UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

EVERETT HADIX, et. al.,

Plaintiffs, No. 4:92-cv-110

v. HONORABLE ROBERT J JONKER

PATRICIA CARUSO, JOHN OCWIEJA and NICK LUDWICK,

Defendants.

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DEFENDANTS' REPLY TO PLAINTIFFS' POST HEARING BRIEF

Defendants contend that Plaintiff have made fundamentally erroneous arguments in this proceeding. These errors make most of their individual event anecdotes of risk, irrelevant. The few timely allegations Plaintiffs make fail to show class wide risk of harm and therefore do not support a finding of a current and ongoing constitutional violation.[1]

Plaintiff's Fundamental Errors

Error 1: Neither SPSM-CC or the original class of prisoners identified in the 1985 Hadix consent decree still exist.

[1] *PLRA,* 18 USC §3626(b).

The 1985 Hadix consent decree states in its introduction, paragraph 1 as follows:

> "1. This was an action brought pursuant to 42 USC 1983 and other applicable statutes seeking declaratory and equitable relief with respect to the conditions of confinement at the Central Complex of the State Prison of Southern Michigan, including the Reception and Guidance Center (hereinafter referred to as SPSM-CC)."

The Plaintiffs represented by Everett Hadix, et al in this consent decree can be found in the introduction section paragraph 2 as follows:

> "2. Plaintiffs are prisoners at the SPSM-CC and represent themselves and the class of all prisoners who are now or will be confined within said institution. Defendants are state officials charged under Michigan law with the operation of the SPSM-CC."

The consent decree further describes the facility whose conditions the consent decree was meant to remedy in the introduction section paragraph 3. Quoted in pertinent part as follows:

> "3. … The provisions contained herein are intended by the parties to assure the constitutionality of the conditions under which prisoners are incarcerated at SPSM-CC. The parties further recognize that this consent judgment in certain respect incorporates the present practice and procedures of the Michigan Department of Corrections."

All of the SPSM-CC cell blocks have been either emptied of prisoners and permanently closed or, in the case of 3 block of the Egler Correctional Facility (RGC), has been "turned out" so that its prisoners do not have access to the former central complex. The closure of the last occupied central complex cell block, cell block 5, occurred on November 2, 2007. The "turning out" of cell block 3 occurred in the early 1980s but that population continued as a general population group until late summer of 2001. At that time all of RGC, including cell blocks 1, 2 and 3 became the Michigan Department of Corrections Reception Center for male prisoners. At that time cell block 7, part of the original SPSM-CC was still open and occupied and used as an Annex to the Reception Center. Therefore, in late summer of 2001 it was fair to say that cell block 3 and even the other cell blocks at RGC were being operated as support facilities as

SPSM-CC 7 block. However 7 block closed by the end of July 2007 and has remained closed to this date, therefore, there is no open and prisoner occupied SPSM-CC. Because there is no open and occupied SPSM-CC there are no "support facilities" providing supporting services to SPSM-CC. From a prisoner's point of view there are no conditions of confinement in existence in the former SPSM-CC as SPSM-CC is empty.

The fact that SPSM-CC is empty also proves that there are no Hadix class members confined in SPSM-CC. Therefore there are no Hadix class members currently subjected to any conditions of confinement in SPSM-CC since neither any Hadix class members are in SPSM-CC nor is the complex operated with the intention of providing conditions of confinement to prisoners, there is no case or controversy regarding compliance with the Hadix consent decree provisions that involves either Plaintiff Hadix class members or the conditions of confinement the consent decree was meant to remedy. Therefore, Defendants contend that not only should the limited mental health issue reopen in this litigation by the court's November 13, 2006 decision be dismissed, but the entire consent decree should be declared moot and terminated.

Error 2: Defendants' compliance with the November 13, 2006 order and preliminary injunction (hereafter 11/13/06 order) does not justify Plaintiffs' simply moving on to new allegations of "concern".

The November 13, 2006 order and preliminary injunction required the following:

A. The defendants shall immediately cease and desist from the practice of using any form of punitive mechanical restraints within Hadix facilities.

