain antipsychotics who exhibited movement disorders that are characteristic side effects of these medications. She is a psychiatrist who is capable of recognizing such a visible disorder without reference to records. Finally, although bald reliance on the totally

various policies and practices subject prisoners to a "risk of harm"; they object to her failure to use the catchphrase from the case law, "substantial risk of serious harm." But as Dr. Burns herself pointed out in her deposition, she has offered evidence helpful to the court in making this ultimate legal determination. She has described in some detail the harms that she believes will, and in some instances did, result from defendants' policies and practices; it is the court's task to determine whether these harms are "serious," based on case law. Indeed, as Dr. Burns is not a legal expert and would not be applying this case law, any assessment she made as to the seriousness of these harms would not be very helpful.[17] See Burkart v.

17. Defendants cite four cases that they contend support their position that there is not a sufficient "fit" between Dr. Burns's opinions and the issues in this case. In these cases, however, the expert evidence at issue was totally unhelpful, whereas here the expert evidence is quite helpful but not sufficient on its own, absent some additional legal analysis by the court, to support liability. These cases all involve experts who, in one way or another, "fail[] to recognize ... the range of behavior between clearly (continued...)

**Washington Metro. Area Transit Auth., 112 F.3d 1207, 1213 (D.C. Cir. 1997) ("Each courtroom comes equipped with a 'legal expert,' called a judge....").**

**Similarly, it is up to the court to determine whether the risk is sufficiently "substantial" to constitute an Eighth Amendment violation.[18] Dr. Burns has offered evidence going to the incidence of the harms she has described; although her statements to**

nonetheless very helpful. For example, she relies on chart reviews, interviews with prisoners, depositions of providers, and MHM quality assurance documents to conclude that for prisoners at a number of the facilities she toured, "virtually the only treatment being provided is psychotropic medication," that any individual psychotherapy being provided was infrequent and brief,[19] and that very few or no outpatient therapy groups were being offered. Burns Report (doc. no. 868-2) at 38-39. In this instance, the incidence of

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19. Defendants respond to individual prisoners' allegations that virtually no therapy is provided by citing medical records which sometimes show frequent contacts with mental-health professionals. But what plaintiffs complain of, and what Dr. Burns found in her inspections, was that prisoners were not receiving psychotherapy, not that they were having no contact whatsoever with mental-health professionals. Although this distinction may be harder to conceptualize with respect to mental-health care than to medical care, Dr. Burns explains that it is an important one. To offer an illustrative (if certainly imperfect) analogy, no one would dispute that to a prisoner with kidney failure, there is a world of difference between being "seen" by a nurse at the cell door who asks whether he is suffering from some of the symptoms of kidney (continued...)

harm is in her opinion extremely high. As another example, Burns opines that mental-health staff continue to prescribe certain long-acting antipsychotic injections even when they cause serious side effects

**significantly underidentified; she believes that this underidentification stems from a deficient screening process that relies on unqualified and unsupervised staff to conduct evaluations. Although she does not state exactly what proportion of the prisoners with mental illness in ADOC custody she believes have not been identified, she does offer a number of statistics from other state prison systems; there is a range, but even the most conservative comparator statistics suggest substantial underidentification. Id. at 24-26.**

**As a final iteration of this argument, defendants contend that Dr. Burns is merely opining as to what care she thinks is good care or what care should be provided, and that this is not what the Constitution requires defendants to provide. Although defendants are quite correct that expert opinions as to desirable prison conditions are insufficient to establish constitutional minima, see Rhodes v. Chapman, 452 U.S. 337, 348 n.13 (1981), their argument badly misconstrues the evidence Dr. Burns is offering. Although she does**

**express some opinions about how care should be provided (based, for example, on the fact that certain types of practitioners are "unqualified" to provide care without supervision, see Burns Report (doc. no. 868-2) at 16), she then goes on to explain how the failure to provide care in this way causes harm to prisoners. For example, she presents evidence, discussed above, to support her conclusion that these unqualified and unsupervised staff frequently fail to diagnose mental illness.**

**The court concludes that Dr. Burns's expert evidence will be helpful to the court in assessing whether the mental-health care provided to prisoners in Alabama falls below the constitutional floor, because she will bring to bear her experience, and the results of her investigation in this case, to help the court to understand the seriousness of the risk of harm posed by the challenged policies and practices. See**

magistrate judge had "improperly relied on expert testimony to establish constitutional minima").

Lastly, defendants attack Dr. Burns's qualifications as well as her methodology with respect to one fairly narrow issue: her ability to offer an opinion regarding the adequacy of correctional staffing. As for her qualifications, they note that she admitted that she has never been responsible for staffing a correctional facility with custody staff or received any training in doing so. As for her methodology, they note that she testified in her deposition that she did not perform (as part of her assignment in this case) any sort of staffing analysis or review for adequacy the numbers of correctional officers in any facility for any shift. The court is not convinced by the argument regarding methodology; it seems clear that an expert might reliably assess a staffing level to be too low and therefore likely to cause harm without determining what staffing level would be appropriate. However, the court is more

**troubled by the fact that although Dr. Burns is an esteemed expert in correctional mental health, plaintiffs have not demonstrated that her experience entitles her to opine on this separate, albeit related, issue. (Plaintiffs' response, that she has been involved in "evaluating and informing internal operations of correctional systems" through her role as a correctional mental-health administrator, is not convincing.) The court will therefore not rely on her opinion on this specific issue for purposes of the pretrial motions.[20] That all said, plaintiffs have in fact offered another expert, Eldon Vail, who is an experienced correctional administrator; defendants have not raised a Daubert challenge to his qualifications to address this issue, and the court has already rejected their contention that he lacks an adequate basis for his conclusions. His opinion on the inadequacies of correctional staffing and their effects on delivery of**

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**20. If, at trial, plaintiffs can convince the court that Dr. Burns is qualified to testify on this topic, (continued...)**

**the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). In addition, a class must clear one of three additional hurdles: because the named plaintiffs in this case seek certification of a Rule 23(b)(2) class, they must also show that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate**

