IN THE SUPREME COURT OF THE STATE OF KANSAS

James Hadley, *et al.*, Petitioners,	)	
vs.	)	**Case No. 122,760**
Jeffrey Zmuda, in his official capacity as the Secretary for the State of Kansas, *et al.*, Respondents.	)	

RESPONSE TO PETITIONERS' MOTION FOR CLASS CERTIFICATION

As required by the Court's April 10, 2020 Order, and without waiving any of their objections and defenses in this matter as set forth in the Response to the Petition filed separately, Respondents respond to Petitioners' Motion for Class Certification as follows.

In this original habeas action, Petitioners ask the Court to certify as a class all individuals in KDOC custody—now or in the future—as well as three subclasses: (1) all "medically-vulnerable" inmates, (2) all "release-eligible" inmates, and (3) all "low-level offenders." They seek immediate release of the first subclass, a vague but broad group which includes every inmate over the age of 50, along with every inmate who "experiences" any of a variety of common health conditions. This subclass would embrace over a thousand inmates, housed at different facilities across the state, with unique convictions and widely-varying sentences. It would include notorious serial

killers Dennis Rader (a.k.a. "BTK") and John Robinson, along with Gary Kleypas and Frazier Glenn Cross, three of whom are under capital sentences.

The Court should deny this motion because class certification is procedurally improper. Petitioners have not shown that K.S.A. 60-223, applicable only to district courts, allows this Court to certify class actions while acting in its original jurisdiction under Rule 9.01 in a habeas corpus proceeding. In any event, Petitioners fail to meet the requirements for a class action.

I. Class certification is procedurally improper

A. Petitioners cite no precedent or authority

As authority for class certification, Petitioners rely exclusively on K.S.A. 60-223. This is a statute in the Kansas Code of Civil Procedure, applicable only to district courts as per K.S.A.60-201. Petitioners cite no statutory authority to support the filing of a class action in an original action filed in this Court, let alone a class action habeas petition.

Nor do the Kansas habeas statutes, K.S.A. 60-1501 to 60-1507, contemplate class actions. Rather, Article 15 creates a separate and summary procedure for habeas corpus. The Kansas Court of Appeals has noted that although "[a] K.S.A. 60-1501 habeas proceeding is civil in nature . . . it is not subject to the ordinary rules of civil procedure." *White v. Shipman,* 54 Kan. App. 2d 85, 89, 396 P.3d 1250 (2017) (citing *Bankes v. Simmons,* 265 Kan. 341, 349, 963 P.2d 412 (1998); *Swisher v. Hamilton,* 12 Kan. App. 2d 183, 184, 740 P.2d 95 (1987)) (holding that the rules of

discovery in the Kansas Code of Civil Procedure do not apply in K.S.A. 60-1501 habeas proceedings)).

The same thing can be said of Rule 9.01, which appears to contemplate a summary procedure, not discovery or the other kinds of activities routinely conducted in the Kansas district courts to find and test facts through the adversary process.

As authority for seeking class action relief through an original action in this Court, Petitioners cite to a single case from the 1970s, *Beaver v. Chaffee*, 2 Kan. App. 2d 364, 365, 579 P.2d 1217 (1978). While this case appears to be an outlier, it does not support Petitioner's request to seek such relief in this Court. In *Beaver*, Shawnee County Jail Inmates were allowed to proceed as a class action in the district court on some claims. That case is distinguishable on several grounds, including that it was not limited to a habeas action but also included claims for declaratory and injunctive relief under Chapter 60. Most importantly, *Beaver* was initiated in the district court (not in the Supreme Court). It was filed in 1974, with the motion for class certification being sustained in mid-June 1975, to be followed by a year of discovery. *Beaver* illustrates why this Court does not take cases where adequate relief is available in the district court as per Rule 9.01(b). There is no record here as contemplated by Rule 9.01(d), and as recognized in Rule 9.01(d), this Court is not set up to operate as a fact-finding trial court which is what Petitioners are seeking here.

Because Petitioners' four-page motion provides no authority for the Kansas Supreme Court to act as a fact-finding court as is required to certify a class in an

original habeas action, the Motion may and should be summarily denied on this basis alone.

B. Class certification is premature

Even if it were possible for the Court to entertain an original habeas action as a class action, consideration of a motion for class certification at this point is wildly premature. In determining certification of a class:

> [The Court] must . . . conduct a rigorous analysis to determine whether the putative class satisfies the requirements of Rule 23. Rule 23 does not set forth a mere pleading standard. Rather, the Court's analysis will frequently overlap with the merits of plaintiffs' claims. This is so because determining whether to certify a class generally involves considerations that are enmeshed in the factual and legal issues comprising plaintiffs' cause of action.

Better v. YRC Worldwide Inc., No. 11-2072-KHV, 2016 WL 1056972, at *4 (D. Kan. Mar. 14, 2016) (internal cites, quotes, and modifications omitted). This Court has recited the same "rigorous analysis" standard. *Dragon v. Vanguard Indus.*, 282 Kan. 349, Syl. ¶ 1, 144 P.3d 1279 (2006) (reviewing a trial court's decision regarding class certification in an action seeking damages).

Before even attempting to undertake the required rigorous analysis of class certification, the Court should decide the threshold issues in this case. As the Court's Order points out, there are basic questions that have not been answered about this Petition, including whether Respondents have even been served and whether the Court has jurisdiction. The Court should defer ruling on Petitioners' Motion for Class Certification until it rules on Respondents' Motion to Dismiss. Federal district courts customarily dealing with these issues recognize that it is proper and most efficient to rule first on dispositive motions raising threshold issues before considering

certification of a class since they often render the motion for class certification moot. *See* Ann. Manual for Complex Litigation § 21.133 (4th ed.); 3 *Newberg on Class Actions* §§ 7:8-7:9 (5th ed. 2013).

