

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION**

**LOUIS HENDERSON, DANA  
HARLEY, DARRELL ROBINSON,  
DWIGHT SMITH, ALBERT KNOX,  
JAMES DOUGLAS, ALQADEER  
HAMLET, JEFFERY BEYER, and  
BONITA GRAHAM, on behalf of  
themselves and of all those similarly  
situated,**

**Plaintiffs,**

**v.**

**KIM THOMAS, BILLY MITCHEM,  
FRANK ALBRIGHT, BETTINA  
CARTER and EDWARD ELLINGTON,**

**Defendants.**

**Civil Action No.: 2:11-CV-00224**

**THE STATE’S SECOND SUPPLEMENTAL OPPOSITION TO  
PLAINTIFFS’ MOTION FOR CLASS CERTIFICATION**

Defendants KIM THOMAS, BILLY MITCHEM, FRANK ALBRIGHT, BETTINA CARTER and EDWARD ELLINGTON (collectively the “State”) respectfully submit this Second Supplemental Opposition to the Motion for Class Certification (Doc No. 2) filed by Plaintiffs LOUIS HENDERSON, DANA HARLEY, DARRELL ROBINSON, DWIGHT SMITH, ALBERT KNOX, JAMES DOUGLAS, ALQADEER HAMLET, JEFFERY BEYER, and BONITA GRAHAM (“Named Plaintiffs”). In support of this Second Supplemental

Opposition, the State submits the Affidavit of Stephanie Atchison and further states as follows:

### **INTRODUCTION**

The allegations upon which Named Plaintiffs have sought class certification in this lawsuit have been in constant flux since March 28, 2011, when Named Plaintiffs first instituted this action and moved for class certification pursuant to Fed. R. Civ. P. 23. In addition to two amended pleadings substituting various Named Plaintiffs, Named Plaintiff Albert Knox has now been released from the Alabama Department of Correction's custody, which necessarily requires a third amended pleading. The fact remains that Named Plaintiffs have been entirely unsuccessful in their efforts to find HIV-positive inmates that have suffered the alleged injuries and can adequately represent a class. As set forth in greater detail below, the release of Plaintiff Knox further highlights that the remaining Named Plaintiffs' have not and cannot show that they are entitled to class certification for the following reasons:

- (1) Named Plaintiffs do not have standing to assert the majority of the class claims alleged in the Second Amended Complaint; and
- (2) The release of Plaintiff Albert Knox serves as further proof that Named Plaintiffs cannot meet the numerosity requirement as to any of the class claims they have alleged.

For these reasons, the State respectfully requests that this Court postpone its decision on class certification after limited discovery as to the issue of class

certification and/or Named Plaintiffs' Motion for Class Certification in its entirety.

### **PROCEDURAL HISTORY**

This action was instituted on March 28, 2011, by ten Plaintiffs—three of whom are no longer parties to this action. (See Complaint, Doc. No. 1 at pp. 1-10). On April 11, 2011, former Plaintiffs Roosevelt James and April Stagner voluntarily dismissed their claims based upon their release from prison. (Doc. Nos. 23 and 24). On May 11, 2011, former Plaintiff Ashley Dotson also dismissed her claims based upon her release. (Doc. No. 32). The remaining seven Named Plaintiffs and two additional Plaintiffs—David Smith and James Douglas—filed the First Amended Complaint on May 11, 2011, reflecting these changes. (Doc. No. 31).

Addressing the perfunctory nature of the allegations set forth in the First Amended Complaint, the State filed its Motion to Dismiss and supporting Memorandum of Law on May 25, 2011. (Doc. Nos. 34 and 35). Thereafter, pursuant to an Order dated July 15, 2011 (Doc. No. 44), the State filed a Motion to Stay or, in the Alternative, Opposition to Plaintiffs' Motion for Class Certification on August 1, 2011.<sup>1</sup> (Doc. No. 47). In reply, Named Plaintiffs subsequently filed Plaintiffs' Response to Defendants' Motion to Stay or, in the Alternative, Opposition to Plaintiffs' Motion for Class Certification. (Doc. No. 49). On September 16, 2011, the Court held a hearing on the State's Motion to Dismiss and

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<sup>1</sup> Named Plaintiffs filed their Motion for Class Certification (Doc. No. 2) contemporaneously with the original Complaint on March 28, 2011.

