

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

WILLIAM THORPE, *et al.*,

Plaintiffs,

v.

VIRGINIA DEPARTMENT OF
CORRECTIONS, *et al.*,

Defendants.

Civil Case No. 2:20-cv-00007-JPJ-PMS

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO RECONSIDER THE
COURT'S AUGUST 8, 2023 ORDER**

I. INTRODUCTION

Plaintiffs’ Motion to Reconsider establishes that reconsideration of the Court’s August 8 Order is appropriate (i) to account for facts that were unavailable at the time of the parties’ class certification briefing, (ii) to correct for clear errors of law, and (iii) to prevent manifest injustice. Nothing in Defendants’ opposition calls Plaintiffs’ arguments into question.

First, while Defendants argue that Mr. Mukuria should not be allowed to serve as the representative of the Constitutional Violation Injunction Class, their attempts to distinguish binding Fourth Circuit precedent fall flat. As the Fourth Circuit explained in *Jonathan R.*, “[w]here a named plaintiff’s individual claim becomes moot before the district court has an opportunity to certify the class, the certification may ‘relate back’ to the filing of the complaint if *other* class members ‘will continue to be subject to the challenged conduct and the claims raised are . . . inherently transitory.’” *Jonathan R. by Dixon v. Justice*, 41 F.4th 316, 325 (4th Cir. 2022). As Plaintiffs explained in their opening brief, *Jonathan R.* is on all fours with the case at bar. Just as in *Jonathan R.*, Defendants exercise complete authority over whether Plaintiffs remain in the Step-Down Program. And just as in *Jonathan R.*, Defendants have exercised that authority to remove Plaintiffs from the Step-Down Program and moot their claims for injunctive relief. As the Fourth Circuit explains, such conduct does not prevent a plaintiff, like Mr. Mukuria, from serving as the class representative. And indeed, Defendants have now moved all of the Named Plaintiffs out of the Step-Down Program, such that none currently meet the Court’s revised requirements for class representative—a fact that was not the case at the time Plaintiffs’ Motion for Class Certification was filed. Thus, any other holding would create “a significant possibility that any single named plaintiff [will] be dismissed prior to [class] certification.” *Id.* at 326 (quoting *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010)).

Second, Defendants’ arguments about the purported untimeliness of Plaintiffs’ proposed class definitions are unavailing. Plaintiffs filed their Motion to Reconsider within 14 days of the Court’s Order amending the definitions of the Disabilities Classes, and thus their filing is indisputably timely. Indeed, it is unclear how Plaintiffs could have raised their objections to the Court’s revised definitions any earlier. As Defendants are well aware, the Court adopted the class definitions that Plaintiffs proposed in connection with their class certification motion, but then revised those definitions *sua sponte* in response to the parties’ submissions on class notice. Because Defendants did not file a motion to reconsider the Court’s class certification order, seek an interlocutory appeal of that order, or file a motion to decertify the class, Plaintiffs had no occasion to propose alternative Disabilities Class definitions before their Motion to Reconsider. In all events, even if Plaintiffs’ proposal were untimely—which it is not—Defendants have suffered no prejudice from Plaintiffs’ filing.

For all of these reasons, Plaintiffs’ Motion to Reconsider should be granted.

II. ARGUMENT

A. Mr. Mukuria Should Be Allowed to Serve as a Class Representative for the Constitutional Violation Injunction Class.

As Plaintiffs explained in their opening brief, the Fourth Circuit’s decision in *Jonathan R.* makes clear that Mr. Mukuria is an appropriate representative for the Constitutional Violation Class. ECF No. 359.1 at 3–6. Because the August 8 Order conflicts with *Jonathan R.*, the August 8 Order rests on a clear error of law that should be corrected. Defendants arguments to the contrary are unavailing.

First, Defendants contend that *Jonathan R.* concerns “whether a plaintiff in a putative class action whose claims have become moot can state a claim,” not “whether he or she can serve as an adequate class representative.” ECF No. 365 at 6. Defendants misunderstand the Fourth Circuit’s

decision. In *Jonathan R.*, the Fourth Circuit expressly addressed whether a plaintiff whose claims had become moot since the filing of his lawsuit could serve as a class representative. *See Jonathan R.*, 41 F.4th at 325 (“But since the district court’s ruling, two more named Plaintiffs have aged out of foster care. And without them, no Plaintiff can represent either the [two subclasses].”). *Jonathan R.* thus deals with the precise issue at hand.