And, if the case is retained, Respondents should be allowed a full and fair opportunity to respond to Petitioner's Motion. It would be unfair to proceed on class certification upon a mere two working days' notice, especially in the midst of the Governor's orders reducing state government operations during the Pandemic. Here, Petitioners provide no detail as to precisely how many proposed class members there would be, where each is located, their names, or other details that would allow any assessment of the motion for class certification, let alone a rigorous analysis. Obviously, Petitioners would not readily have information regarding the medical conditions "experienced" (which appears to contemplate something broader than a medical diagnosis) by more than 9000 inmates at all of the KDOC facilities, including facilities at which these Petitioners are not present. Not to mention the unknown "future" inmates whom Petitioners propose to include in the class.

Two days' notice is not sufficient to allow an adequate detailed response to a class certification motion. Respondents have not had the opportunity to conduct discovery of each of the proposed class representatives or to probe the assertions in the self-serving declarations submitted to date. Nor have Respondents had the opportunity to conduct expert discovery, which will be essential to the medical and scientific underpinning of Petitioners' claims, which are presently supported only by hearsay/bibliography (Petitioners' Exhibit A to their Memorandum in Support) and

an attempt at an expert opinion that is not properly qualified or supported, let alone investigated (Petitioners' Exhibit B).

The motion for class certification should not be decided hastily. Any consideration of class certification should await determination of Respondents' Motion to Dismiss and, if the Motion to Dismiss is denied, the opportunity for Respondents to conduct discovery on Petitioners' claims and an adequate opportunity to prepare a detailed response to Petitioner's Motion.

II. Petitioners do not meet the requirements for class certification

Even if considered, Petitioners' submissions and cursory motion fail to establish the statutory requirements and cannot withstand the rigorous analysis standard for class certification. Under K.S.A. 60-223(a), presuming that can even apply in an original action, there are four prerequisites to a class action:

> (1) The class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class. As this Court has stated, a "rigorous analysis" of those factors is required. *Dragon*, 282 Kan. at 354. *See Fish v. Kobach*, 318 F.R.D. 450, 454 (D. Kan. 2016) (denying a request to certify a class of voters, noting that class certification involves an "intensely fact-based question that is fraught with practical considerations").

Additionally, since Petitioners seek certification under K.S.A. 60-223(b)(2), they must 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 respecting the class as a whole." As the U.S. Supreme Court explained in *Wal-Mart Stores, Inc. v. Dukes*, "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the 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.'" 564 U.S. 338, 360 (2011) (citations omitted) (quoted approvingly in *Combs v. Devon Energy Prod. Co.*, 303 P.3d 1278 (Table) (Kan. App. 2013)).

A. Typicality and commonality are lacking

Petitioners' request for a class action comprised of all current and future prisoners at all KDOC facilities does not meet K.S.A. 60-223's commonality or typicality requirements. In *Dukes*, the U.S. Supreme Court explained "that [t]he commonality and typicality requirements . . . tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and *whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence*." 564 U.S. at 349 n.5 (emphasis added, internal quotes omitted).

In *Smith v. Rayl,* No. 58,152, 1988 Kan. LEXIS 184 (Sept. 9, 1988) [attached per Kan. App. Rule 7.04 (g) (2) (C)], this Court reviewed a Leavenworth County

District Court decision in a case in which the plaintiff inmates filed a civil action seeking declaratory and injunctive relief, arguing that their constitutional rights were violated because they were denied the right to participate in employment and educational programs. That petition was filed on behalf of inmates "similarly situated," and the plaintiff inmates moved the district court to certify a class. The plaintiff inmates cross-appealed the district court's order denying class certification.

In affirming the district court's denial of class certification, this Court noted that plaintiff inmates had failed to make the required showing that the claims or defenses of the representative parties were typical of the class as per K.S.A. 60-223(a)(3). The Court noted that the four named plaintiffs "raise specific issues" related to their own experiences. In affirming the denial of class certification, the Court cited and applied the following rule: "Since the propriety of injunctive and declaratory relief requires consideration of the individual circumstances and requests of each member of the class, the requisite typicality does not exist." *Id.* at ** 26-27 (citing 7A Wright, Miller, and Kane, *Federal Practice and Procedure: Civil 2d* 1763, p. 303 (1986)).

Even in the district court *Beaver* case, cited by Petitioners, the district court held that a class action is not appropriate for issues which depend on the particular circumstances of an individual inmate. 2 Kan. App. 2d 364, at Syl. 6.

Here, as in *Smith,* each of the individual Petitioners goes on at some length about their individual situations, including unique factual detail and circumstances, such as their individual medical conditions, ages, criminal histories and conditions of

confinement. As in *Smith,* there is no showing of typicality. Indeed, under the rule announced and applied by this Court in *Smith,* actions seeking injunctive and declaratory relief (as here), are based upon individual circumstances such that typicality is not and cannot be satisfied.

Similarly, in *Mathis v. Bees,* 692 F. Supp. 248, 257 (D.C.N.Y. 1988), where a state prisoner brought an action challenging delays in his appeal, class certification was denied because the question of whether the delay arose to a constitutional violation could only be resolved on a case-by-case basis. *Accord John Doe I v. Meese,* 690 F. Supp. 1572 (S.D. Tex. 1988) (question of whether INS properly determined political asylum status required examiners to look at each individual on a case-by-case basis and thus was improper for class certification).