**Amgen, 133 S. Ct. at 1194-95 (citation omitted). A party seeking class certification must "affirmatively demonstrate his compliance with the Rule"; that is, plaintiffs must offer evidence sufficient to satisfy the court that the various requirements of Rule 23 have been met. Wal-Mart, 564 U.S. at 350.**

**the court will proceed to consider each requirement for certification in turn.**

## 2. Rule 23(a)

### A. Numerosity

**"the fact that the inmate population at these facilities is constantly revolving")); see also Pederson v. Louisiana State Univ., 213 F.3d 858, 868 n.11 (5th Cir. 2000) ("[D]istrict courts must not focus on sheer numbers alone.... [T]he fact that the class includes unknown, unnamed future members also weighs in favor of certification.");**

held [that when] the alleged class includes future [members], necessarily unidentifiable[,] ... the requirement of Rule 23(a)(1) is clearly met, for joinder of unknown individuals is clearly impracticable." (citation and internal quotation marks omitted)); Clarkson v. Coughlin, 145 F.R.D. 339, 346 (S.D.N.Y. 1993) (Sweet, J.) ("The class action device is particularly well-suited in actions brought by prisoners due to the fluid composition of the prison population. ... Class actions therefore generally tend to be the norm in actions such as this." (citations and internal quotation marks omitted))).[22]

Plaintiffs have submitted evidence to show that in February 2016, there were 3,416 prisoners on the mental-health caseload (and argue that this figure

22. Recognition of prisoners' relatively limited "access to the legal system ... has [also] led courts to certify classes in cases ... involv[ing] issues of common concern to inmates even when the potential class size is small and somewhat undefined." Bradley v. Harrelson, 151 F.R.D. 422, 426 (M.D. Ala. 1993)

**significantly understates the number of seriously mentally ill prisoners in the State). This exceeds the customary numerosity threshold by a factor of 85. Defendants nonetheless have a bone to pick. They contend that "this number ... says nothing about how many individuals can claim an actual injury traceable to the State's policies and procedures." Defs.' Opp. to Class Cert. (doc. no. 807) at 141. There are a number of problems with this argument.**

**First, courts look at numerosity in a fairly straightforward fashion: by assessing the practicability of joinder, in light of the number of people who fall within the definition of the class. Movants for class certification do not need to present evidence showing--one by one, many times over--that individual putative class members can proceed on the class claims; requiring as much would largely defeat the efficiency benefits of class-wide adjudication, and is unnecessary in light of the commonality requirement. See Rubenstein, Newberg on Class Actions § 3:11**

("[W]here joinder is impracticable, judicial economy weighs in favor of representative litigation of common issues for similarly situated plaintiffs."). Instead, they need to show that the class representatives can proceed on claims which are common to the class.

Plaintiffs' evidence regarding the size of the mental-health caseload goes directly to--indeed, conclusively resolves--the question whether more than 40 or so prisoners in ADOC custody have serious mental illnesses. And, again, the fact that the class contains as-yet-unknown future members also counsels strongly in favor of finding that Rule 23(a)(1) has been satisfied.

Second, even if the court were required to consider how many prisoners "can claim an actual injury traceable to the State's policies and procedures," rather than how many prisoners in ADOC custody have a serious mental illness, the court would reiterate that the actual injury being claimed in this case is exposure to the substantial risk of serious harm

**stemming from those policies and procedures. If, as plaintiffs claim, defendants provide inadequate numbers of mental-health care providers and thereby subject all prisoners with serious mental illnesses to a substantial risk of serious harm, then all class members can claim an actual injury--even those who have not yet suffered serious harm.**

**Finally, and for the sake of thoroughly responding to a thoroughly unconvincing argument, the court notes that plaintiffs have indeed presented evidence (some of it not subject to any direct rebuttal) to show that numerous individuals have in fact already suffered a range of serious harms. The reports of their experts are filled with examples of prisoners who the experts opine have suffered serious harm after receiving care that was inadequate due to the failure of defendants to provide enough funding, staffing, and oversight.[23] A**

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**23. Indeed, in light of the impracticability of joinder in a prospective-relief case involving current and future prisoners, the number of named plaintiffs (continued...)**

**selection of these concrete harms includes: being denied necessary treatment other than psychotropic medication, being maintained on certain psychotropic medications despite suffering serious side effects and the availability of alternative medications, frequently missing doses of psychotropic medications or having them inappropriately or abruptly discontinued, being denied follow-up care after attempting to commit suicide, and being held in segregation without regard to the psychological deterioration it is causing.**

2016; therefore, this class--of prisoners subject to involuntary-medications orders--meets the presumptive numerosity threshold discussed above.

B. Commonality

answers apt to drive the resolution of the litigation." 564 U.S. at 350 (citation and internal quotation marks omitted). In short, commonality requires a showing that there is "some glue" holding the claims together. Id. at 352. However, plaintiffs seeking to demonstrate commonality under Rule 23(a)(2) need not show that common questions "predominate" over individual questions as required under Rule 23(b)(3); indeed, "even a single common question will do." Wal-Mart, 564 U.S. at 359 (citations and alterations omitted).

In Wal-Mart, the plaintiffs failed to satisfy the commonality requirement because they had not offered "significant proof" of a policy of discrimination that applied across the corporation's numerous stores.[24] Id.

24. It is worth emphasizing the critical difference between the common policy the plaintiffs did have enough evidence to demonstrate in Wal-Mart--a policy of delegating discretion to supervisors--and the policies and practices at issue here. The court explained in Wal-Mart that this was a "very common and presumptively reasonable way of doing business--one that [it had] said should itself raise no inference of discriminatory conduct." 564 U.S. at 355 (citation and internal quotation marks omitted). In contrast, the policies (continued...)