Named Plaintiffs' Motion for Class Certification, along with two Motions to Strike filed by the State (Doc. Nos. 40 and 51). The State's Motion to Dismiss and two Motions to Strike, and Named Plaintiffs' Motion for Class Certification remain pending as of this date.

Following the hearing on September 16, 2011, two Plaintiffs—John Hicks and David Smith—voluntarily dismissed their claims on September 29, 2011, based upon their release from the ADOC prison system (Doc. Nos. 57 and 58). Plaintiff Melinda Washington also voluntarily dismissed her claims on September 29, 2011, without any explanation. (Doc. No. 59). That same day, the remaining Named Plaintiffs requested leave to file a Second Amended Complaint. (Doc. No. 60). The Second Amended Complaint removes the recently dismissed Plaintiffs and includes three new Plaintiffs—Alqadeer Hamlet, Jeffery Beyer, and Bonita Graham. (Doc. No. 61).

On October 3, 2011, this Court entered an Order granting Plaintiffs' Motion for Leave to File Second Amended Complaint and directing the State to file: (1) an objection, if any, to allowing Named Plaintiffs' leave to amend their complaint; (2) a response to the Second Amended Complaint; and (3) a statement as to how the addition of the three (3) new Plaintiffs affects the issue of class certification. (Doc. No. 67-1). Pursuant to this Order, the State filed a Supplemental Opposition to Plaintiffs' Motion for Class Certification (Doc. No. 71) on October 17, 2011,

addressing the continuous shortcomings of Named Plaintiffs' pleadings and inability to establish the prerequisites of numerosity, typicality, commonality, and adequacy of representation as set forth in Fed. R. Civ. P. 23(a).

Also on October 17, 2011, the parties filed a Rule 26(f) Report of Parties' Planning Meeting (Doc. No. 70). Since that date, the parties have engaged in some limited discovery and have litigated their discovery issues before Magistrate Judge Wallace Capel, Jr. (See Doc. Nos. 72-81).

**SUPPLEMENTAL NARRATIVE STATEMENT OF  
UNDISPUTED FACTS REGARDING ALBERT KNOX**

Plaintiff "Albert Knox is a person with HIV" who is "housed in a segregated dormitory at Limestone Correctional Facility." (Second Amended Complaint, at ¶ 22). On January 22, 2010, Plaintiff Knox received two disciplinary reports for being in an unauthorized area while eating his lunch meal with general population inmates. (Id. at ¶ 23). As a result, Plaintiff Knox was dropped from the Substance Abuse Program ("SAP") and spent forty-five (45) days in a disciplinary segregation cell. (Id.). Plaintiff Knox claimed that he experienced disparate disciplinary action while incarcerated at Limestone. (Id.). Additionally, Plaintiff Knox alleged he was prohibited from residing in the SAP dormitory or eating with other program participants. (Id.).

According to the Second Amended Complaint, Plaintiff Knox admitted that his end-of-sentence date was March 12, 2013. (Id.). However, on October 24,

2011, Plaintiff Knox was released on parole from Limestone and ADOC custody.<sup>2</sup> (See Second Supplemental Affidavit of Stephanie Atchison, at ¶ 3, attached hereto as Exhibit “1”). To date, counsel for Named Plaintiffs have not even acknowledged Plaintiff Knox’s release from prison.

### **ARGUMENT**

#### **I. THE REMAINING NAMED PLAINTIFFS DO NOT HAVE STANDING TO ASSERT ALL OF THE CLAIMS ASSERTED AND, THEREFORE, CANNOT ADEQUATELY REPRESENT THE CLASS.**

The release of Plaintiff Albert Knox further underscores Named Plaintiffs’ inability to find HIV-positive inmates who have standing to bring the claims alleged in the Complaint. As the State has set forth in its previous briefs regarding class certification, “any analysis of class certification must begin with the issue of standing.” Griffin v. Digger, 823 F.2d 1476, 1482 (11th Cir. 2000). Indeed, the Eleventh Circuit has made it clear that “a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim.” Id. at 1483. In H. v. Montgomery County Board of Education, 784 F. Supp. 2d 1247 (M.D. Ala. 2011), this Court held that “[t]o establish Article III standing, a plaintiff has the burden to show that (1) she has ‘an injury-in-fact;’ (2) ‘the injury is fairly traceable to the defendant[’s] conduct;’ and (3) ‘a favorable

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<sup>2</sup> Although Plaintiff Knox was released from custody on October 24, 2011, counsel for the State was not made aware of his release until January 9, 2012.

judgment is likely to redress the injury.’ Id. at 1257 (quoting Mulhall v. UNITE HERE Local 355, 618 F.3d 1279, 1286 (11th Cir. 2010)) (alteration in original).