In *Phillips v. Sheriff of Cook County,* 828 F.3d 541 (7th Cir. 2016), the need to consider individual circumstances of the plaintiff pretrial detainees was cited as a reason for denial in a civil case seeking injunctive relief under 42 U.S.C. § 1983. There, pretrial jail detainees claimed the jail was deliberately indifferent to their dental care needs, citing delays in receiving evaluations by a nurse and delays in receiving appointments. The plaintiffs sought to pursue the matter as a class action. The court found that the plaintiffs had not satisfied the commonality element for class certification as the constitutionality of the delays depended on a variety of individual circumstances that could only be answered by looking at the unique facts of each detainee's case.

As the U.S. Supreme Court articulated in *Dukes*, class "claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." 564 U.S. at 338. *Accord Better*, 2016 WL 1056972, at *6 n.15. Here, the only common thread running through this Petition is the unsupportable assumption on Petitioners' part that no one should be in any prison of any kind during a pandemic – that all prisons are inherently and irremediably unsafe to all prisoners. While seeking immediate release of all individuals in the extremely broad category of "medically-vulnerable" inmates, Petitioners lump together individuals with different unique health profiles, family situations, criminal histories and disciplinary records as well as housed in different facilities with unique physical and housing layouts. The proposed class and subclasses lack commonality because no "one stroke" resolution is possible. Any release decisions must be made on a case-by-case basis.

B. Representative parties not adequate

The ability of prisoners to represent other prisoners as class representatives is questionable. *See Lewis v. Clark,* 577 Fed. Appx. 786, 793 (10th Cir. 2014). In any event, Petitioners cannot show that "the representative parties will fairly and adequately protect the interests of the class," numbering in the thousands of other

inmates located in various facilities throughout the State of Kansas. In the *Better* case, the court explained that:

> [C]lass representatives must have sufficient knowledge or understanding concerning what the suit is about to ensure that they are not simply lending their names to a suit controlled entirely by class counsel. In addition, class representatives have a fiduciary obligation to the putative class; therefore they must have the character and means to carry out that obligation, including the ability to examine independently the decisions of counsel and play an active role in the litigation to protect the interests of the class.

2016 WL 1056972, at *7. There, the court rejected the adequacy of the purported class representatives after an extensive examination, expressing concerns that class representatives had not talked among themselves, did not understand and accept their fiduciary roles, had not participated in the case, had not communicated with counsel, and lacked understanding of the case. *Id.* at *8-19.

Petitioners do not provide evidence that they are in a position to be good class representatives. Their motion lacks specific factual support for their alleged means, incentive, or knowledge sufficient to adequately prosecute this case, their communications among themselves or with their counsel, and there is no mention of their knowledge of or means to carry out their important fiduciary obligation to the case. Their conclusory and non-factual allegations do not provide the necessary evidentiary basis for the Court to find they can adequately represent all current and future inmates of KDOC. Notably, one of the proposed class representatives does not even personally appear but inexplicably purports to appear via a "next friend." If a Petitioner cannot even represent themselves, how can they serve as a class representative?

It appears Petitioners have not talked among themselves (and as prisoners, they probably cannot). It is not clear that any of them have actually read the Petition, as their signatures were appended on a separate piece of paper. The Court must demand more than mere recitation of K.S.A. 60-223 to certify Petitioners' requested classes in any case, let alone an original action for habeas relief.

C. The proposed class is not precise, objective, and readily ascertainable

"In determining whether to certify a class, the court begins with the [plaintiffs'] proposed definition of the class." *Robinson v. Gillespie*, 219 F.R.D. 179, 183 (D. Kan. 2003). As explained by a federal court in this District:

> The Manual for Complex Litigation explains *the importance of defining the class in terms of sufficiently definite and readily ascertainable criteria*: "Defining the class is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled under Rule 23(c)(2) to the 'best notice practicable' in a Rule 23(b)(3) action. The definition must be precise, objective, and presently ascertainable."

In re Urethane Antitrust Litig., 237 F.R.D. 440, 444-45 (D. Kan. 2006) (quoting Manual for Complex Litigation § 21.222, at 270 (4th ed.2005)). Further, "[a] class is overbroad, and should not be certified, if it includes a great number of members who could not have been harmed by the defendant's allegedly unlawful conduct." *Friedman v. Dollar Thrifty Auto. Grp., Inc.*, 304 F.R.D. 601, 606 (D. Colo. 2015) (internal quotes and citations omitted).

Petitioners' proposed class definitions are overbroad, imprecise, and unqualified. They do not distinguish between the inmates at different KDOC facilities, although each facility is unique and only two have cases of COVID-19. The

proposed class of "medically vulnerable" inmates who "experience" a wide range of common health conditions, at whatever age, is not definite, nor is it readily ascertainable. Petitioners seek immediate release of all inmates over the arbitrary age of 50, without consideration of the extreme public safety risk many offenders would pose or distinguishing between their underlying convictions or disciplinary records while incarcerated. These classes are untenable given the breadth and vagueness of the definitions.

D. Petitioners do not satisfy K.S.A. 60-223(g)

Finally, Petitioners' Motion contains a request that the Court appoint Attorneys Bonds and Shroff as counsel for the class but entirely fails to make the showing under K.S.A. 60-223(g), which requires mandatory consideration of multiple factors. The four-page Motion lacks evidentiary attachments, and fails to provide anything from which the Court could conduct the required analysis, and therefore must be denied as facially insufficient. "The adequacy of representation requirement is particularly important because it protects the due process interests of unnamed class members who will be bound by final judgment in the suit. Adequacy of representation turns on two questions: (1) whether named plaintiffs and their counsel have any conflicts of interest with other class members; and (2) whether named plaintiffs and their counsel will vigorously prosecute the action on behalf of the class." *Better*, 2016 WL 1056972, at *7. Further, "[b]oth named plaintiffs and their attorneys must have the means and capacity to vigorously prosecute the class action." *Id.* In *Better*, the Court rejected the adequacy of proposed counsel. *Id.* at 19-20.

