UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

WILLIE CARL SINGLETON, a monor by NEVA SINGLETON, his mother and next friend, et al.,

Plaintiffs,

vs.

BOARD OF COMMISSIONERS OF STATE INSTITUTIONS, et al.,

Defendants.

No. 63-243-Civ-J

PETITION FOR RECONSIDERATION

Comes now the Board of Commissioners of State Institutions, et al, Defendants, and respectfully request that this Honorable Court reconsider its Order dated April 9, 1964, denying Defendants Motion to Dismiss in view of the following:

1. Defendants' Motion to Dismiss was predicated upon the proposition that inasmuch as the named Plaintiffs were no longer in the Child Training Schools the legal questions raised by their Complaint had become abstract and moot and there were no parties to whom this Court could grant any relief.

2. It further appears to the Defendants that this Court was of the opinion that the instant suit could nevertheless still be maintained inasmuch as the named plaintiffs were members of a class, to wit: "All Negro juveniles confined and committed to the Florida State Schools under the jurisdiction . . . of the Defendants".

3. In effect, it appears that the Court considered the nature of the suit, to wit: a class action, as being determinative of the question of whether said suit could still be maintained notwithstanding the named plaintiffs' no longer being confined in the Training Schools.

4. Defendants respectfully submit that in so holding and in denying the Motion to Dismiss this Court overlooked and failed to consider the essential requirements necessary to maintain a class action which plaintiffs have failed to do in accordance with Rule 23 (a) Federal Rules of Civil Procedure. Said paragraph (a) provides as follows:

> "If persons constituting a class are so numerous as to make it impracticable to bring them all before the Court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
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> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
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> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
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> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

5. In Carroll v. Associated Musicians of Greater New York, 316 Fed. 2d 574, (1963), USCA 2d Cir., N.Y. the United States Court of Appeals for the Southern District held that two musicians who had been expelled from the musicians union after the commencement of their action, no longer had the standing to maintain a class action on behalf of other musicians in the said union. Chief Judge Lumbard concluded as follows at page 576:

> "Inasmuch as Carroll and Peterson have no standing to seek equitable relief on their own behalf because they are no longer union members, it follows that they cannot adequately represent a purported class of orchestra leaders, all of whom are members of the union. Judge Levet's dismissal of the class action was therefore proper."

6. The named plaintiffs, having since the commencement of their suit Petitioned for their own release, such Petition having been granted and the said plaintiffs having in fact been released from the Training Schools, they no longer have

the standing to maintain an action on behalf of a class of Negro juveniles alleged to be confined at the said Child Training Schools.

7. According to 3 Moore's Federal Practice, page 3423, an action is not a class suit merely because it is designated as such in the pleadings and whether it is or it is not depends upon the attending facts. In addition, it is also pointed out in Moore's Federal Practice that the representative party must be a member of the class;

> "The plaintiff or defendant representative must be a member of the class which he purportedly represents. Rule 23(a) provides that "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued . . ." Even without this provision, the real party in interest rule would require the same holding in many cases."

8. According to Plaintiffs' allegations, page 3 of their Complaint, their class action is predicated upon "common questions of law and fact . . . common grievances and common relief", indicating that it is in the nature of a "spurious" class action. Defendants respectfully submit that there are no common questions of law and fact inasmuch as the Plaintiffs occupy a different position, both factually and legally, from those in the alleged class, to wit: said Plaintiffs are no longer in the institutions, are no longer suffering an irreparable injury and are no longer in a position where any alleged substantial right is being violated.

9. In Conley v. Gibson, USDC, Texas, 29 FRD 519 (1961) the District Court made the following interesting observations at page 520:

'The sole question remaining is whether or not B.A. Watson and J. D. Conley have shown a deprivation of their individual rights. As to these remaining named Plaintiffs in this class action, Watson and Conley, it is well settled that they must be able to show injury/to themselves individually or they have no standing to represent the class. As the Fifth Circuit held in Brown v. Board of Trustees of LaGrange Independent School Dist., 187 F.2d 20,

