UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MICHAEL LINDSEY GAMBUZZA, etc., et al.,

Plaintiff,

v.

JAMES HIGGINBOTHAM, etc., et al.,

Defendants.
_____/

CASE NO. 8:09-cv-1891-T-17TBM

DEFENDANTS' MEMORANDUM OF LAW REGARDING MOOTNESS

The issue of mootness in the present case really turns on whether the Plaintiffs have standing to bring the claims as stated in their Amended Complaint. "A plaintiff will generally have standing where three criteria are met: (1) the plaintiff has experienced an injury in fact; (2) the injury is fairly traceable to the defendant's conduct; and (3) the plaintiff's harm is likely to be redressed should the court order relief." See Doe v. Kearney, 329 F.3d 1286, 1292 (11th Cir. 2003)(citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). In the present case, the Court has already held that the Plaintiffs' Amended Complaint "lack[ed] an arguable basis in law because the Courts have found that the post-card only mail policy is 'reasonably related to legitimate penological interests.'" [D.E. #37]. The Plaintiffs have not suffered an "injury in fact" in the present case. Further, even in the event they have suffered an injury "fairly traceable to the defendant's conduct", their subsequent release from the Manatee County Jail means that the Court is unable to prevent future harm.

> Plaintiffs must demonstrate a personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions. Abstract injury is not enough. The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or *threat of injury must be both real and immediate, not conjectural or hypothetical*.
>
> See City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983)(internal quotations and citations omitted)(*emphasis added*).

"As general rule, transfer or release of inmate from prison will moot inmate's claims for injunctive and declaratory relief, as injunctive relief is a prospective remedy that is meant to prevent future injuries, but will not moot claim for monetary damages, since claim for monetary damages looks back in time and is intended to redress past injury." See Smith v. Allen, 502 F.3d 1255, 1267 (11th Cir. 2007). Further, "[i]f the class has not yet been certified, it also justifies dismissal of the entire action." See McKinnon v. Talladega County , Ala., 745 F.2d 1360, 1363 (D.C. Ala. 1984). As the plaintiffs have been released from custody and the class has not been certified, all of the Plaintiffs' claims are subject to dismissal.

In Sosna v. Iowa, 419 U.S. 393 (1975), the Supreme Court recognized an exception to this general rule when a plaintiff's claims are "capable of repetition, yet evading review." However, that holding is limited to cases where an individual's claims become moot after a class has been duly certified. This is because the members of the class, who the named plaintiff is representing, may still have a controversy with the defendant.

> Our conclusion that this case is not moot in no way detracts from the firmly established requirement that the judicial power of Art. III courts extends only

> to cases and controversies specified in that Article. There must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23, but there must be a live controversy at the time this Court reviews the case. The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.
>
> See Sosna v. Iowa, 419 U.S. 393, 402 (1975)(quotations and citations omitted).

"Sosna decided that in the absence of a class action, the 'capable of repetition, yet evading review' doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." See Weinstein v. Bradford, 423 U.S. 147, 149 (1975). The present doesn't satisfy either of these requirements.

In addition to Sosna, the Supreme Court applied the "capable of repetition, yet evading review" doctrine in Gerstein v. Pugh, 420 U.S. 103 (1975). In Gerstein v. Pugh, the Supreme Court applied the holding in Sosna to a class action brought by pretrial detainees claiming a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief. Although the class representatives had been convicted, and were no longer pretrial detainees[1], the Supreme Court held that the Plaintiffs' claims were not moot because they belonged to "that narrow class of cases in which the

[1]Although the District Court certified the class, it was not clear from the record whether the named plaintiffs' claims were moot at the time the class was certified. See Gerstein at 111, n. 11.

mootness of a class representative's[2] claims do not moot the claims of the unnamed members of the class." See Gerstein at 111, n. 11. However, Gerstein is distinguishable from the case at bar.

In Gerstein, the named Plaintiffs represented pretrial detainees whose "detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted." Id at 111. "The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under allegedly unconstitutional procedures. The claim, in short, is one that is distinctly capable of repetition, yet evading review."[3] Id. In its reasoning, the Court stated "[i]t is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class." Id. Although the Plaintiffs were pretrial detainees ultimately released, the alleged unconstitutional policy also applies to convicted inmates who are serving sentences after conviction in the Manatee County Jail. Further, at the time the Amended Complaint was filed, Michael Gambuzza, one of the named Plaintiffs in this case, was incarcerated at the

[2]Although the Plaintiffs' Amended Complaint brings the claims "on behalf of themselves and all others similarly situated", this case was never certified as a class action and the Plaintiffs were never designated as representatives of that class.

[3]The defendants maintain that the Plaintiffs' claims have been reviewed by the Court and dismissed as lacking an arguable basis in law. [D.E. #37].

Manatee County Jail for one year and two hundred eighty-nine (289) days.[4] A convicted individual serving a sentence in Manatee County Jail, or a pretrial detainee similarly situation to Mr. Gambuzza, would have ample time to file a complaint and have a Motion for Class Certification considered by the Court. Based on this distinguishing factor, the present case does not fall into that narrow class of cases that is capable of repetition, yet evading review.