Because certification of a class requires "rigorous analysis," this Court cannot and should not simply take Petitioners' counsel's conclusory allegations on faith, but must require more, including facts and evidence, which should have been included with their Motion. Petitioners have made no showing concerning "the work counsel has done in identifying or investigating potential claims in the action" and have offered no evidence in the record to support this requirement. Nor have the Petitioners shown the Court "the resources that counsel will commit to representing the class," a class that could number in the thousands, including possibly persons of diminished education. Nor have the Petitioners made a sufficient showing concerning "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action," and "counsel's knowledge of the applicable law." As the federal courts have stated it, the Court "does not "blindly rely on conclusory allegations which parrot Rule 23." *Tripp v. Berman & Rabin, P.A.*, 310 F.R.D. 499, 503 (D. Kan. 2015) (citing *Shook v. El Paso Cty.,* 386 F.3d 963, 968 (10th Cir. 2004)) (internal quotes omitted). On the present showing, the Petitioners' counsel have not made the necessary showing of the adequacy of their representation of the proposed class.

III. Conclusion

Petitioners' motion lacks any authority for the Kansas Supreme Court to act as a fact-finding trial court and selectively incorporate K.S.A. 60-223 to certify a class on an expedited basis in an original action filed pursuant to the Kansas habeas statutes. The Court should wait to consider the issue of class certification until the

threshold issues raised by the Court and Respondents' Motion to Dismiss have been determined. In any event, Petitioners fail to meet the statutory requirements to bring a class action for reasons including that the requirement that individual circumstances be considered negates the typicality and commonality required for class action relief as a matter of law. In the event this Petition is not dismissed, Respondents respectfully request the opportunity to conduct discovery as to Petitioner's claims and to respond to the Motion in more detail than the time frame allotted by the Court's April 10, 2020 Order allows.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2020, I electronically filed the foregoing with the Clerk of the Appellate Court's electronic filing system which will serve all registered participants and a copy was also served by email, addressed to: Lauren Bonds, Zal K. Shroff, ACLU Foundation of Kansas, 6701 W. 64th St., Suite 210, Overland Park, KS 66202, lbonds@aclukansas.org, zshroff@aclukansas.org, Counsel for Petitioners.

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Attachment per Kan. App. Rule 7.04 (g) (2) (C)

Smith v. Rayl

Supreme Court of Kansas

September 9, 1988, Filed

No. 58-152

Reporter
1988 Kan. LEXIS 184 *; 762 P.2d 842

JERRY WAYNE SMITH, et al., Appellees, v. GARY RAYL, et al., Appellants. JAMES BAGBY, et al., Appellees, v. GARY RAYL, et al., Appellants

Notice: [*1] NOT DESIGNATED FOR PUBLICATION

Prior History: Appeal from Leavenworth district court; MAURICE P. O'KEEFE, JR., judge. Affirmed in part, reversed in part, and remanded.

Counsel: Charles E. Simmons, of the Department of Corrections, was on the brief for appellants.

Jerry Wayne Smith, appellee, pro se.

Opinion

MEMORANDUM OPINION

Per Curiam: Defendants, officials of the Kansas State Penitentiary (KSP), appeal: (1) the findings by the district court of Leavenworth County that the constitutional rights of the plaintiffs, inmates at KSP, were violated because they were denied the right to participate in employment and educational programs; (2) the district court's order that the State of Kansas and the Department of Corrections (Department) convene an interim legislative committee to address the issue of employment and educational programs; and (3) the court's order that the Department of Corrections promulgate regulations and implement procedures providing all inmates with educational and employment opportunities. The plaintiffs cross-appeal: (1) the court's order denying their request for certification as a class; and (2) the court's failure to determine all the issues raised in each of their petitions. Because the district court erred by finding [*2] that the inmates' constitutional rights had been violated, breached the Kansas Constitution's doctrine of separation of powers by ordering the legislature to take specific action, and failed to make proper findings of fact as required by Supreme Court Rule 165 (1987 Kan. Ct. R. Annot. 86), we reverse in part and remand the matter for further proceedings.

Plaintiffs, Jerry Wayne Smith, James Bagby, Wiley Miles, and James Mitchell, challenge the internal policy of KSP whereby inmates who receive disciplinary convictions, or who quit, are terminated from, or decline work or program assignments are ineligible for other assignments (education or employment) for a period of 120 days. By regulation, such individuals are housed in "A" cellhouse (ACH) and are classified as "unassigned for cause. ACH is designated as a nonworking cellhouse. After the 120-day period expires, if a request for a new work assignment has been initiated by the inmate, the inmate is moved to the "B" cellhouse (BCH), when space is available.

After initiating the transfer, the inmate then becomes eligible for incentive pay and a new work or program assignment. If the inmate fails to request a transfer, refuses to transfer [*3] to BCH, or declines a specific work assignment, the inmate remains or is returned to ACH, where another 120-day period of work and pay ineligibility commences.

On June 28, 1983, plaintiff Smith filed a pro se action in the district court of Leavenworth County seeking declaratory and injunctive relief. The petition alleged that Smith and those inmates similarly situated had been wrongfully deprived of the right to work and the right to a meaningful education in violation of the Fourteenth Amendment to the United States Constitution and K.S.A. 75-5201 *et seq.*

Plaintiff requested that the court issue a preliminary and permanent injunction enjoining the defendants, their agents, employees, and successors:

"1. From continuing to deprive Plaintiffs of such work, education and vocational training opportunities which are mandated by the laws of Kansas for the rehabilitation of prisoners.

"2. From continuing to reduce job [and] education and vocational positions in the various [departments] within the Kansas State Penitentiary complex and reinstate all positions which the defendants previously discontinued since their takeover."