B. The defendants shall work to develop to a staffing plan for adequate psychiatric and psychological staffing at Hadix facilities to ensure that routine and emergent psychiatric and psychological services are provided in a timely way.

C. The defendants shall work to provide daily psychologists or physiatrist rounds in the segregation unit at the Hadix facilities.

D. The defendants shall work to develop protocols for mental health and medical staff and shall require weekly conferences of the two disciplines.

E. Defendants shall include necessary training to prevent staff and administrative indifference to the provision of care.

Defendants have accomplished each of these activities or changes in policy and practice as previously described in Defendants initial Proposed Finding of Fact and Conclusions of Law (Docket No. 2824) and Defendants' Post Hearing Brief with Proposed Finding of Fact and Conclusions of Law (Docket No. 2829). Plaintiffs do not argue that Defendants are using any form of punitive mechanical restraints within a "Hadix facility" (for the purpose of this argument Defendants acknowledge Plaintiffs' assertion of the Reception and Guidance Center Dwayne Waters Hospital and C-Unit along with the dialysis unit at the Ryan Correctional Facility (RRF) as "Hadix facilities").

However as an example as a drift in the Plaintiffs' argument Plaintiffs are seeking to address the procedure for dealing with medical restraints, thought to be necessary ion order to provide needed medical care and not for punishment as a "mental health issue". Defendants contend this is outside the limited mental health issues mandated by the 11/13/06 Order. That order in its introductory paragraph stated:

> "IT IS HEREBY ORDERED that Plaintiffs' Motion to Reopen Judgment Regarding Mental Health Care and Issue a Preliminary Injunction (Dkt No. 2102) is GRANTED and section II.B of the Consent Decree is reopened **limited** to the provisions of this Order and Preliminary Injunction."[2]

[2] Emphasis added.

In a similar fashion Plaintiffs appear to have reviewed the 11/13/06 order's requirement of daily psychologist rounds "… in the segregation unit at the Hadix facilities, …" as implying any restricted movement beyond basic general population movements should be considered a segregation unit, even though the 11/13/06 order which had clearly contemplated the RGC as being a Hadix facility identified only the segregation unit in JMFs 6 block as the unit for which daily psychologist rounds were to be done. It appears that because Defendants have voluntarily applied the daily psychological rounds to the special management housing units in one block of the RGC, Plaintiffs have then assumed that the 11/13/06 provisions applied to the SMHU. Of course 1 block, which contains the SMHU, was never part of SPSM-CC. This logic, as applied by Plaintiffs would allow them to argue that that Defendants voluntary establishment of daily business day PSU rounds at the Baraga Correctional Facility since March 2008 may subject that activity to the Hadix Plaintiffs scrutiny. Such a drastic extension should of course be rejected by the Court just as it should reject the Plaintiffs' less drastic extension of the 11/13/06 of daily PSU rounds in "the segregation unit at the Hadix facilities" to the SMHU.

The November 13, 2006 order of weekly conferences to include mental health and medical staff which would include but not be limited to the treatment of prisoners in the segregation unit to allow the exchange of information between these disciplines, was clearly meant to apply to the population in JMF including JMF segregation unit to address what the Plaintiffs have referred to as "stove piping" between the disciplines. These were ambulatory settings with JMF closed the only ambulatory settings left in Plaintiffs' version of the Hadix facilities would be RGC. There is no question that RGC medical and mental health care staff should conduct weekly case management meetings to discuss the care of prisoners of concern. Plaintiffs would attempt to expand this idea of case management meetings to the Dwayne Waters Health Center inpatient setting. Turning for a moment to the case that the Plaintiffs and the court

refer to PH, that issue was appealed to the Sixth Circuit by the Defendants and was part of the remand ordered to this court. The argument turns on the parties interpretation of the State protected right of the individual in Michigan to refuse medical care including mental health care even up to the point of death, if that person is of sufficiently sound mind to make rationale choices about their care. It is not inherently irrational to choose death by a means or a location of your control over life and prolonged suffering simply because the outcome of one's choice is death. That was PH's situation. The law related to this issue has been presented to the court in Defendants' Initial Proposed Finding of Fact and Conclusions of Law (Docket No. 2824). Therefore, the requirement of weekly case management meetings including mental health and medical staff originally established for the ambulatory setting in JMF and now actually applied to the ambulatory setting at RGC Plaintiffs would attempt to impose on the inpatient setting on Dwayne Waters Health Center, where medical and psychological staff routinely confer sequentially and sometimes jointly on all the cases.

