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' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO RECONSIDER THE COURT'S AUGUST 8, 2023 ORDER

I. INTRODUCTION

Plaintiffs respectfully seek reconsideration of the Court's order denying Mr. Mukuria's application to serve as the class representative for the Constitutional Violation Injunction Class and amending the definitions of the Disabilities Classes to include only those Step-Down Program participants who have been assigned a mental health code of MH-2S or higher. ECF 358 (the "Revised Order"). Reconsideration is necessary to account for facts that were unavailable at the time of the Court's decision and to prevent manifest injustice.

First, the Court wrongly concluded that Mr. Mukuria is not an appropriate class representative because, even though the Step-Down Program is temporary in nature, constitutional deprivations related to the Step-Down Program are not "capable of repetition, yet evading review." *See id.* at 10–11 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)). In support of this conclusion, the Court pointed to the "fact" that another Plaintiff, Steven Riddick, is "housed in solitary confinement and unable to progress through the Step-Down Program," implying that Mr. Riddick should serve as the class representative instead of Mr. Mukuria. *Id.* Respectfully, the premise underlying the Court's determination is incorrect. After Plaintiffs filed their class certification motion, Defendant Virginia Department of Corrections ("VDOC") transferred Mr. Riddick out of the Step-Down Program, meaning that *none* of the named Plaintiffs currently participate in that program. This new development underscores the extent to which the constitutional violations at issue are "capable of repetition, yet evading review," and thus why Mr. Mukuria is qualified to serve as the class representative. In addition, the fact that no named Plaintiffs are currently housed in the Step-Down Program implicates a *different* exception to the mootness doctrine—the "relation back" exception—which provides an independent basis for Mr. Mukuria's appointment as class representative. *See Jonathan R. by Dixon v. Justice*, 41 F.4th 316, 325–26 (4th Cir. 2022).

Second, Plaintiffs seek reconsideration of the Court's amendments to the definitions of the Disabilities Classes, which now include only those former, current, and future participants in the Step-Down Program who have been assigned a mental health classification code of MH-2S or higher at the time of their Level S or Level 6 security level classification. ECF No. 358, at 8. As the Court recognized in its original certification order—and again in its Revised Order—the criteria used to classify inmates as MH-2S or higher are not coextensive with—and, indeed, are narrower than—the definition of "person with a disability" under the Americans with Disabilities Act ("ADA") or the Rehabilitation Act ("RA"). 42 U.S.C. § 12102(1); 29 U.S.C. § 705(20)(B). By excluding from the Disabilities Classes easily ascertainable individuals with demonstrated mental health disabilities, the Court denies such individuals the possibility of participating in *this* lawsuit, which will result in manifest injustice. Plaintiffs understand and are sensitive to the Court's concerns about the ascertainability of class members. But there are other objective criteria—beyond an MH-2S classification—that will facilitate the identification of individuals with mental health disabilities. These categories of inmates can be readily identified from already-produced documents, and thus do not present the same type of administrability concerns that animated the Court's Revised Order.

For these reasons, Plaintiffs respectfully request that the Court reconsider its Revised Order to allow Mr. Mukuria to serve as the representative for the Constitutional Violation Injunction Class and to amend the revised definitions of the Disabilities Classes.

II. ARGUMENT

Plaintiffs' Motion to Reconsider is governed by Federal Rule of Civil Procedure 54(b), which states that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment

adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). Rule 54(b) motions are "not subject to the strict standards applicable to motions for reconsiderations of a final judgment." *Am. Canoe Ass'n et al. v. Murphy Farms, Inc.*, 326 F.3d 505, 514 (4th Cir. 2003). Instead, district courts may grant motions to reconsider "(1) to accommodate an intervening change in the controlling law; (2) to account for new evidence not [previously] available . . . ; or (3) to correct a clear error of law or prevent manifest injustice." *Regan et al. v. City of Charleston, S.C.*, 40 F. Supp. 3d 698, 701–02 (D.S.C. 2014) (quoting *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998)). Here, Plaintiffs seek reconsideration under prongs (2) and (3).