The plaintiff further stated in his petition:

"C. That [*4] this Court order the defendants to create as many work, education and vocational training assignments as are necessary to dispense with the forced idleness which plaintiffs are presently being subjected to.

"D. That the present limitation on the number of prisoners allowed to participate in meaningful programs violates the laws of Kansas.

"E. That defendants be admonished that criminal sanctions shall be available to any and all members of plaintiff class should defendants, their employees. agents, and any and all persons in concert and participation with them, engage in retaliatory punitive measures against any or all of the Plaintiffs for bringing this action.

"F. That all matters of fact and law be tried to a jury.

"G. That Plaintiffs be awarded costs and attorney fees.

"H. For such other and further relief which this Court deems just and proper."

Smith also filed a motion for class certification, pursuant to K.S.A. 60-223.

Two days later, inmates Bagby, Miles, and Mitchell and thirteen other inmates filed an action containing similar allegations and also moved for class certification. In addition to the relief requested by Smith, these plaintiffs requested damages for [*5] mental anguish and punitive damages. The other thirteen inmate petitioners subsequently withdrew or were dismissed.

The cases were tried over a period of thirteen months. The following testimony was presented as to each individual inmate.

Jerry Wayne Smith

Jerry Wayne Smith had been an inmate of "A" cellhouse since 1982. He testified that he had originally had employment in the education department, which was terminated. While in ACH, Smith attempted to obtain employment in the law library and to establish his own education program. He also tried to secure a release to attend various educational programs, pursuant to K.A.R. 44-7-105 (1987 Supp.), which was denied. Smith stated: "I think that the prison officials have an obligation to me to offer me the kind of rehabilitation program that my aptitude and experience calls for The Department maintained that, since Smith placed

conditions on his move to BCH (that he be either placed in the law library or be given educational release), he had not followed proper procedure and could not be transferred. On August 29, 1984, Smith received a disciplinary conviction and thereby became ineligible to move due to the "120-day rule."

[*6] James Mitchell

Mitchell has never been denied an employment or program assignment. Although Mitchell was terminated from a tutor position in the education department, he was transferred immediately to another work assignment. As a result of disciplinary convictions, Mitchell was then transferred to ACH, but was able to continue in a computer program. He stated that the basis of his suit was his termination from his employment in the education department.

James Bagby and Wiley Miles

Both Bagby and Miles were terminated from their employment in the education department. Approximately one year before filing this action, they were assigned to ACH. Both admitted at trial that they were aware that ACH was a nonworking cellhouse. Despite this knowledge, neither Bagby nor Miles requested a move to BCH. They contend that they should be permitted to be in an employment or education program while in ACH. There was testimony that Bagby was offered employment as an orderly in ACH, but declined, stating it would interfere with his court case.

The plaintiff inmates allege, as prisoners, that they are denied their desired employment and educational opportunities guaranteed by the Fourteenth [*7] Amendment of the United States Constitution. (On appeal, however, plaintiffs concede that they have "no such right per se under the due process clause, however, they maintain they do possess such a right pursuant to state statutes and regulations.)

At the close of the evidence, the trial court made no specific findings regarding each inmate's allegations. Instead, the trial court first denied certification of the class, then reframed the issue to be whether the "plaintiffs have been denied their right to education and employment according to law." The court then held (1) because the institution was overcrowded and unable to afford all inmates education and employment, the inmates' constitutional rights were being violated; (2) that plaintiffs were denied their right to education and employment according to state law, specifically K.S.A. 75-5201, K.S.A. 75-5210, and K.S.A. 1987 Supp. 75-5211; and (3) that the actions of the Department of Corrections in promulgating the 120-day rule were arbitrary and capricious.

Despite the fact that the trial court denied class certification, its memorandum opinion granted relief to every inmate in the institution, stating:

"[T]he rights of the [*8] four individual plaintiffs *as well as the rights basically of every inmate of A Cell House and every inmate of the institution* have been constitutionally taken away from them." (Emphasis added.)

Finally, the court ordered the State of Kansas to form an interim legislative committee to "comply with the standards and regulations set forth by law"; to promulgate regulations so that all inmates, except those being disciplined, would be entitled to employment or education and ordered that this be done in 60 days; and to devise a plan under which more education and employment opportunities would be available for inmates and ordered this to be done in 60 days.

Both the Department of Corrections and the four inmates have appealed.

Violation of rights under the United States Constitution

When the district court held that "the fact that the institution is overcrowded and not able to provide

the employment and education as required by law denies the inmates their constitutional rights," it neither stated which constitutional rights it deemed were violated, nor did it consider the specific issues raised by the inmates. In actuality, the individual inmates were not totally *denied* [*9] educational and vocational programs, since each plaintiff testified at length regarding his involvement in rehabilitation. Rather, the issue raised by the inmates is whether their constitutional and/or State statutory rights are violated by the *temporary denial* of access to rehabilitation by the "120-day rule."

Generally, even though prison inmates retain certain constitutional rights, these rights are still subject to restriction and limitations. Lawful incarceration brings the necessary withdrawal or limitation of many privileges and rights, which is justified by the considerations underlying our penal system. The fact of confinement as well as the legitimate policies of the penal institution limits the inmates' constitutional rights. The goal is a mutual accommodation between institutional needs and objectives and constitutional provisions. Maintaining internal institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of the inmate. Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape [*10] or unauthorized entry. *Bell v. Wolfish,* 441 U.S. 520, 545-46, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979).