There is no dispute that the Defendants have completed training for staff to prevent staff administrative indifference to the provision of care called "managing offenders in our care" and known as identifying prisoners in distress.

On August 20, 2007, Defendants submitted their plan for adequate psychological and psychiatric staffing at Hadix facilities to ensure that routine and emergent psychiatric and psychological needs are provided in a timely way. As to those emergency psychological/psychiatric needs that occurred during the regular business day, the onsite psychiatrist or PSU staff responded as described in the testimony of Roy Calley, Craig Crawford, Dr. Rome and as demonstrated by Plaintiffs' plan Dr. Metzner. As to emergent psychological and psychiatric needs that occurred after normal office hours Dr. Rushbrook described the establishment in operation of the on-call psychiatrist system. That has provided responsive

psychiatric services on an emergent basis for more than a year. As to the plan for adequate psychological and psychiatric services for routine care the Defendants have given notice that they have fully staffed the PSU unit with psychologists qualified in Michigan and experienced in fact in assessing and diagnosing the existence of mental illness in prisoners arriving at the RGC. At the time of the hearing (April and June 2008) the Defendants had three full-time psychiatrists providing the services to just RGC, DWHC and C unit. Admittedly that has since fallen to 2 and one-half psychiatrists as Dr. Thai is no longer working for the Michigan Department of Corrections (for reasons unrelated to his practice of psychiatry) and Dr. Kahn left to take another position in another state. Dr. Kahn has been replaced full-time with a new psychiatrist with corrections experience and Dr. Thai has been replaced, half time, with another psychiatrist with corrections experience.

This alteration is a mix of available psychiatrist is a consequence of professional life in this field, it is difficult to find a psychiatrist who will work for available salaries or in a state correctional facility on a long term basis. One remedy for that unavailability of psychiatrist services is to make a lesser demand on the time of the psychiatrists who are there. That was not the goal that has turned out to be the result of the Defendants psychotropic bridge order initiated in late February 2008. This the procedure that Plaintiffs' witness, Diane Childress, admitted would have prevented the disruption in psychotropic medication for her son in the spring of 2007 and could well have prevented most of subsequent difficulties. This is the procedure that Dr. Metzner described as possibly being over inclusive, that Dr. Rome believed was a very solid way to maintain stability in status quo for identified mentally ill patients and that Roy Calley testified increased the OPMTs case load from about 7 percent to over 16 percent of the incoming RGC population. Add to that percentage those additional prisoners who don't come in with prescribed mediations for mental illness but are instead found by the universal screening of the as yet

unidentified as mentally ill prisoners and the prisoners who may make it on to the on team mental health team case load will only go up from Mr. Calley's 16 percent as of April 2008. Plaintiffs laud Dr. Metzner's concerns about the need for applying clinical judgment to both continue psychotropic medications and/or find its appropriate doses or to wean prisoners off psychotropic medications. And, the use of clinical judgment to identify prisoners who are in need of mental health services. Defendants agree and are doing just that.

Defendants have used the option of continuing prescribed psychotropic medications for prisoners arriving in RGC to minimize the disruption to the treatment of some other clinician had ordered. In addition Defendants have initiated the mental health screening protocols to identify both at the initial day of intake and again through the mental health appraisal on days 2 through 4, any prisoners who need to be referred for a more intense assessment and/or treatment. This process has allowed the Defendants to focus on using its qualified diagnostic staff for the screening process and thereby being able to more efficient identify prisoners in need of medication who can then be referred to psychiatrists without having the psychiatrists spend unnecessary time with prisoners who are not on psychotropic medications.

Therefore limiting the issue to the issue that was present to the court by the 11/13/06 order, which was presented under very different circumstances of affected population and facilities, Defendants contend that Plaintiffs efforts to expand beyond the scope of the November 13, 2006 order should be rejected. Defendants are in compliance with that order and an order should be entered terminating prospective relief regarding mental health.