A. The Court Should Allow Mr. Mukuria to Serve as the Representative of the Constitutional Violation Injunction Class.

Plaintiffs ask the Court to reconsider its determination that Mr. Mukuria is not an appropriate representative for the Constitutional Violation Injunction Class because he is no longer participating in the Step-Down Program. ECF 358, at 11–12. As the Court correctly recognized, there are "exception[s]" to the general rule that a "litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court." *Id.* at 10 (quoting *Sosna v. Iowa*, 419 U.S. 393, 403 (1975)). These exceptions include instances where constitutional violations are "capable of repetition, yet evading review," such as when a plaintiff does not suffer a constitutional violation long enough to litigate a case through to the class certification stage. *Gerstein*, 420 U.S. at 110 n.11.

Notwithstanding these exceptions, the Court held that Mr. Mukuria could not serve as the representative of the Constitutional Violation Injunction Class because *another* Plaintiff—Mr. Riddick—is in the Step-Down Program, and thus is better suited to serve as the representative for that class. ECF No. 358, at 10. This is incorrect. VDOC transferred Mr. Riddick out of the

program on March 17, 2023, after the completion of the class certification briefing. *See* Crowley Decl. at ¶ 8. Given Mr. Riddick's transfer, the factual assumption underlying the Court's denial of Mr. Mukuria's application to serve as class representative—*i.e.*, that other Plaintiffs remain in the Step-Down Program and are better situated to represent the interests of the Constitutional Violation Injunction Class—is inaccurate.

The Court's decision should also be revisited because it overlooked a separate exception to the general rule that a litigant must be a member of the class that he or she seeks to represent: the "relation back" exception. *See Jonathan R.*, 41 F.4th at 325. As the Fourth Circuit has explained, "[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.'" *Id*.

Analyzing whether claims are "inherently transitory" is distinct from the "capable of repetition yet evading review" analysis. *See Olson v. Brown*, 594 F.3d 577, 583 (7th Cir. 2010).[1] In determining whether claims are "inherently transitory," "what matters most" is the "uncertainty about whether a claim will remain alive" over the course of litigation. *Jonathan R.*, 41 F.4th at 325–26. Because inmates are often transferred or released from incarceration while their cases are pending, the exception is commonly applied in inmate class actions, as "[i]t is by no means certain that any given individual, named as plaintiff, [will] be in custody long enough for a district judge to certify the class." *Id.* Indeed, the Fourth Circuit has explained that "the exception [is] particularly fitting when *defendants* create 'a significant possibility that any single

[1] Although *Olson* is a Seventh Circuit opinion, the Fourth Circuit relied extensively on *Olson* in its *Jonathan R.* decision and incorporated *Olson*'s analysis throughout the opinion. *Jonathan R.,* 41 F.4th at 325–26.

named plaintiff [will] be dismissed prior to certification,'" such as when defendants control whether a putative class representative remains at a particular facility. *Id*. at 326 (emphasis in original).

That is exactly the situation here. As in *Jonathan R.*, the length that any given inmate is confined to the Step-Down Program is unpredictable. *See Jonathan R.*, 41 F.4th at 326. Certain inmates have remained in the Step-Down Program for years, while others have languished for decades. ECF Nos. 174.20–174.28, 174.60. More importantly, the length of time during which any individual inmate remains in the Step-Down Program is within VDOC's sole control. In fact, since Plaintiffs filed this lawsuit, VDOC has transferred nine of the 11 named Plaintiffs out of the Step-Down Program (including three to other states), rendering their claims for injunctive relief moot.[2] ECF Nos. 174.20–174.22, 174.24–174.25, 174.27–174.28, 174.60. As other courts have explained, these types of transfers "illustrate[]" the type of "unpredictab[ility]" that can "unexpectedly moot an inmate's claim," which is "precisely what makes the 'inherently transitory' exception applicable" in inmate class actions. *Olson*, 594 F.3d at 583.

The relation back exception should be applied in this case. Mr. Mukuria diligently served as a putative class representative before VDOC transferred him out of the Step-Down Program in 2020. ECF No. 174.24. Although he has been released from Step-Down Program, other inmates "continue to be subject to the . . . conduct" that Mr. Mukuria challenges, making the continued prosecution of this action important. Because Defendants offer no credible reason why Plaintiffs

[2] Two Plaintiffs were transferred out of the Step-Down Program before Plaintiffs filed this lawsuit. ECF No. 1, ¶¶ 26, 35.

should be forced to search for a *new* class representative to prosecute their claims, the Revised Order should be amended.[3]

B. The Court Should Amend the Revised Definitions of the Disabilities Classes to Prevent Manifest Injustice.

Plaintiffs also request that the Court reconsider its amendment to the definitions of the Disabilities Classes because the revised definitions are ambiguous and overly restrict class membership, resulting in a manifest injustice. ECF No. 358, at 8.