If the trial judge was referring to the denial of the inmates' due process rights under the Fourteenth Amendment, then this case is similar to *Foster v. Maynard,* 222 Kan. 506, 565 P.2d 285 (1977). In *Foster,* inmates at the KSP filed a habeas corpus action, K.S.A. 60-1501, alleging the deprivation of various constitutional rights while being confined in protective custody in the east wing of the Adjustment and Treatment (A & T) Building. Specifically, the inmates claimed that they did not receive the same privileges (listening to the radio, earning money through institutional employment, exercise, etc.) as inmates housed in the north wing. There, inmates argued, as here, that the alleged deprivation of privileges was a disciplinary measure imposed by prison officials. After reviewing the district court's findings of facts, the court reiterated the standard established in *Levier v. State,* 209 Kan. 442, 497 P.2d 265 (1977):

"[P]rison officials are vested with wide discretion in the discharge of their duties and . . . their decisions concerning matters of internal management [*11] and operation of a state penitentiary will not be disturbed unless clearly arbitrary or shocking to the conscience. See *Breier v. Raines,* 221 Kan. 439, 559 P.2d 813; *Morris v. Raines,* 220 Kan. 86, 551 P.2d 838.

"These decisions are reinforced by the recent United States Supreme Court decision of *Meachum v. Fano,* 427 U.S. 215, 49 L. Ed. 2d 451, 96 S. Ct. 2532. There a state prisoner brought a civil rights action under 42 U.S.C. Sec. 1983 contending his transfer from one state prison to another with conditions of confinement considerably more severe without a prior hearing violated his right to due process of law under the Fourteenth Amendment. The court stated:

"'. . . We reject at the outset the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause. . . . [T]he determining factor is the nature of the interest involved rather than its weight.

"'Similarly, we cannot agree that any change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. The Due Process Clause by its own force [*12] forbids the State from convicting any person of crime and depriving him of his liberty without complying fully with the requirements of the Clause. But given a valid conviction, the

criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.' 427 U.S. at 224." 222 Kan. at 509.

The court then concluded that the classification of inmates was merely an administrative classification made in furtherance of the day-to-day operation and management of the prison, stating:

"The classification decision of prison officials to house the appellants on the east wing because of the unavailability of space on the north wing and because of their aggressive behavior clearly constitutes a reasonable exercise of discretion aimed at promoting the welfare of the institution and the protective custody inmates. The determination implicated no constitutional right of the appellants. The classification of prisoners concerning housing and job assignments is necessary to the proper administration of a state prison and rests [*13] within the sound discretion of the prison administrator. Furthermore, no interest approaching the level of a fundamental right was deprived the appellants by their placement on the east wing of the A and T Building." 222 Kan. at 510.

Although not specifically raised, the inmates here also implicate the equal protection clause of the Fourteenth Amendment by contending that (1) inmates in ACH enjoy fewer privileges than other inmates; and (2) some inmates within ACH are treated differently than other inmates in ACH. In *Foster,* where the same arguments were raised, the court found that all classifications made by prison officials were responsible administrative classifications furthering legitimate objectives of orderly administration of the prison, stating:

"The equal protection clause cannot be deemed to preclude responsible administrative classification to further legitimate objectives. The decision of prison authorities in regard to where the appellants should be housed served the legitimate goals of protecting the welfare of the protective custody inmates and ensuring the efficient operation of the prison laundry by preventing intermingling of those inmates with demonstrated [*14] behavioral problems with the rest of the prison population." 222 Kan. at 510. See *Morris v. Raines,* 220 Kan. 86, 551 P.2d 838.

When the trial judge failed to specify which constitutional right had been violated, the Department of Corrections determined that the issue was whether the prisoners were being subjected to cruel and unusual punishment prohibited by the Eighth Amendment. Kansas cases have defined cruel and unusual punishment as involving a deprivation which is inhumane, barbarous, or shocking to the conscience. *State v. Rouse,* 229 Kan. 600, 605, 629 P.2d 167 (1981). Under the Eighth Amendment, it is clear that the denial of rehabilitation programs to a certain group of inmates for a limited period of time does not constitute cruel and unusual punishment. In *Rhodes v. Chapman,* 452 U.S. 337, 69 L. Ed. 2d 59, 101 S. Ct. 2392 (1981), the United States Supreme Court was asked to decide whether housing two inmates in single cells in maximum-security state prisons violated the Eighth Amendment. In holding that no constitutional violation existed, the Court stated that the Eighth Amendment prohibits punishments which involve the wanton and unnecessary infliction of pain, [*15] are grossly disproportionate to the severity of the crime, or are totally without penological justification. 452 U.S. at 346. There has been no showing by the inmates that the conditions of which they complain violate the Eighth Amendment.

It is the general rule that, whether analyzed as a deprivation of a property or liberty right under the Fourteenth Amendment or as a violation of the Eighth Amendment's proscription against cruel and unusual punishment, there is no constitutional mandate that a prisoner be assigned a rehabilitative opportunity (education or employment) according to his or her particular abilities. *Garza v. Miller,*

688 F.2d 480 (7th Cir.), *cert. denied* 459 U.S. 1150 (1983); 60 Am. Jur. 2d, Penal and Correctional § 100, p. 1193. It has also been established that a state prisoner does not have an unqualified right to participate in work programs and to receive benefits therefrom; any Such right can be constitutionally restricted as a result of valid penological concerns such as security or orderly prison management. *Jackson v. Hogan,* 388 Mass. 376, 446 N.E.2d 692 (1983).

This court in *Levier v. State* indicated that a limitation of prisoners access [*16] to vocational and educational programs would not amount to a constitutional violation by stating that the constitutional rights of inmates center around "adequate food, light, clothing, medical care and treatment, sanitary facilities, reasonable opportunity for physical exercise and protection against physical or psychological abuse or unnecessary indignity--in short, the basic necessities of civilized existence." 209 Kan. at 448.

If this court determined that the inmates' constitutional rights include a right to specific and uninterrupted vocational and educational programs, we would be granting prisoners greater constitutional rights than afforded those not imprisoned. We conclude that the temporary denial of access to educational and rehabilitation programs does not violate any rights guaranteed by the United States Constitution.