**at 353. Here, plaintiffs have identified eight different specific policies or practices, and offered significant proof that they are common to the class of prisoners in Alabama with serious mental illnesses.[25]**

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**and practices at issue here are very far from "a policy against having uniform [] practices." Id.; see also Parsons, 754 F.3d at 681 ("[This case] involves uniform statewide practices created and overseen by two individuals who are charged by law with ultimate responsibility for health care and other conditions of confinement in all [state] facilities, not a grant of discretion to thousands of managers."); Logory v. Cty. of Susquehanna, 277 F.R.D. 135, 143 (M.D. Pa. 2011) ("Unlike Dukes, where commonality was destroyed where there was no common mode of exercising discretion that pervade[d] the entire company, here there is a solid [prison] policy that applied directly to all potential class members" (internal citation and quotation marks**

**This is all plaintiffs need to do for purposes of class certification; they need to show that the policies and practices they challenge are common, not (yet) that the common policies and practices are unconstitutional. Put differently, they need to demonstrate the existence of common questions with common answers, not what those common answers are. See**

**The court will proceed as follows: First, it will discuss what must be shown to demonstrate that the policy or practice is common, generally and in the context of an Eighth Amendment substantial-risk-of-harm claim such as the one brought here. Second, it will discuss the evidence plaintiffs have offered to show that policies and practices they have challenged are indeed common to the class. Third and last, the court will address defendants' arguments that dissimilarities among class members defeat commonality.**

**As a general matter, a policy or practice need not affect every member of a class in order to be "common."** See **Rubenstein,** Newberg on Class Actions **§ 3.23 (5th**

have addressed it have adopted the Fifth Circuit's approach.").

Moreover, "class members can assert such a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are subject to the same harm will suffice." Baby Neal ex rel. Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994) (emphasis in original) (citing Hassine v. Jeffes, 846 F.2d 169, 177-78 (reversing the denial of certification of a class of prisoners challenging the risks posed by unsafe prison conditions)). As another district court recently explained in a jail-conditions case, "the Fifth Circuit, like the Third, [has] expressly disagreed with the proposition that a policy must injure each class member to provide the foundation for class wide relief." Jones v. Gusman, 296 F.R.D. 416, 465-66 (E.D. La. 2013) (Africk, J.) (citing M.D. ex rel. Stukenberg v. Perry, 675 F.3d 832, 847-48 (5th Cir. 2012)). Instead, in M.D., the court of appeals explained that a valid claim for class-wide relief

**could be "based on**

**"whether [the challenged] conditions and health care have either subjected prisoners to an unconstitutionally unreasonable risk of harm or, conversely, were sufficient to provide humane conditions of confinement"); Scott v. Clarke, 61 F. Supp. 3d 569, 587 (W.D. Va. 2014) (Moon, J.) ("Plaintiffs allege that the policies and practices at FCCW--e.g., the defective sick call process; FCCW's refusal to refer or undue delay in referring prisoners for specialized care; the failure to maintain continuity in the provision of prescribed, potentially life-sustaining medications; etc.--reflect substandard medical care on the part of the Defendants. Whether these policies and practices place the Plaintiffs and other current and future FCCW prisoners at a**

**mutually enforcing effect, put inmates at a substantial risk of harm is amenable to a common answer. ... Similarly, whether OPP officials have been deliberately indifferent to any such risk can be demonstrated in a manner that is applicable to all class members. ... Class Plaintiffs' Eighth and Fourteenth Amendment medical and mental-health care claims [likewise] warrant certification. ... Class Plaintiffs have identified discrete and particularized practices including, for example, medication and suicide prevention practices, as well as staffing inadequacies,**

**detainees and practice of using pepper spray in response to this violence), report and recommendation adopted as modified on other grounds, 2013 WL 1810806 (M.D. Fla. April 30, 2013) (Merryday, J.); M.D. v. Perry, 294 F.R.D. 7, 45 (S.D. Tex. 2013) (Jack, J.) (finding commonality and certifying a class with respect to a Fourteenth Amendment risk-of-harm claim challenging a policy or practice of allowing caseworkers in a foster care system to carry excessive caseloads that posed a risk of harm to children).**

**The fact that not every mentally ill prisoner is subjected to precisely the same level of risk also does not defeat commonality. Indeed, the last time**

**because there is no requirement that every class member be affected by the institutional practice or condition in the same way." Bradley v. Harrelson, 151 F.R.D. 422, 426 (M.D. Ala. 1993) (Albritton, J.); see also Parsons, 754 F.3d at 678-80 ("[A]lthough a presently existing risk may ultimately result in different future harm for different inmates--ranging from no harm at all to death--every inmate suffers exactly the same constitutional injury when he is exposed to a single statewide ADC policy or practice that creates a substantial risk of serious harm. ... Even if some inmates are exposed to a greater or idiosyncratic risk of harm by the policy and practice of not hiring enough staff to provide adequate medical care to all inmates, that single policy and practice allegedly exposes every single inmate to a serious risk of the same basic kind of harm." (internal citations omitted)).**

**Plaintiffs have offered more than adequate evidence to establish the existence of the common policies and**

practices they challenge.[26] This evidence, discussed in the court's opinion on summary judgment, could not be more different from the indefinite and speculative evidence offered by the expert in Wal-Mart, of a "culture" of discrimination manifested in millions of discretionary decisions. 564 U.S. at 353-54. Here, the experts point to very concrete policies and practices--such as using unsupervised and unqualified nurses to conduct intake screenings, or placing prisoners with serious mental illness in prolonged segregation--that undisputedly occur or that plaintiffs have offered considerable evidence (often in the form of admissions by MHM administrators) to show are

26. The court notes that, in addition to the expert evidence discussed here, plaintiffs have offered evidence regarding care they and a couple of dozen putative class members have received, in order to further illustrate the commonality of the policies and practices they challenge. The evidence regarding the named plaintiffs will be discussed below, in the context of the typicality analysis. Although illustrative, the court need not and does not base its decision regarding commonality on the declarations of the unnamed class members; plaintiffs' expert evidence is more than sufficient.