In the event a named plaintiff's Motion for Class Certification was denied, and his/her release from custody subsequently mooted his/her personal claim, he/she would still be able to appeal the denial of class certification. See United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402 (1980)(citing Deposit Guaranty National Bank, Jackson, Mississippi v. Roper, 445 U.S. 326, 336-337 (1980)). While a named plaintiff, whose claims become moot, may appeal the denial of class certification, that is not the circumstance we are considering in this case. The instant matter does not fall into the class of cases in which a named plaintiff was permitted to pursue the appeal of the denial of class certification after he/she no longer had a personal stake in the case. The named Plaintiffs never filed a Motion for Class Certification and there is no appealable order related to the certification of the class.

The Court correctly cited to case law for the proposition that the fact the Plaintiffs may eventually find themselves inmates at the Manatee County Jail again does not provide them with standing to pursue their claims. See Spencer v. Kemna, 523 U.S. 1, 15 (1998); McKinnon v. Talladega County, Ala., 745 F.2d 1360, 1363 (D.C. Ala. 1984); Romano v.

[4]When Michael Gambuzza was finally released from the Manatee County Jail, he had been incarcerated at the Manatee County Jail for two years six months and one week.

Rambosk, 2010WL2732005 (M.D. Fla. 2010). Although the threat of future harm may provide a plaintiff with standing to pursue his claims for injunctive or declaratory relief, the threat must be "sufficiently real and immediate to show an existing controversy." See City of Los Angeles v. Lyons, supra at 103. In Lyons, the plaintiff received a preliminary injunction enjoining "the use of both the carotid-artery and bar arm holds under circumstances which do not threaten death or serious bodily injury." Id at 99-100. In finding that the plaintiff's claims were moot, the Supreme Court stated:

> In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such [a] manner.
>
> See Lyons at 105-106.

As stated above, the Plaintiffs release from the Manatee County Jail rendered their claims for injunctive and declaratory relief moot because they no longer had a personal stake in the matter. While the phrase "the City ordered or authorized police officer to act in such [a] manner" appears to stand for the proposition that the "Post-Card Only Policy" provides the plaintiffs with standing based on the sufficiently real and immediate threat showing an existing controversy, an examination of the cases applying this language demonstrate that it does not apply to the present case. See Honig v. Doe, 484 U.S. 305 (1988)(concluding it was certainly reasonable that an emotionally disturbed child would return to the classroom and "again engage in classroom misconduct" and that the school would attempt to remove

the student again); Lynch v. Baxley, 744 F.2d 1452 (11th Cir. 1984)(holding that a mentally ill plaintiff had standing to seek an injunction against Alabama's practice of detaining individuals in county jails pending civil commitments); Church v. City of Huntsville, 30 F.3d 1332 (11th Cir. 1994)(stating that "[b]ecause of the allegedly involuntary nature of their condition, the plaintiffs cannot avoid future exposure to the challenged course of conduct in which the City engages"); 31 Foster Children v. Bush, 329 F.3d 1255 (11th Cir. 2003)(holding that foster children had standing because they were involuntarily in the custody of the defendants and would be until at least their eighteenth birthdays). The common thread in all these cases is that the plaintiffs' exposure to the alleged unconsitutional policies of the government entity was involuntary. In distinguishing Church v. City of Huntsville, infra, from Lyons, the Eleventh Circuit Court of Appeals stated:

> The situation in this case differs materially from that in Lyons, because the plaintiffs here are far more likely to have future encounters with the police than was Lyons. It is true that the federal courts are "generally ... unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." Honig v. Doe, 484 U.S. 305, 320, 108 S.Ct. 592, 602, 98 L.Ed.2d 686 (1988) (collecting cases). Thus, in Lyons, the Supreme Court refused to assume that the plaintiff would again violate the traffic laws, prompting the police to stop him. However, the Supreme Court has held that such reluctance is not warranted when, for reasons beyond the plaintiff's control, he or she is unable to avoid repeating the conduct that led to the original injury at the hands of the defendant. Id., 108 S.Ct. at 602.

See Church v. City of Huntsville, 30 F.3d 1332, 1337-38 (11th Cir. 1994).

In order for threat to the plaintiffs to be "sufficiently real and immediate to show an existing controversy", the Court would have to assume that the Plaintiffs would again break the law

(in Manatee County), be arrested, and spend time in the Manatee County Jail, an assumption both the Supreme Court and the Eleventh Circuit have been reluctant to make. Therefore, the plaintiffs fail to satisfy the second prong of the "capable of repetition, yet evading review" doctrine.

CONCLUSION

As the Plaintiff's claims do not challenge an action that in duration is too short to be fully litigated prior to its cessation or expiration, and there is no reasonable expectation that the the Plaintiffs will be subjected to the same action again, the Plaintiffs' claims for injunctive and declaratory relief are moot.

CERIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed a copy of the foregoing with the Clerk of the Court by using the CM/ECF system, which will forward a true and correct copy of the foregoing to: Joshua A. Glickman, Esquire, and Shawn A. Heller, Esquire, Florida Justice Institute, Inc., 3750 Miami Tower, 100 SE Second Street, Miami, Fl 33131-2309, this ***30th*** day of March, 2011.

PURDY, JOLLY, GIUFFREDA & BARRANCO, P.A.
Attorneys for Defendant
2455 East Sunrise Boulevard, Suite 1216
Fort Lauderdale, Florida 33304
Telephone (954) 462-3200
Telecopier (954) 462-3861
E-Mail: jason@purdylaw.com

By: ***s/ Jason L. Scarberry***
JASON L. SCARBERRY
Florida Bar No.: 0693375