Assuming that Plaintiff Albert Knox will be dismissed from this lawsuit, the remaining Named Plaintiffs cannot and have not shown that they have an injury in fact as to the following claims:<sup>3</sup>

- (1) Exclusion of prisoners with HIV from the residential component of the Limestone SAP (Second Amended Complaint, at ¶¶ 51-54);
- (2) Exclusion of prisoners with HIV from the residential Pre-Release Unit at Limestone (id. at ¶ 55);
- (3) Exclusion of prisoners with HIV from the residential component of the Tutwiler SAP (id. at ¶ 78);
- (4) Public disclosure and stigmatization of HIV inmates at Limestone (id. at ¶ 48-49);
- (5) Disparate disciplinary action against HIV inmates at Limestone (id. at ¶ 23, 65-66);
- (6) Exclusion of prisoners with HIV from kitchen jobs and other jobs at Limestone (id. at ¶ 58);
- (7) Exclusion of prisoners with HIV from Tutwiler kitchen jobs (id. at ¶ 79);
- (8) Exclusion of prisoners with HIV from Limestone Dining Hall (id. at ¶ 64); and

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<sup>3</sup> Albert Knox is the sole Named Plaintiff alleging disparate disciplinary treatment at Limestone and exclusion from the residential component of the Substance Abuse Program at Limestone. His release from prison moots all of his claims and the remaining Named Plaintiffs do not have standing to assert these claims.

- (9) Exclusion of prisoners with HIV from the Community Corrections Program (id. at ¶ 80).

Absent a showing that at least one Named Plaintiff has suffered the injury that gives rise to these nine (9) claims, Named Plaintiffs do not have standing to bring these claims on behalf of a purported class. Accordingly, Named Plaintiffs cannot conceivably be adequate representatives of the class where they have not even suffered the alleged injuries of the potential class members. See Griffin, 823 F.2d at 1482 (“Only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others.”).

## **II. NAMED PLAINTIFFS CANNOT SATISFY THE NUMEROSITY REQUIREMENT OF FED. R. CIV. P. 23.**

Even assuming the remaining eight (8) Named Plaintiffs have standing to bring the claims asserted (they do not), they still have not met their burden of showing that their claims are numerous among the potential class members. Named Plaintiffs rely exclusively upon the Second Amended Complaint to support their request for class certification, which mentions only nine (9) potential class members. The release of Plaintiff Albert Knox means that Named Plaintiffs are now down by one potential class member and their argument in support of numerosity hinges on the claims of the remaining eight (8) Named Plaintiffs. If Named Plaintiffs failed to prove numerosity with nine (9) Named Plaintiffs, they



certainly cannot do so with eight (8) Named Plaintiffs. As shown in the chart below, there is not a single claim asserted by Named Plaintiffs for which they can prove numerosity.<sup>4</sup>

ALLEGATIONS / REQUESTED RELIEF	INVOLVED NAMED PLAINTIFFS	PARAGRAPH CITATIONS <sup>5</sup>
Requesting transfer to a men's Work Release program	Henderson, Robinson, Douglas	18, 20, 28
Requesting transfer to a women's Work Release program	Graham	34
Delay in transfer to Decatur Work Release facilities	Smith	24
Requesting transfer from Limestone to Another Facility with certain vocational programs or closer to "home"	Henderson, Robinson, Smith, Douglas, Hamlet	18, 20, 25, 27, 30
Requesting transfer to Faith-Based Honor, or Senior Dorms at Limestone	Henderson, Robinson, Douglas, Beyer	18, 20, 22, 23, 24, 50, 52
<b>Requesting transfer to SAP or Pre-Release Dorms at Limestone</b>	<b>None</b>	<b>51-54</b>
Requesting transfer to Faith-Based Honor or Medical Dorms at Tutwiler	Graham	34, 76
<b>Requesting transfer to SAP Dorm at Tutwiler</b>	<b>None</b>	<b>78</b>
<b>Public Disclosure and Stigmatization at Limestone</b>	<b>None</b>	<b>48-49</b>
<b>Alleged Disparate Disciplinary Action at Limestone</b>	<b>None</b>	<b>23, 65-66</b>

<sup>4</sup> This chart summarizes all of the allegations and relief sought by the Named Plaintiffs, excluding the claims of Plaintiff Albert Knox.