Second, Defendants argue that if the Court affirms its decision that Mr. Mukuria is not an appropriate class representative, Plaintiffs should be prohibited from identifying new class representatives. Defendants’ argument is incorrect. As an initial matter, Mr. Mukuria *should* be permitted to serve as the class representative, and thus the Court need not address Defendants’ alternative argument. *See supra* at 3–4; *see also* ECF No. 359.1 at 3–6. If the Court declines to approve Mr. Mukuria as the representative, however, Plaintiffs should be allowed to amend their complaint to identify a new representative who meets the definition of the Constitutional Violation Injunction Class. Indeed, in *Jonathan R.*, the Fourth Circuit acknowledged that where no named plaintiff meets the class definition, it is appropriate to grant plaintiffs leave to amend their complaint and identify new class representatives. 41 F.4th at 325. In keeping with this principle, courts consistently allow plaintiffs to amend their complaints and identify new representatives if no plaintiff currently meets the class definition. *See, e.g., Chisolm v. TranSouth Fin. Grp.*, 194 F.R.D. 538, 559 (E.D. Va. 2000); *Booth v. Prince George’s Cnty.*, 66 F.R.D. 466, 473 (D. Md. 1975); *see also Cox v. Babcock & Wilcox*, 471 F.2d 13, 16 (4th Cir. 1972).

Finally, Defendants point to other named Plaintiffs, including Steven Riddick, as potential class representatives. ECF No. 365 at 7. But all of the named Plaintiffs—including Mr. Riddick—are in the same boat as Mr. Mukuria: each has been transferred out of the Step-

Down Program by Defendants. ECF No. 359.1 at 3–4. Named Plaintiffs whom Defendants transferred to other states under the Interstate Corrections Compact may be returned to the physical custody of VDOC through a unilateral request by VDOC at any time. *See* Va. Code Ann. § 53.1-216. There is little functional difference between a prisoner housed in a VDOC facility outside of the Step-Down Program, and a prisoner housed in another state’s facility under the Interstate Corrections Compact. Defendants have no credible basis for arguing that Mr. Riddick can serve as the class representative, but Mr. Mukuria cannot. Instead, Defendants insistence that Mr. Riddick serve as the class representative is nothing more than a transparent ploy to deny Plaintiffs—and the class—their choice of class representative. This type of gamesmanship should not be countenanced.

B. Plaintiffs’ Revised Class Definitions Are Timely and Appropriate.

Defendants further contend that the Court should reject Plaintiffs amended definitions of the Disabilities Classes as “belated” and out of time. ECF No. 365 at 7–8. Defendants’ position is meritless. As explained above, Plaintiffs filed their Motion to Reconsider within 14 days of the Court’s August 8 Order, which makes their motion indisputably timely. To the extent Defendants argue that Plaintiffs should have submitted amended definitions for the Disabilities Classes *before* the Court’s August 8 Order, their position is preposterous. The Court adopted Plaintiffs’ proposed definitions in its class certification order; Defendants did not object to or appeal that order; and thus Plaintiffs had no reason to propose *alternative* definitions prior to the

Court's August 8 Order.¹ Once the Court amended the class definitions *sua sponte*, Plaintiffs promptly filed this motion.

Plaintiffs' proposed definitions of the Disabilities Classes are necessary to prevent a manifest injustice. Plaintiffs' proposed definitions reflect Plaintiffs' attempt to address the concerns raised by this Court's August 8 Order, while avoiding the manifest injustice of excluding numerous inmates with serious mental health disabilities from the Disabilities Damages Class, and creating a Disabilities Injunction Class in which no prisoner in VDOC custody could ever possibly meet the criteria (which does not appear to have been the Court's intent). Plaintiffs' proposed definitions acknowledge the Court's desire to use objective and easily ascertainable criteria to identify members of the Disabilities Classes. At the same time, Plaintiffs' proposed definitions recognize that the MH-2S classification is not the only objective and categorical criterion by which individuals with serious mental health disabilities can be identified. Instead, other objective criteria that do not require individualized, fact-intensive determinations of disability—such as an inmate's receipt of an MH-2 classification or his placement in Marion Correctional Treatment Center for mental health treatment—can *also* be used to identify members of the Disabilities Classes in ways that avoid “mini-trials” and other fact-intensive disputes over class membership.