**widespread. See Parsons, 754 F.3d at 678 ("The putative class and subclass members thus all set forth numerous common contentions whose truth or falsity can be determined in one stroke: whether the specified statewide policies and practices to which they are all subjected by ADC expose them to a substantial risk of harm. ... These policies and practices are the 'glue' that holds together the putative class and the putative subclass; either each of the policies and practices is unlawful as to every inmate or it is not."). The only genuine debate in this case is as to the effects of**

based not on untethered theorizing, but on a large quantity of concrete evidence. He explains as follows:

> "[T]he observations that I made about various ADOC facilities were remarkably consistent throughout my tours--that is, with only minor variations, virtually the same kinds of problems surfaced in each of the facilities that I inspected. Moreover, there was remarkable consistency in what prisoner after prisoner in these separate facilities told me (as documented in [the lengthy appendix to his report]). It did not seem to matter whether the prisoners I interviewed were selected randomly for brief cell-front interviews, selected for individual, confidential interviews after having been seen cell-front, picked randomly from the facility's prisoner roster for individual confidential interviews, or suggested by counsel for Plaintiffs--they all told essentially the same kind of grim and often tragic stories. In addition, because

> **oversight responsibilities and the provision of mental health services in Alabama's 15 major prisons. Their stated opinions provide strong support for my own observations about the system-wide magnitude of the very serious problems that I encountered."**

**Haney Report (doc. no. 868-4) at 158-59.**

**As discussed at much greater length in the court's opinion denying summary judgment, Dr. Burns, plaintiffs' other mental-health expert, concurs, concluding that the "deficiencies in ADOC--inadequate staffing levels, qualifications, identification and classification, treatment and oversight of the mental health care--deny prisoners care for their serious mental illness leading to needless pain, suffering, self-injury, suicide and punishment for symptoms of untreated mental illness. These are systemic problems that can and should be addressed through changes to the mental health care delivery system." Burns Report (doc. no. 868-2) at 52.**

**Even Dr. Patterson, defendants' own expert, recognizes that a number of the policies and practices being challenged are pervasive, including that the**

**"staffing of the facilities is insufficient and a significant number of the mental health staff are unlicensed practitioners" who had not received any documented supervision. Patterson Report (doc. no. 679-9) at 47. Moreover, he recognizes that other policies and practices, and concrete harms, stem from this source. For example, he observes "certain deficiencies in adequately identifying inmates during the reception and intake processes that are in need of mental health services, and therefore the numbers of inmates in need of mental health services are ... underestimated and reflect the need for increased numbers of and properly trained and credentialed mental**

**pattern of failure attributable to a very specific set of decisions about system-wide staffing. He agrees, then, that insufficiency of mental-health staffing is a pervasive problem, and that this causes prisoners not**

**Whether this policy or practice of understaffing subjects mentally ill prisoners to a substantial risk of serious harm is one question (of a number of them) apt to drive the resolution of this litigation. Unlike in Wal-Mart, the plaintiffs here have offered considerable evidence to show that this policy or practice is one of the reasons (indeed, the primary reason) that they are at serious risk of risk of TT 0.0035i**

**substantial risk of serious harm, Wal-Mart, 564 U.S. at 352: because ADOC provides inadequate numbers of and**

**the root cause of the injuries and threats of injuries suffered by Plaintiffs is the systemic failures in the provision of health care generally"); Jones, 296 F.R.D. at 466 ("The facts and law also demonstrate that Class Plaintiffs' Eighth and Fourteenth Amendment medical and mental health care claims warrant certification. These claims do not allege amorphous systemic deficiencies. Class Plaintiffs have identified discrete and particularized practices including, for example, medication and suicide prevention practices, as well as staffing inadequacies, that are mutually enforcing causes of OPP's deficient conditions. Accordingly, a class action is an appropriate vehicle for these claims." (citations and internal quotations marks omitted)).**

**Rather than discussing each of the remaining policies and practices at length, the court will merely discuss another example. With respect to the policy or practice of "placing prisoners in segregation without regard to its harmful effects on their mental health,"**

**This distinguishes the case at bar from Sher v. Raytheon Co., wherein the Eleventh Circuit reversed a grant of class certification and remanded for reconsideration because the district court had not "evaluat[ed] and weigh[ed] conflicting expert testimony," and "decline[d] to declare a proverbial, yet tentative winner" between these experts, at the class-certification stage. 419 F. App'x 887, 890 (11th Cir. 2011). In Sher, a case about release of toxins**

**Morgan does not suggest that**

**mental-health care are delivered (as an example, not all major facilities have residential treatment units), and in terms of the levels of staffing (some facilities have some psychiatrist coverage while others have none at all, and some facilities have especially severe shortages of custodial staff while others have somewhat more moderate shortages),[30] this does not defeat**

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**30. Defendants particularly press this point with respect to plaintiffs' contention that the failure to provide adequate custodial staff interferes with the provision of mental-health care, noting that some**

commonality for two principal reasons.

First, plaintiffs' experts have cited evidence

**being provided).**

**Second, and perhaps more important, the named plaintiffs' records clearly reflect that they are transferred very frequently between a large number of different facilities; it is fair to presume that the other class members are too.[31] In that sense, defining a subclass to include only those who are or will be housed at a subset of facilities would be a semantic distinction without much if any practical difference. The claim in this case revolves around a prospective risk of harm; even if some aspect of the mental-health care at a particular facility is idiosyncratically better or worse, it is clear that numerous class members not currently housed at that facility are likely to be exposed to it in the future.**

**Another comparison to Wal-Mart is instructive. In**

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**31. Specifically, seriously mentally ill prisoners are often transferred due to their need to be housed in a residential treatment unit or a stabilization unit, which are available at only a few facilities. As a result, many of the putative class members are (continued...)**

**Wal-Mart, the fact that the class members worked at thousands of stores across the country made it impossible to show the existence of a common poli**

because there was "more than a reasonable basis to believe that she will be subjected to segregation in [the same facility] again").