Inmates' Rights Under State Law

The trial court found that the inmates were entitled to educational and vocational programs under state law. The following statutes are applicable:

K.S.A. 75-5201 provides:

"The legislative purpose in enacting this act shall be deemed to be establishment of a policy of treatment of persons convicted of felonies in [*17] this state by placing maximum emphasis on rehabilitation of each such person while in the custody of the state or under the jurisdiction of the courts of the state, consistent with the interests and safety of the public, so that a maximum of persons so convicted may be returned to private life in the communities of the state with improved work habits, education, mental and physical health and attitudes necessary to become and remain useful and self-reliant citizens. It is the intent of the legislature that judges, the secretary of corrections, his or her agents, subordinates and employees and the Kansas adult authority, its agents, subordinates and employees will construe and apply this act and acts of which it is amendatory or supplemental liberally to rehabilitate, train, treat, educate and prepare persons convicted of felony in this state for entry or reentry into the social and economic system of the community upon leaving the custody of these state agencies and officers."

K.S.A. 15-5210(a) & (b) provide:

"(a) Persons committed to the institutional care of the secretary of corrections shall be dealt with humanely, with efforts directed to their rehabilitation and return to the [*18] community as safely and promptly as practicable For these purposes, the secretary shall establish programs of Classification and diagnosis, education, casework, mental health, counseling and psychotherapy, chemical dependency counseling and treatment, sexual offender counseling, prerelease programs which 'emphasize re-entry skills, adjustment counseling and job placement, vocational training and guidance, work, library, physical education and other rehabilitation and recreation services; the secretary may establish facilities for religious worship; and the secretary shall institute procedures for the study and classification of inmates. The secretary shall maintain a Comprehensive record of the behavior of each inmate reflecting accomplishments and progress toward rehabilitation as well as charges of infractions of rules and regulations, punishments imposed and medical inspections made.

"(b) Programs of work, education or training shall

include a system of promotional rewards entitling inmates to progressive transfer from high security status to a lesser security status. The secretary shall have authority at any time to transfer an inmate from one level of status to another level [*19] of status. Inmates may apply to the secretary for such status privileges. The secretary shall adopt rules and regulations establishing standards relating to the transfer of an inmate from one status to another, and in developing such standards the secretary shall take into consideration progress made by the inmate toward attaining the educational, Vocational and behavioral goals set by the secretary for the individual inmate."

K.S.A. 1987 Supp. 75-5211(a) provides in part:

"(a) The secretary of corrections shall provide employment opportunities, work experiences, educational or vocational training for all inmates capable of benefiting therefrom. Equipment, management practiced and general Procedures shall, to the extent possible, approximate normal Conditions of employment which includes a forty-hour work week for every inmate who is available, willing and able to participate,"

These statutes have been supplemented by K.A.R. 44-7-105 (1987 Supp), and K.A.R. 44-7-106, which provide in part:

"44-7-105. Education release. The principal administrator may establish a program which extends the limits of confinement for the purpose of providing academic education or Vocational training [*20] opportunities to selected inmates subject to approval by the secretary of corrections

"(a) Programs shall be described in writing to the secretary detailing:

"(1) Type of educational or Vocational opportunity and availability of similar programs within the institution or facility;

"(2) identifiable need for the program and number of inmates projected for participation;

"(3) anticipated costs and method of funding; and

"(4) selection criteria for participants.

"(b) program participation shall be available only to inmates assigned minimum custody status. (Authorized by K.S.A. 75-5210, 75-5251, 75-5267; effective May 1, 1980; amended May 1, 1987.)"

"44-7-106. *Incentive pay and inmate job assignments.* (a) The principal administrator of each institution or facility shall direct inmates to participate in work programs, as available, to acquire and exercise vocational skills and to develop acceptable work habits, job-related attitudes, and self-confidence while producing needed goods or services. Inmates shall be assigned to jobs in the institutions of facilities as aides, or as part of work details or maintenance crews."

These statutes and regulations provide that the prime goal of [*21] incarceration is rehabilitation and that rehabilitation opportunities be available to inmates. However, the statutes do not entitle an individual inmate to a particular rehabilitation program or allow the inmate to design his or her own program. Further, K.S.A. 75-5210(f) gives the department the discretion to adopt rules and regulations for the maintenance of order and discipline, including loss or privileges and other restrictions.

K.S.A. 1987 Supp. 75-5211(a) states that the Secretary of Corrections "shall provide employment opportunities, work experiences, educational or vocational training *for all inmates capable of benefiting therefrom."* (Emphasis added.) This language grants prison officials the discretion to determine which inmates are "capable of benefiting." *Foster v. Maynard,* 222 Kan. at 514. See *Turner v. Maschner,* 11 Kan. App. 134, 715 P.2d 425 (1986). Here, prison officials have determined that, if an inmate refuses an employment opportunity, refuses to transfer to BCH, or does not initiate a transfer from ACH, he is "incapable of benefiting" from rehabilitation for a period of 120 days. Opportunity for rehabilitation

is not denied, but merely interrupted; [*22] therefore, the 120-day rule is not an unreasonable denial of the inmates' rights under state law.

The statutory discretion conferred upon the Secretary accords with the legislative intent to leave the internal management and operation of the state correctional system to the sound discretion of the Secretary. *Foster v. Maynard,* 222 Kan. at 514. Here, prison officials had determined (1) it was a better security practice to house all unassigned inmates in one house, and (2) that such housing resulted in more efficient scheduling and lower cellhouse theft.