Defendants' attempt to characterize the mental health code of MH-2 as a “mild impairment” ignores the substantial, undisputed, and consistent evidence that Defendants'

¹ Defendants characterize Plaintiffs' proposed revised class definitions as “expansive.” But the proposed definitions are significantly narrower than the original definitions of the Disabilities Classes certified by the Court, and are almost certainly under-inclusive of the total universe of class members with mental health disabilities. However, paying heed to the Court's concerns about ascertainability, Plaintiffs believe that the proposed class definitions both allow the class to be ascertained without fact-intensive determinations, and capture the majority of class members with mental health disabilities.

practice is to only assign mental health codes of MH-2 to prisoners with impairments serious enough to meet the criteria for diagnosis and to require medication to treat their symptoms. Plaintiffs' alternative definitions should be adopted for the reasons stated in Plaintiffs' opening brief. *See* ECF No. 359.1 at 6–12.

C. Identification of New Class Representatives Need Not Disrupt the Trial Schedule

Defendants make several claims in their response that naming Class Representatives other than the Named Plaintiffs would require extensive discovery and a revision of the current briefing and trial schedule. But Defendants do not explain why, and their claims are exaggerated. First, any new Class Representative would be a prisoner in the custody of VDOC; thus, Defendants already have access to virtually all relevant documents and records relating to them. Second, Plaintiffs disclosed numerous individuals as possessing relevant information in its Rule 26(a) disclosures, many of whom would qualify as class members under the Court's revised Constitutional Injunction Class definition and Plaintiffs' proposed Disability Classes definitions. Plaintiffs' expert Dr. Craig Haney identified and interviewed other prisoners currently in the Step-Down Program who qualify as class members under those definitions. Those interviews are reported in-depth in his May 26, 2023 report. Defendants have not attempted to depose or otherwise seek discovery regarding any of these individuals. Nonetheless, Plaintiffs would not object to Defendants taking the deposition of any approved Class Representative out of time, should that be necessary. There is no realistic basis to conclude that naming new class representatives would materially prejudice the Defendants or require revision of the current scheduling order.

III. CONCLUSION

For these and other reasons, Plaintiffs' Motion to Reconsider should be granted.

Plaintiffs request a hearing on the Motion for further argument.

Dated: September 12, 2023

Respectfully submitted,

/s/ Megan A. Crowley
Megan A. Crowley (*pro hac vice*)
Jared Frisch (*pro hac vice*)
Paul Wilson (*pro hac vice*)
Covington & Burling LLP
850 Tenth Street, NW
Washington, DC 20001-4956
Telephone: (202) 662-6000
mcrowley@cov.com
jfrisch@cov.com
pwilson@cov.com

William O'Neil (*pro hac vice*)
Matthew Phelps (*pro hac vice*)
Covington & Burling LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018-1405
Telephone: (212) 841-1000
woneil@cov.com
mphelps@cov.com

Vishal Agraharkar (VSB #93265)
Eden B. Heilman (VSB #93554)
Geri Greenspan (VSB #76786)
Matthew Callahan (*pro hac vice*)
ACLU of Virginia
701 E. Franklin Street, Ste. 1412
Richmond, VA 23219
Telephone: (804) 644-8022
vagraharkar@acluva.com
eheilman@acluva.com
ggreenspan@acluva.com
mcallahan@acluva.com

Kathryn Ali (VSB #97966)

Ali & Lockwood LLP
300 New Jersey Avenue, NW, Ste. 900
Washington, DC 20001
Telephone: (202) 651-2475
katie.ali@alilockwood.com

Maxwell J. Kalmann (*pro hac vice*
admission forthcoming)
1818 Library Street, 10th Floor
Reston, VA 20190
(650) 586-1043
maxkalmann@meta.com

Counsel for Plaintiffs

Certificate of Service

I hereby certify that on the 12th day of September, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all CM/ECF participants.

/s/ Megan A. Crowley

Megan A. Crowley (*pro hac vice*)

Jared Frisch (*pro hac vice*)

Paul Wilson (*pro hac vice*)

Covington & Burling LLP

850 Tenth Street, NW

Washington, DC 20001-4956

Telephone: (202) 662-6000

mcrowley@cov.com

jfrisch@cov.com

pwilson@cov.com

William O'Neil (*pro hac vice*)

Matthew Phelps (*pro hac vice*)

Covington & Burling LLP

The New York Times Building

620 Eighth Avenue

New York, NY 10018-1405

Telephone: (212) 841-1000

woneil@cov.com

mphelps@cov.com