Moreover, litigation of these system-wide issues would not preclude sensitivity to any salient differences between facilities in crafting a remedial order in the event that the court does find liability.[32] The remedial order the Supreme Court affirmed in Brown v. Plata, 563 U.S. 493 (2011), for instance, ordered the California prison system to reduce overcrowding (which was resulting in unconstitutional medical care) to a certain percentage of design capacity across the State, while allowing it flexibility to adjust for the distinctive features and needs of different institutions by having some facilities be more crowded and some less. Coleman v. Schwarzenegger, 922 F. Supp. 2d 882, 970 n.64 (E.D. Cal. 2009), aff'd sub nom. Brown

32. Defendants would, subject to the court's consideration of objections raised by plaintiffs and independent approval, have the opportunity to propose the terms of any eventual remedial order.

**v. Plata, 563 U.S. 493 (2011).**

**However, as noted above, the court has decided to define the class to exclude prisoners at Tutwiler Prison for Women. Although there is expert evidence regarding the mental-health care being provided at Tutwiler, and although many of the same policies and**

**Defendants also argue that differences in the health care needs of class members preclude a finding of commonality. For this proposition, they rely on language from a Third Circuit decision, Rouse v. Plantier, 182 F.3d 192, 199 (3d Cir. 1999):**

> **"In light of the diverse medical needs of, and the different level of care owed to, each group of plaintiffs [specifically, 'stable' versus 'unstable' diabetics], the District Court erred in holding that all members of the plaintiff class alleged a violation of their Eighth Amendment rights. Based on the evidence in the summary judgment record, there may be**

**claims for damages stemming from inadequate treatment in the past (rather than, as here, a purely prospective injunctive-relief class action alleging a current substantial risk of serious harm). In light of the posture of the case, the court's instruction to the district court, to focus on differences in the medical needs of different subsets of the plaintiff claims, is totally unremarkable: if the care provided in the past was adequate for, say, 'stable' diabetics, they would not have suffered any retrospective constitutional violation, and would not be entitled to any damages. But here, such parsing is neither necessary nor appropriate: there are no damages to be apportioned, and, more important, even if a given class member admits that he has not in the past received care that**

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**only issue in this appeal is whether the defendants are entitled to summary judgment based on qualified immunity," a defense that applies only to individual-capacity damages claims and not to official-capacity claims for prospective injunctive**

**violated the Constitution, he is not precluded from raising a prospective Eighth Amendment claim that defendants are currently subjecting him to a substantial risk of serious harm. Also, as a factual matter, the allegations in Rouse involved much more fine-**

**ii. Due Process Claim**

**The court also finds that the procedural due-process class satisfies the commonality requirement. As with the Eighth Amendment claims, plaintiffs presented evidence through their expert, Dr. Burns, showing that prisoners across the ADOC system have not received adequate process before being**

protect due-process rights. See Hightower ex rel. Dehler v. Olmstead, 959 F. Supp. 1549, 1557 (N.D. Ga. 1996) (considering procedural due-process claims, among others, brought by a certified class of patients in a state hospital), aff'd sub nom. Hightower v. Olmstead, 166 F.3d 351 (11th Cir. 1998).

### C. Typicality

Although the commonality and typicality inquiries "tend to merge," the typicality requirement--which is "somewhat of a low hurdle"--focuses the court's attention on "whether a sufficient nexus exists between the claims of the named representatives and those of the class at large." Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 158 n.13 (1982); Taylor v. Flagstar Bank, FSB, 181 F.R.D. 509, 517 (M.D. Ala. 1998) (Albritton, J.); Busby v. JRHBW Realty, Inc., 513 F.3d 1314, 1322 (11th Cir. 2008) (citation and internal quotations omitted). A class representative's claims are typical if they "arise from the same event or pattern or

**practice and are based on the same legal theory" as the class claims; they need not be identical. Williams v. Mohawk Indus., Inc., 568 F.3d 1350, 1357 (11th Cir.**

**management creates a substantial risk of a prisoner taking psychotropic medications suffering unnecessarily from serious side effects, there must be a named plaintiff who**

citations based on symptomatic behavior. There is no serious dispute,[38] though, that all of the named plaintiffs fall within categories (1) and (3); that many of the named plaintiffs--including at least six who have been housed in segregation (Hartley, Jackson, Johnson, McCoy, Pruitt, and Williams)--fall within category (2); that at least eight (Braggs, Hartley, Johnson, McCoy, Pruitt, Wallace, and Williams) fall within category (4); and that at least two (in many

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38. Again, defendants do argue, vehemently, that the named plaintiffs have not offered evidence to show that they, individually, have suffered past violations of the Eighth Amendment as a result of these policies and practices. (As discussed in the court's opinion on summary judgment, this is both incorrect and irrelevant, because their claim concerns not past harm but a future risk of harm that they contend exists because they need mental-health care but can obtain it only from a seriously deficient system.) For the purpose of typicality, the named plaintiffs need only show that they are exposed to a particular policy or practice--for example, that they need mental-health care, and that they can only obtain that care from the limited number of mental-health staff defendants have

**cases, more) fall within each of the remaining categories.[39]**

**Although they need not do so, plaintiffs have in fact presented evidence that at least one of them has not only been exposed to but harmed by the risk created by each of the policies or practices at issue. Rather than engage in an exhaustive discussion that would largely rehash the extended section on individual harm in the court's opinion on summary judgment, the court will instead mention illustrative examples.[40]**

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**39. Defendants' own expert, Dr. Patterson,**

**As for defendants' policy or practice of failing to provide adequate numbers of and sufficiently qualified mental-health staff, plaintiffs have offered evidence to show that the inadequate staffing has adversely affected Hartley's treatment: his treatment plans**

**ill and required residential care but was not being provided it due to his classification at an inappropriately low**

**disorder--contemplated in his treatment plans; that Pruitt's repeated requests to speak to counselors have been rejected; and that Wallace, despite his repeated suicide attempts and self-harm, and diagnoses of bi-polar disorder and intellectual disability, has not consistently received group therapy. Defendants' expert, Dr. Patterson, agrees with plaintiffs that Wallace's care has been inadequate, due in part to the lack of group therapy.**