The housing practice and the 120-day rule do not deny the inmates any rights under state law. Nor is the Department determination that inmates who are deemed "incapable of benefiting" from rehabilitation should be excluded from programs for 120 days arbitrary or capricious. The rule is a quasi-disciplinary measure for those inmates who refuse to conform to rehabilitation regulations. The fact that the 120-day rule also assists in solving the problem of the lack of sufficient rehabilitative opportunities for cell inmates does not make the rule either unconstitutional or arbitrary and unreasonable. Although plaintiff inmates contended [*23] that the 120-day rule was applied arbitrarily and unreasonably to them, the trial court made no findings of fact on this issue.

Finally, the court ordered (1) that an interim legislative committee be formed to comply with the "standards and regulations set forth by law," (2) that the State promulgate regulations ensuring that all inmates receive employment and education, except those in the Adjustment and Treatment Center, and (3) that the State devise a plan so that "more jobs can be available to the inmates and more educational slots provided for them." The court gave the State 60 days to comply with these orders. By promulgating these orders, the trial court has usurped the power of the legislature and violated the doctrine of separation of powers.

Like the Constitution of the United States, the Kansas Constitution contains no express provision establishing the doctrine of separation of powers. However, we have recognized that the doctrine arises from the structure of the three-branch system of government. Both state and federal governments are divided into three branches, *i.e.,* legislative, executive, and judicial , each of which is given the powers and functions appropriate [*24] to it. Thus, a dangerous concentration of power is avoided through these checks and balances. Generally, the legislative power is the power to make, amend, or repeal laws; the executive power is the power to enforce the laws; and the judicial power is the power to interpret and apply the laws in actual controversies. See *State ex rel. Stephan v. Kansas House of Representatives,* 236 Kan. 45, 59, 687 P.2d 622 (1984).

In *Gawith v. Gage's Plumbing and Heating Co., Inc.,* 206 Kan. 169, 476 P.2d 966 (1970), this court established the test to be used to distinguish the judicial from the legislative power:

"A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." 206 Kan. at 178 (citing *Prentise v. Atlantic Coast Line,* 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67 [1908]).

The power to convene legislative study committees is a power specifically conferred on the legislative branch by statute. [*25] K.S.A. 46-1205; K.S.A. 46-1206. By ordering such a committee to be convened, the trial court has usurped these powers. By ordering the State of Kansas to promulgate regulations affording *all* prison inmates employment and education and by ordering the State to "devise a plan" making more jobs available for inmates, the trial court exceeded its powers by encroaching on clearly legislative functions.

CROSS-APPEAL

The inmates cross-appeal the trial judge's denial of their motion for class certification pursuant to K.S.A. 60-223. K.S.A. 60-223(a) allows one or more members of a class to sue or be sued as representative parties on behalf of all if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims of defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In order to fairly and adequately protect the interests of the class, certification is based in part on the qualifications of plaintiff's counsel. *Shutts v. Phillips Petroleum Co.,* 235 Kan. 195, [*26] 207, 679 P.2d 1159 (1984), *aff'd in part, rev'd in part* 472 U. S. 797, 86 L. Ed. 2d 628, 105 S. Ct. 2965, *opinion on remand* 240 Kan. 764, 732 P.2d 1286 (1987); 7A Wright, Miller, & Kane Federal Practice and Procedure: Civil 2d § 1766 (1986). Here, based on K.S.A. 60-223(a)(4), the trial court denied certification of the class, finding that "the plaintiffs, as laymen, have too limited knowledge of the legal principles which would allow them to represent fellow inmates in a class action." This decision was partially predicated upon this court's holding that inmates may not assume the role of an attorney and represent fellow inmates in civil court actions. *State ex rel. Stephan v O'Keefe,* 235 Kan. 1022, 686 P.2d 121 (1984).

We also note that the inmates' motion for class certification could have been denied on additional statutory grounds. No showing was made that the claims or defenses of the representative parties were typical of the class. K.S.A. 60-223(a)(3). Rather, these four plaintiffs raise specific issues relating to their termination from employment in the education department and their subsequent treatment as residents of "A" cellhouse. Since here the propriety [*27] of injunctive and declaratory relief requires consideration of the individual circumstances and requests of each member of the class, the requisite typicality does not exist. 7A Wright, Miller, & Kane Federal Practice and Procedure: Civil 2d § 1763, p. 203 (1986). The inmates' cross-appeal on this issue is denied.

Despite the fact that the judge denied class certification, he made findings of fact and rendered a decision and order applicable to the entire class (inmates at KSP) and ordered relief for the class. The underlying premise of the court's orders is that each prison inmate, as a member of that class, has a federal and/or state right to rehabilitation through vocational and education programs. The trial judge failed to recognize that petitioners are not only litigating the denial of rehabilitation, but also the *interruption* of their individual programs, their treatment as residents of "A" cellhouse, and their alleged denial of incentive pay, damages, and attorney fees.

Supreme Court Rule 165 (1987 Kan, Ct. R. Annot. 86), provides in part:

"In all contested matters submitted to a judge without a jury including motions for summary judgment, the judge *shall* state the [*28] controlling facts required by K.S.A. 60-252 and the legal principles controlling the decision." (Emphasis supplied.)

The requirements of this rule are for the benefit of the appellate courts in facilitating appellate review. When the record on review does not support a presumption that the trial court found all the facts necessary to support the judgment, and when the findings are too sparse and incomplete, the case will be remanded for additional findings and conclusions of law. See *In re Lett & Jackson,* 7 Kan. App. 2d 329, 331, 640 P.2d 1294 (1982); *Burch v. Dodge,* 4 Kan. App. 2d 503, 608 P.2d 1032 (1980).

Since the trial judge failed to determine all the issues raised by each inmate, we must remand the matter to the district judge to determine the remaining issues and then to make proper findings

of fact and conclusions of law.

Affirmed in part, reversed in part, and remanded for determination of the remaining issues.