> 'All of these considerations, however, are completely beside the mark here, for plaintiff has wholly failed to plead or prove any deprivation of his civil rights and it is elementary that he has no standing to sue for the deprivation of the civil rights of others. What the Supreme Court said in McCabe v. Atchison, T. and S.F. Ry. Co., 235 U.S. 151 at pages 161-162 & 164, 35 S.Ct. 69, 71, 59 L.Ed. 169, and quoted with approval in State of Mo. ex rel. Gaines v. Canada, 305 U.S. 337, 351, 59 S.Ct. 232, 83 L.Ed.208, has precise application here:
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> ' * * * The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant--not to others--which justifies judicial intervention. * * * ' "

In Anderson v. Kelly, U.S.D.C., Ga., 32 FRD 355, (1963), the District Court stated at page 357:

> "We will first consider the rule governing class actions and the cases which have construed the rule. The rule simply provides that where there are numerous aggrieved parties one or more of them may sue on behalf of all to enforce a right which is common to the Plaintiff and the group or class which he represents. If the representative Plaintiff sues to enforce a right which he alleges has been withheld from the class, then he is required to show that that right has been withheld from him also. Otherwise, he is merely a volunteer. He is not a member of the class and has no standing in court to represent the class. It is best stated by the United States Supreme Court:
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> > 'They (plaintiffs in a class action) cannot represent a class of whom they are not a part.' Bailey v. Patterson, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962).
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> The decision in the Bailey case, supra, follows an earlier decision of the Supreme Court which held:
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> > 'It is an elementary principle that in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it

make any difference that other persons, who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injuries to the complainant -- not to others--which justifies judicial intervention. (Cases cited)' McCabe v. Atchison, T.&S.F.Ry.Co., 235 U.S. 151, 35 S.Ct. 69, 59 L.Ed. 169.

The rule stated in the Bailey case, supra, and the McCabe case, supra, is enunciated in a decision of the Fifth Circuit Court of Appeals where it is said:

'* * * (P)laintiff has wholly failed to plead or prove any deprivation of his civil rights and it is elementary that he has no standing to sue for the deprivation of the civil rights of others.' Brown v. Board of Trustees of LaGrange Independent School District, 187 F.2d 20."

10. The case of Barrows v. Jackson, 346 U.S. 249, 97 L.Ed. 1586, 73 Supreme Ct. 1031 alluded to by the Plaintiffs in support of their standing to maintain the instant action on behalf of all/others is totally unconnected with the instant situation and particularly with the essential requirements of a class action. In the Barrows case, there was no allegation nor would the circumstances indicate any remote connection whatsoever with a class action. The question of concern in the Barrows case was whether the Respondent, Jackson, could rely on the invasion of the rights of others as a defense to an action brought against her. The U. S. Supreme Court permitted her to vindicate the Constitutional rights of a third party inasmuch as there would be a direct injury (damages) to respondent and it would be difficult for these third parties to present their grievances to any Court. It can be readily seen that such is not the situation existing in the instant cause of action.

WHEREFORE, in view of the absence of any showing by the Plaintiffs: that they are members of the class which they allege to represent; that the interest of the Plaintiffs are co-extensive of those of the alleged class; that the interest

of the Plaintiffs are compatible with those of the alleged class; that there exists an actual or justiciable controversy; that injunctive or any other relief could be granted so as to protect the rights or interests of the named Plaintiffs, it is respectfully requested that this Honorable Court reconsider its Order of April 9, 1964, denying Defendants' Motion to Dismiss and accordingly modify its Order granting Defendants' Motion to Dismiss.

Defendants respectfully request that the time for filing its Answer or other responsive pleading be tolled from the filing of this Petition until the disposition thereof.

Respectfully Submitted,

James W. Kynes
Attorney General

Gerald Mager
Assistant Attorney General

Attorneys for Defendants.

C E R T I F I C A T E

I HEREBY CERTIFY that a true and correct copy of the above Petition for Reconsideration has been mailed to the Honorable Earl M. Johnson, 625 West Union Street, Jacksonville 2, Florida, and the Honorable Constance Baker Motley and Honorable Jack Greenberg, 10 Columbus Circle, New York 19, New York, Attorneys for Plaintiffs, this 17th day of April, 1964.

GERALD MAGER