**Plaintiffs have offered evidence to show that named plaintiffs have been exposed to and harmed by defendants' practice of inadequately monitoring and providing inadequate follow-up care to prisoners who are suicidal or engage in self-harm. Over the course of a six-month period, Pruitt was admitted to a crisis cell as a result of self-injurious behavior at least five times, for stretches sometimes lasting more than a week. As to inadequate monitoring 35 Tc -5]83Tm c114 (crisng**

**or nurse practitioner during any of these admissions. He was attacked by other prisoners during two different admissions (disinfectant was thrown in his face and burning fabric was thrown onto his leg). Dr. Burns notes that he was not placed on the**

**mentally, according to his own testimony and the opinion of one of plaintiffs' experts.**

**Plaintiffs have likewise presented evidence to show that Wallace and Pruitt have been harmed by defendants' policy or practice of disciplining prisoners for behavior that stems from mental illness. Wallace received nine disciplinary citations for instances of cutting his wrists, and Pruitt has also received discipl**

**and that on several occasions, he did not have a lay**

**will adequately prosecute the action." Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181, 1189 (11th Cir. 2003) (citation omitted).[43]**

**"Adequate representation is usually presumed in the absence of contrary evidence," and generally exists for injunctive-relief classes, because there is no monetary pie to be sliced up. Access Now, Inc. v. Ambulatory Surgery Ctr. Grp., Ltd., 197 F.R.D. 522, 528 (S.D. Fla. 2000) (Seitz, J.).**

**As noted above, defendants' argument against the adequacy of the named plaintiffs as class representatives is that the named plaintiffs have not**

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**43. Prior to the promulgation of Rule 23(g) regarding the adequacy of class counsel, courts considered that topic in the context of Rule 23(a)(4). Since Rule 23(g) was added in 2003, courts have been "slo**

**themselves raised the claims they now seek to bring on behalf of the class**

**plaintiffs are adequate representatives of the Eighth Amendment class, and Bui is an adequate representative of the procedural due-process class.**

### 3. Rule

**Indeed, some courts have gone so far as to say that the rule's requirements are "almost automatically satisfied in actions primarily seeking injunctive relief." Baby Neal ex rel. Kanter, 43 F.3d at 59.**

**As plaintiffs have repeatedly explained and offered evidence to demonstrate throughout the litigation of this case, and as this court has found in addressing the commonality requirement, the problems of which they complain and the remedies they seek are systemic.[44] The**

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**44. As discussed above in the commonality context, the fact that some class members may have thus far received appropriate mental-health care and therefore might not yet have been harmed by the challenged policies and procedures does not defeat certification. Additionally, even if not all of the class members were subjected to a substantial risk of serious harm--that is, even if it were sure that the risk would not materialize with respect to some mentally ill prisoners--certification would still be appropriate. See Anderson v. Garner, 22 F. Supp. 2d 1379, 1386 (N.D. Ga. 1997) (Murphy, J.) ("'[A]ll the class members need not be aggrieved by or desire to challenge the defendant's conduct in order for one or more of them to seek relief under Rule 23(b)(2).' Johnson v. American Credit Co. of Georgia, 581 F.2d 526, 532 (5th Cir. 1978); Georgia State Conference of Branches of NAACP v. State, 99 F.R.D. 16, 35-36 (S.D. Ga. 1983) ("What is necessary is that the challenged conduct or lack of (continued...)**

**Supreme Court has approved of system-wide relief in prison cases involving "systemwide violation[s]" resulting from "systemwide deficiencies." Plata, 563 U.S. at 532.**

**Defendants are quite right that a single injunction would not be appropriate if plaintiffs sought an order requiring that each named plaintiff be provided the specific forms of treatment he has been denied. They cite Wal-Mart for the proposition that Rule 23(b)(2) "does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant." 564 U.S. at 360. But Rule 23(b)(2) certainly does not preclude certification merely because the class members could bring separate claims regarding the adequacy of the particular treatment they have individually received--claims which, everyone agrees, could not be resolved with a single injunction**

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**conduct be premised on a ground that is applicable to the entire class.")).**

**or declaratory judgment--when those are not the claims they actually have brought in this lawsuit.**

**For some reason, defendants repeatedly misconstrue the claims in the case as demands for individual treatment of various kinds, and then proceed to argue that the individualized claims plaintiffs are not raising cannot be brought in the form of a class action.[45] As the court explained at some length in its analysis of the applicable Eighth Amendment case law in its summary-judgment opinion, defendants' position is unwarranted; plaintiffs are not seeking adjudication of demands for particular individualized treatment, and the challenge they are actually bringing--to systemic**

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**45. In support of this reading of plaintiffs' claims, defendants cite to deposition testimony wherein the named plaintiffs, when asked by defense counsel what concrete changes they would like to see in the individual care they are currently being provided, answer that question. These statements, however, are not their claims. Adequate staffing levels and adequate amounts of residential treatment space are not individual forms of treatment one can request; they are conditions that make it possible for appropriate treatment to be provided when and to the extent necessary.**

**deficiencies that create a substantial risk of serious harm--are well recognized.**

**Defendants declare that "an alleged delay in care at St. Clair bears no relationship of any kind to allegedly insufficient staffing at Hamilton, or allegedly insufficient intake procedures at Kilby." Defs.' Opp. to Class Cert. (doc. no. 807) at 167. This position is controverted by the evidence in this case. Plaintiffs' experts opine that all of these problems--and others--stem directly and ineluctably from a**

**resources, and relief would be appropriate for everyone subjected to the substantial risk of serious harm plaintiffs claim this creates--that is, prisoners with serious mental illness.**

**It would, in fact, be impossible to grant any meaningful relief on this claim without granting it on a class-wide basis. See Wal-Mart, 564 U.S. at 360 ("The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted."**

**prisoners, whose needs change over time, could not. Moreover, any order remedying a systemic deficiency with respect to only one prisoner would rob Peter to**

by the fact that there are not enough staff members qualified to conduct the screenings or supervise others in doing so. Moreover, as discussed above in the