While Plaintiffs appreciate the Court's instruction that "identifiable, objective criteria" should be used to define the Disabilities Classes, *see id.* at 7, the single criterion the Court has selected for class membership—an inmate's receipt of a "Mental Health Classification Code [of] MH-2S or higher at the time of the Level S or Level 6 security level classification"—excludes numerous individuals with serious mental health disabilities who are currently participating, or have previously participated, in the Step-Down Program.[4] Accordingly, Plaintiffs propose amending the disabled class definitions as follows:

---

[3] If the Court is disinclined to reconsider its decision with respect to Mr. Mukuria's service as a class representative, Plaintiffs respectfully request that the Court grant Plaintiffs leave to amend their complaint so as to identify a new class member to represent the Constitutional Violation Injunction Class. Courts in the Fourth Circuit routinely permit identification of new named plaintiffs if no current named plaintiff meets the class definition. *See, e.g.*, *Chisolm v. TranSouth Financial Group*, 194 FRD 538, 559 (E.D. Va. 2000); *Booth v. Prince George's County*, 66 FRD 466, 473 (D. Md. 1975); *see also Cox v. Babcock & Wilcox*, 471 F.2d 13, 16 (4th Cir. 1972).

[4] The Court's amended class definitions are somewhat ambiguous, in that it is unclear whether the Court means to require a mental health code of MH-2S or higher at the time someone is *initially* classified as Level S or 6, or whether a mental health code of MH-2S or higher *at any time while* someone is classified at Level S or 6 is sufficient. For purposes of this motion, Plaintiffs assume the Court intended the latter interpretation. Requiring a classification of MH-2S or higher at the time of one's initial classification as Level S or 6 would essentially defeat the disability classes entirely, because the mental health code MH-2S is used when a prisoner is assigned to a mental health unit, and a mental health code of MH3 is used when a prisoner is admitted for treatment to Marion Correctional Treatment Center. Once someone is discharged from either setting, their mental health code is reduced to MH2 or lower. Thus, it is highly unlikely that anyone would be assigned to the Step-Down Program while carrying a mental health code of MH-2S or higher.

> Disabilities Injunction Class: All persons who are currently, or will in the future, be confined at Red Onion or Wallens Ridge at the Level S or Level 6 security levels and subject to any phase of the Step-Down Program, and who either: (1) have been classified as Mental Health Classification Code MH-2 while in Level S or Level 6 and subject to any phase of the Step-Down Program; or (2) have been classified as MH-2S or higher or admitted to Marion Correctional Treatment Center for treatment, at any point prior to classification at Level S or Level 6 or while subject to any phase of the Step-Down Program.
>
> Disabilities Damages Class: All persons who, at any time from August 1, 2012, to the present have been confined at Red Onion or Wallens Ridge at the Level S or Level 6 security levels and subject to any phase of the Step-Down Program and who: (1) have been classified as Mental Health Classification Code MH-2 while in Level S or Level 6 and subject to any phase of the Step-Down Program; or (2) have been classified as MH-2S or higher, or admitted to Marion Correctional Treatment Center for treatment, at any point prior to classification at Level S or Level 6 or while subject to any phase of the Step-Down Program.

Plaintiffs' proposed revisions address the concerns that animated the Court's amended order while accounting for the practicalities of how the Step-Down Program is carried out in practice and the definitions of a person with disability under the ADA and RA.