<sup>5</sup> These paragraph citations refer to the Second Amended Complaint. (Doc. No. 61).

Alleged Disparate Disciplinary Action at Tutwiler	Harley	74
<b>Exclusion from Kitchen Jobs and Other Jobs at Limestone</b>	<b>None</b>	<b>58</b>
<b>Exclusion from Kitchen Jobs at Tutwiler</b>	<b>None</b>	<b>79</b>
Exclusion from Food Services Positions at DWR	Hamlet	29
<b>Exclusion from Limestone Dining Hall</b>	<b>None</b>	<b>64</b>
Alleged arbitrary medical clearance criteria for work release	Robinson, Graham	21, 34, 86
Alleged Disclosure of HIV condition	Harley	32
<b>Exclusion from the Community Corrections Program</b>	<b>None</b>	<b>80</b>

As the chart indicates, the most numerous claim that Named Plaintiffs allege is denial from being transferred from Limestone to other facilities. Yet, there are only five (5) HIV-positive inmates that allege to have suffered this injury. Five (5) is certainly not numerous. See Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1536, 1553 (11th Cir. 1986). To litigate claims based upon a showing of only five (5) potential class members with an alleged injury would result in a severe waste of time and resources and completely undermine the efficacy of federal class actions.

### **CONCLUSION**

For the foregoing reasons, Defendants KIM THOMAS, BILLY MITCHEM, FRANK ALBRIGHT, BETTINA CARTER and EDWARD ELLINGTON respectfully request that the Court deny Plaintiffs' Motion for Class Certification in its entirety or, in the alternative, stay the Court's consideration of Plaintiffs'

Motion for Class Certification until the State is afforded an adequate opportunity to conduct discovery regarding class certification.

Respectfully submitted this 25th day of January 2012.

/s/ William R. Lunsford  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 25th of January 2012, I electronically filed the foregoing with the Clerk of the Court and this pleading will be served on all parties registered with the Court's ECF filing system.

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/s/ William R. Lunsford  
*One of the Attorneys for the  
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# Exhibit "1"

Second Supplemental Affidavit of Stephanie  
Atchison

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**Defendants.** )

**SECOND SUPPLEMENTAL AFFIDAVIT OF STEPHANIE ATCHISON**

**STATE OF ALABAMA** )

**COUNTY OF MONTGOMERY** )

Before me, the undersigned Notary Public, personally appeared  
STEPHANIE ATCHISON who, after being duly sworn, states as follows:

1. My name is Stephanie Atchison. I am over the age of nineteen (19) years and I have personal knowledge of the information contained in this affidavit.

2. I am currently employed as the Assistant Director in the Classification Division of the Alabama Department of Corrections ("ADOC"). I have been employed in the ADOC's Classification Division for more than thirty-two (32) years during which time I have served in various capacities including the following positions: Classification Specialists, Classification Specialist Supervisor, Central Review Board Analyst and Assistant Director of Classification. I have been employed in my current capacity as the Assistant Director of Classification for more than three (3) years.

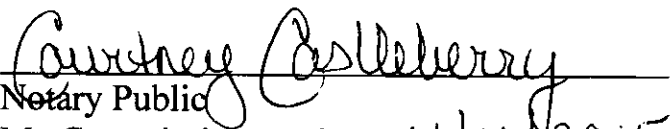
3. Mr. Albert Knox was an HIV-positive inmate housed at Limestone Correctional Facility. On October 24, 2011, Mr. Knox was released on parole from the custody of the ADOC.

Further affiant saith not.

  
STEPHANIE ATCHISON

SWORN TO and SUBSCRIBED before this the 25<sup>th</sup> day of January 2012.

(SEAL)

  
Notary Public  
My Commission Expires: 4/11/2015