**track the violations established by the evidence at trial, that any such relief must comply with the [Prison Litigation Reform Act]'s extensive requirements, that prison officials must play a role in shaping injunctions, that ultimate proof of some violations but not others might easily change the structure of a remedial plan, that conditions in prisons might change over the course of litigation, and that the class certification hearing is not a dress rehearsal of the trial on the merits (let alone a dress rehearsal of the remedy proceedings)"); Morrow v. Washington, 277 F.R.D. 172, 198 (E.D. Tex. 2011) (Ward, J.) ("Plaintiffs have set forth facts suggesting that Defendants' behavior was generally applicable to the class as a whole, making injunctive relief appropriate. The precise terms of the injunction need not be decided at this stage, only that the allegations are such that injunctive and declaratory relief are appropriate and**

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**to redress the risk these policies and practices pose to all such prisoners.**

**that the class is sufficiently cohesive that an injunction can be crafted that meets the specificity requirements of Rule 65(d).").**

**Defendants' other cases fare no better. In Heffner v. Blue Cross and Blue Shield of Ala., Inc., 443 F.3d 1330, 1345 (11th Cir. 2005), certification of a Rule 23(b)(2) damages class was reversed because the court concluded that the class members were not entitled to relief (in the form of a refund of a deductible) absent an individualized showing that they had in fact relied on a summary plan description indicating that no deductible would be charged. Similarly, in Jamie S. v. Milwaukee Pub. Sch., 668 F.3d 481, 499 (7th Cir. 2012), the court reversed certification of a class in a case where "the intricate remedial scheme ... require[d] thousands of individual determinations of class**

**determinations of liability and remedy are made." Here, by contrast, no individualized determinations are necessary or relevant. If the court grants relief, it will do so across the board, in one fell swoop. This relief will ensure that the statewide prison mental-health care system, with which all class members interact, is not operated pursuant to policies and practices that subject all prisoners to a substantial risk of serious harm.**

**This is exactly the kind of case for which Rule 23(b)(2) was intended.[48]**

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**48. It is just as clear that the procedural due-process claim certified for class-wide resolution satisfies Rule 23(b)(2), as the relief requested here (an injunction requiring the provision of certain procedural protections, not only in policy but also in practice) would clearly apply to the class as a whole. By contrast, the failure to make constitutionally appropriate substantive determinations as to whether prisoners should be involuntarily medicated is less clearly susceptible to "final injunctive relief or corresponding declaratory relief ... respecting the class as a whole" under Rule 23(b)(2). Although a consistent refusal by those who authorize involuntary medication to consider some specific, discrete factor could arguably be susceptible to class-wide relief, even if further individual determinations would need to (continued...)**

**4. Rule 23(g)**

**In order to certify a class, the court must also appoint class counsel. In so doing, the court "must consider ... (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experiences in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(a). The court also "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class," Fed. R. Civ. P. 23(g)(1)(B).**

**Lawyers affiliated with the Southern Poverty Law Center, the Alabama Disabilities Advocacy Program, and the law firm of Baker, Donelson, Bearman, Caldwell &**

Berkowitz have represented named plaintiffs in litigating and negotiating the settlement of this case, and they now seek appointment as class counsel.[49] As previously discussed for purposes of certification of the Phase 1 class in this case, the record reflects that these attorneys have substantial experience in litigating class actions and in the complex substantive areas of both prisoners'-



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**In any event, defendants' arguments with respect to SPLC are not convincing. Although they focus on one possible deficiency in SPLC's pre-filing investigation--namely, its failure to review the medical and mental-health records of all named plaintiffs prior to filing their complaint--they ignore the detailed and involved investigation that SPLC and plaintiffs' other counsel conducted prior to (and since) the filing of this case. Before filing suit, plaintiffs' counsel conducted a two-year investigation into health care in ADOC facilities, interviewed**

**In addition, defendants argue that SPLC has taken positions in conflict with its fiduciary obligations to the putative class. Essentially, defendants complain that when, earlier this year, the Alabama legislature considered a proposal to invest hundreds of millions of dollars in building four large new prison facilities in the State, the president of SPLC sent a letter to a number of legislators opposing its passage. Whether or not this letter had any effect on legislative support for, or the eventual defeat of, the bill, nothing in it was in conflict with the interests of the putative class his organization seeks to represent.**

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**resemblance to the case at bar. In these cases, counsel's deficiencies were glaring; they had failed to conduct even the most cursory inquiry into whether the proposed class representatives even existed--in Ballan v. Upjohn Co., 159 F.R.D. 473, 488 (W.D. Mich. 1994) (Hillman, J.), one was a "phantom," who "counsel had named ... without knowing who, let alone where, [she] was"--or had failed to speak at all to at least one of the proposed class representatives prior to the morning of his deposition, see Williams v. Balcor Pension Investors, 150 F.R.D. 109, 120 (N.D. Ill. 1993) (Zagel, J.).**

**As defendants themselves acknowledge, it was "the opinion of the Commissioner [that] inmates in the ADOC system would benefit from the [bill], because it would alleviate problems caused by overcrowding and understaffing." Defs.' Opp. to Class Cert. (doc. no. 807) at 171 (emphasis added). SPLC's president expressed a different opinion, favoring a legislative approach that prioritized "sentencing reform," and "demand[ed] that the prison system reform its management practices." Id.**

**Defendants' argument incorrectly presupposes either that the Commissioner's view was indisputably correct, or else that the only legislative alternatives were the passage of the bill as proposed, on the one hand, and no action at all on the other. This, too, is not the case; there is a panoply of possible legislative approaches to any issue as complex as prison reform. The fact that an SPLC official expressed a preference for options other than the one that happened to be on the table at a particular moment hardly reflects an**

**abandonment of his fiduciary duty to his current or prospective clients.**

**Setting aside the fact that plaintiffs' counsel are free to take a different position than the Commissioner, it is not entirely clear how and why--even accepting his position--the prison construction project would benefit the plaintiff class. According to the statement of the Commissioner quoted by defendants, the salient impact**