1. Plaintiffs' revised definitions are easily ascertainable.

Plaintiffs' revised definitions will allow potential class members to be easily ascertained. Plaintiffs' expert, Russell Molter, conducted an analysis of data provided by VDOC in discovery. This data indicates the dates during which each class member was participating in each level of the Step-Down Program, as well as dates that each class member was assigned a mental health code greater than MH0. Using this data, Mr. Molter identified fifty individuals transferred to Marion Correctional Treatment Center while classified as Level S, and fourteen people who entered the Step-Down Program after being admitted to Marion Correctional Treatment Center or other mental health unit. Further, Mr. Molter identified 415 class members assigned a mental health code of MH2 or higher at any point, and 84 individuals who were given a mental health

code of MH2S or higher at any time. While Mr. Molter's report did not identify which individuals carried which mental health codes while they were participating in the Step-Down Program, his analysis demonstrates that it would not be difficult to do so. Accordingly, Mr. Molter's analysis makes clear that using Plaintiffs' proposed class definitions, class membership is both numerous and easily ascertainable.

2. Plaintiffs' revised definitions align with the ADA.

The revised definitions of the Disabilities Classes in the Court's Revised Order—which are premised on an individual's receipt of an MH-2S classification at the "at the time of the Level S or Level 6 security level classification"—are far more stringent than the definition of "disability" under the ADA and RA. Under the ADA and RA, an individual is a person with a disability if he or she "(1) has a physical or mental health impairment that substantially limits one or more of the individual's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment." *Davis v. Univ. of N.C.*, 263 F.3d 95, 99 (4th Cir. 2001). This definition must be "construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA." 28 C.F.R. § 108(a)(2)(i). The ADA's implementing regulations state that "[m]ajor depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia each substantially limits brain function." 28 C.F.R. § 35.108(d)(2)(iii)(K). However, people who received these diagnoses do not necessarily receive an MH-2S classification while in VDOC custody. Further, this list of diagnoses is not exhaustive, and other diagnoses may qualify as disabilities depending on the level of impairment they cause. In contrast to the ADA's expansive definition of "disability," VDOC's definition of SMI is drastically narrower.

VDOC's operating procedures explain that a classification of MH-2S or higher requires an inmate to be diagnosed with a "serious mental illness" that is "currently . . . associated with

serious impairment in psychological, cognitive, or behavioral functioning that substantially interferes with the person's ability to meet the ordinary demands of living." *See* Ex. 2, VDOC O.P. 730.2 at 14. The MH-2S designation was created in 2018 to identify people who were then in the Step-Down Program, but whose mental illnesses made solitary confinement an inappropriate housing assignment, and who were to be transferred to the newly created High Security Diversionary Treatment Program. Accordingly, the MH-2S designation is only used when someone is so severely ill that they require treatment in one of VDOC's mental health units.

Deposition testimony clarifies that in policy and practice the process by which people are designated MH-2S systematically under-designates people with qualifying disabilities. On its face, the SMI form utilized to designate people as MH-2S requires a person to have a "severe" rather than a "substantial" impairment. Ex. 6, Trent (June 17, 2022) Tr. at 255:18-21. The Psychology Associates who administer the form receive no training on administering such forms to identify people as having SMI. *See id.* at 257:11-20. When presented with an example of a person who has difficulty sleeping, acknowledged that they would not consider that to be the type of impairment contemplated by VDOC's SMI form, *id.* at 256:13-17, in contravention of the clear requirements of the ADA.[5] ADA regulations clearly indicate that an "impairment that is . . . in remission is a disability if it would substantially limit a major life activity when active," and "the determination of whether an impairment substantially limits a major life activity shall

[5] The ADA defines "major life activities" to include, without limitation, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C.A. § 12102(2)(A). A mental illness need only affect one major life activity to be considered a disability. 42 U.S.C.A. § 12102(4)(C). Thus, a mental illness that substantially limits sleeping alone would qualify as a disability.

be made without regard to the ameliorative effects of mitigating measures such as . . . medication." 42 U.S.C.A. § 12102(4)(D)–(E). By only relying on mental health codes of MH-2S or higher, the disabilities classes will be underinclusive to the point that it would create a manifest injustice.

3. Plaintiffs' revised definitions reflect VDOC's practices.

Plaintiffs' proposed definitions comport with the ADA's definition of disability, as demonstrated by the way in which VDOC uses its mental health coding system in practice. VDOC's policy provides that a mental health diagnosis plus symptoms that are mild to moderate are required for a MH-2 designation. But in practice, individuals are not generally classified as MH-2 unless they are diagnosed with a mental illness by the psychiatrist and are prescribed medication to treat their symptoms. *See, e.g.*, Ex. 1, McDuffie (April 4, 2023) Tr. at 286:21-287:5, 289:3-9. Given VDOC's practice for MH-2 classifications, a person with a mental health code of MH-2 meets the definition of a person with a disability under the ADA. Specifically, the individual has a mental health impairment (i.e., they have received a mental illness diagnosis) that limits one or more major life activities (which may include thinking, sleeping, or the ability to interact with other people) to the point that medication is required to improve functioning.