**note in replying to this argument that the record reflects that the Commissioner has also suggested that his proposal would allow ADOC to dramatically cut the cost of providing health care. The court certainly passes no judgment on the merits of SPLC's perspective, but it does seem perfectly reasonable for lawyers representing clients who seek more funding for health care to oppose a bill the proponent of which says would result in less funding for health care.**

**5. Ascertainability**

**Defendants argue that the Eighth Amendment class certified here is not ascertainable. However, there is serious reason to doubt that the judicially created ascertainability requirement applies to Rule 23(b)(2) classes. Even if it does, this class meets the requirement.**

**Although the Eleventh Circuit did hold in defendants' primary case, Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012), that a class must**

**be "clearly ascertainable"--that is, "its members can**

**In Shelton v. Bledsoe, 775 F.3d 554 (3d Cir. 2015), the court distinguished Rule 23(b)(2) and (b)(3) classes by noting that the latter "'allows certification in a much wider set of circumstances,' including those 'in which class-action treatment is not as clearly called for,'" and explaining that because Rule 23(b)(3) classes are an "'adventuresome innovation,' Congress included additional 'procedural safeguards,'" such as individual notice and an opportunity to opt-out.**

**conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" Id. at 561 (quoting Wal-Mart, 131 S. Ct. at 2557 (citation and internal quotation marks omitted). In sum, the court explained, "the identities of individual class members are less critical in a (b)(2) action than in a (b)(3) action." Id.**

**As the court noted in Shelton, an advisory committee note to Rule 23 describes cases which are**

**enumeration[] is inappropriate for (b)(2) classes."[53]**

**Shelton, 775 F.3d at 561.**

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**53. The court also adds the following observations. Requiring plaintiffs seeking certification of a Rule 23(b)(2) class to demonstrate that they could determine conclusively and**

**As the Third Circuit recounted, two other circuits have reached the same conclusion.[54] In Shook v. El Paso**

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**In addition, strict application of this standard to cases where the violation at issue is a failure to identify would create a Catch-22; it would be the height of irony for a prison system to be able to defeat certification of a class seeking to challenge its failure to identify prisoners with mental illness by arguing that that very failure made the class unascertainable.**

**54. As explained in the leading treatise on class action law, "early circuit cases" in the Fifth, Sixth, and Seventh Circuits applied the ascertainability requirement "without considering the unique nature of 23(b)(2) actions," but "later district court cases in these circuits have adopted an intermediate position ... under which the requirement of ascertainability is applied less stringently in 23(b)(2) actions." Rubenstein, Newberg on Class Actions § 3:7 (5th ed.). It also observes that "recent decisions either ... eschew the implied requirement of definiteness in Rule 23(b)(2) class actions, or follow the intermediate approach, and treat definiteness as flexible ...[,] even in circuits that have traditionally applied the definiteness requirement to such class actions." Id. (citing, among other cases, In re Monumental Life Ins. Co., 365 F.3d 408, 413 (5th Cir. 2004) (recognizing that "a precise class definition is not as critical where certification of a class for injunctive or declaratory relief is sought under [R]ule 23(b)(2)," at least so long as notice and opt-out rights are not requested), and Kenneth R. ex. rel. Tri-City CAP, Inc./GS v. Hassan, 293 F.R.D. 254, 264 (D.N.H. 2013) (McAuliffe, J.) (holding that a Rule 23(b)(2) class defined as containing persons with "serious mental**

**(continued...)**

**Cty., 386 F.3d 963, 972 (10th Cir. 2004), the court**

**For these reasons, the court concludes that the class proposed in this litigation need not be ascertainable. That said, the court concludes in the alternative that even if the requirement did apply, plaintiffs' proposed class definition would satisfy it.**

**Although defendants complain that the term "serious" mental illness is undefined, defendants themselves note in their motion for summary judgment that there is case law in this circuit articulating what counts as "serious" in the arena of Eighth Amendment mental-health claims: an illness "that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the need for a doctor's attention." Hill v. Dekalb Reg'l Youth Det. Ctr., 40 F.3d 1176, 1187 (11th Cir. 1994) (explaining that "[t]his standard has been acknowledged and used by other federal circuit and district courts," and concluding that it was the "appropriate and guiding principle"). This is a rather straightforward, objective standard: a prisoner would**

**be a member of this class if he has been diagnosed as needing mental-health treatment or if he is very obviously mentally ill.[55] Of course, because this is not a Rule 23(b)(2) damages class action, and class members will not be entitled to individual notice or**

**recognizes that the ascertainability requirement applies "less stringently" in Rule 23(b)(2) cases. 2015 WL 5634446, at *10. These cases declined to certify or expressed concern about certifying what are known as "fail-safe" classes--classes that are defined in terms of the eventual merits adjudication. See Schilling, 2011 WL 293579, at *5 ("A class definition is ... too general where it requires the Court to determine whether an individual's constitutional rights have been violated in order to ascertain membership in the class itself."). In this case, a fail-safe class would be one defined to consist of all prisoners who**

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**The motion for class certification filed by the remaining named plaintiffs is granted in part and denied in part. The court will certify a class of all persons with a serious mental-health disorder or illness who are now, or will in the future be, subject to defendants' mental-health care policies and practices in ADOC facilities, excluding the work release centers and Tutwiler Prison for Women. The court will also certify a class of all persons with a serious mental-health disorder or illness who are now, or will in the future be, subject to defendants' formal involuntary-medication policies and practices.**

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**creating a fail-safe class). The Fifth Circuit has both "rejected a rule against fail-safe classes," In re Rodriguez**

**The court will decline to certify a class for the individual plaintiffs' due-process challenge regarding involuntary medication without a recent finding of dangerousness, or for their due-process challenge regarding coerced consent. However, the individual plaintiffs with these claims will proceed to trial, and ADAP, through its associational standing, may represent the interests of unnamed prisoners who are subject to these policies and practices.**

**An appropriate order will be entered.**

**DONE, this the 25th day of November, 2016.**

**/s/ Myron H. Thompson**
**UNITED STATES DISTRICT JUDGE**