Plaintiffs' proposal to use the MH-2S code classification or higher at any time reflects the ADA's determination that the diagnoses required for VDOC to assign a MH-2S code are permanent and constitute disabilities. *See* 28 C.F.R. § 35.108(d)(2)(iii)(K). VDOC's mental health codes reflect the level of mental health treatment *currently* provided to or required by a patient and this is reflected in the policies themselves. *See, e.g.*, Ex. 2, VDOC O.P. 730.2 at 14. A patient classified as MH-2S prior to their assignment to the IStep-Down Program may later be downgraded to a MH-2 classification and then be assigned to the program. For example, an examination of changes in inmates' mental health codes over a period of time, through the data

produced by VDOC, establishes that inmates who at one time are classified with MH-2S or MH-3 codes can be downgraded to MH-2 or MH-1. People classified as MH-2S or at *any time* prior to or during their participation in the Step-Down Program should be considered disabled because their diagnoses of serious mental illness are permanent and constitute disabilities.

Indeed, as the Court recognized in both its initial certification order and Revised Order, while the statutory definition of "disability" undoubtedly includes "those inmates classified as MH-2S and higher," it also "likely encompasses individuals who are classified by VDOC at even lower mental health classification codes," including the proposed representatives for the Disabilities Classes—none of whom has received a mental health classification code of MH-2S or higher. ECF No. 299, at 16; *see also id.* at 26 (holding that Messrs. Cavitt, Khavkin, Riddick, and Wall "have sufficiently established that they are members of the disabilities classes they purport to represent"). Excluding these Plaintiffs—and other similarly-situated inmates—from the Disabilities Classes denies potential relief to individuals suffering from serious mental health disabilities, resulting in manifest injustice.

The Court's amended definitions present other problems as well. For example, the Court has defined the Disabilities Damages Class to include all individuals "who at any time from August 1, 2012, to the present . . . have been . . . subject to any phase of the Step-Down Program and . . . classified at Mental Health Classification Code MH-2S or higher." ECF No. 358, at 8. The MH-2S classification, however, became effective on January 1, 2019, meaning that numerous individuals with mental health disabilities who participated in the Step-Down Program *before* 2018 are excluded from the Disabilities Classes by virtue of VDOC's delayed introduction of the classification. *Compare* Ex. 3, VDOC 2019 O.P. 730.2 (VADOC-00002925) at 10 *with* Ex. 4, VDOC 2015 O.P. 730.2 (VADOC-00002913). Moreover, beginning in 2018,

VDOC began moving inmates classified as MH-2S out of the Step-Down Program and into a secured diversionary treatment program at another facility. Ex. 5, VADOC-00067972 at 11; Ex. 3, VDOC 2019 O.P 730.2 (VADOC-00002925) at 10. Accordingly, numerous inmates classified as MH-2S order higher will be excluded under the definition of the Disabilities Injunction Class, which is defined as "[a]ll persons who are *currently*, or will in the future be confined at Red Onion or Wallens Ridge at the Level S or Level 6 security levels and subject to any phase of the Step-Down Program and who *are* or will in the future be classified at Mental Health Classification Code MH-2S or higher . . . ." ECF No. 358, at 8 (emphasis added).

Because the Court's revised definitions exclude individuals with demonstrated mental health disabilities from the Disabilities Classes—and create complications due to recent changes in VDOC's housing policy—Plaintiffs respectfully request that the Court further revise the definitions of the Disabilities Classes, as set forth above.

III. CONCLUSION

For the reasons above, the Court should reconsider its Revised Order and (i) permit Mr. Mukuria to serve as the representative for the Constitutional Violation Injunction Class, and (ii) revise the definitions of the Disabilities Classes in the manner described above.

Dated: August 22, 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

Class Counsel

Certificate of Service

I hereby certify that on the 22nd day of August, 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