Error 3: Plaintiffs have relied on a few scattered anecdotes from 2006 and 2007 in a failed attempt to show a current and ongoing constitutional violation(s) in 2008.

Plaintiffs rely heavily on a reinterpretation of some cases going back to early 2006 and mostly in 2007 by Dr. Walden, Plaintiffs' internist medical expert, to try to assert that psychiatric

care could have resulted in better outcomes for some prisoners with terminal diseases. Dr. Pandwy, the acting Chief Medical Officer for the Michigan department of Corrections with wide ranging practical experience in emergency rooms, pediatric care and general medicine reviewed many of those same cases and found no short fall in necessary psychological or psychiatric care. Craig Crawford, the outpatient mental health team supervisor and since June 30, 2008 the Unified Mental Health Supervisor, also reviewed many of the cases Dr. Walden relied on and found no shortage of psychiatric care. Plaintiffs also place great reliance on the report of Dr. Walsh which relied on data from late 2006 and early 2007 for asking for remedies that Dr. Walsh himself did not practice when he was the Director of Psychological Services at the Reception Center. While Dr. Walsh opined that he believed there was a risk of harm to the current RGC population he could define any difference in the current level of the psychological and psychiatric care provided to the RGC population and had been provided to that population in January 2001 when the mental health provisions in this litigation were terminated as there were then no current and ongoing constitutional violations. That, of course, was long before the initiation of the Department's psychotropic bridge mediations protocol and, of course, going forward – the new mental health screening and appraisal processes, finally, Plaintiffs place great emphasis on the generic comments of Dr. Kupers coupled with his walk around assessments and diagnoses of prisoners he had pre-selected in JMF, SMT and to a much lesser extent RGC. However, even Dr. Kupers when the question was posed to him directly from the court could not put any kind of a number on what he believed to be the risk of harm to the current RGC population from the way Defendants provided mental health services.

In order for a class wide remedy to be ordered in a conditions of confinement case, there must be a demonstration of a class wide injury. At most Plaintiffs have offered speculation that somebody, somewhere at some time in the future may be harmed by insufficient attention to their

mental condition. While Defendants agree that this is a possibility in RGC and in every human establishment, Defendants contend that the Plaintiffs have fallen woefully short of demonstrating the presence of a current and ongoing constitutional violation represented by a real risk of harm to the class of Hadix prisoners. It would be more proper to rely on Plaintiffs' offer to evidence as a demonstration that there is no class wide injury.

Defendants Final Citation Modifications

Finally, Defendants update the record citations to 4 paragraphs in Defendants' Second Amended Post-Hearing Proposed Finding of Fact and Conclusions of Law Related to the April 28-30, and June 11-12, 2008 Hearing Regarding Mental Health. Those 4 paragraphs with the updated citations (originally included in the Defendants amended brief field July 23, 2008) are as follows:

26. Defendants have also undertaken and provided training to prevent staff and administrative indifference to the provision of care. This training was called "Offenders in our Care" (identifying prisoners in distress) training and was provided to all staff who would have contact with prisoners in the JMF administrative segregation unit and also to those staff in RGC who would have contact with the prisoners in the SMHU. (Metzner, Tr. I, pp. 30-31; Rome, Tr. VI, pp. 964-965; Baker, Tr. III, p. 460).

31. Following the initial intake health screening, and assuming no acute problems are identified, the prisoner goes to dress-in and formal identification including issuance of the ID card. If a prisoner arrives at RGC with psychotropic medications that the prisoner brings with him from the jail, or reports that he has a current prescription for psychotropic medication, and these medication orders can be confirmed, the prisoner is referred to an MP so that those medications may be immediately continued. This continuation of medication process had not been consistent in 2006 or 2007 because the practice had been to refer such a prisoner to an

OPMHT psychiatrist who would then make a decision whether a medication should be issued, discontinued or changed based on an initial face to face interview. (Calley, deposition, pp. 147-176; Calley, Tr. I, pp. 128-129).

34. Prisoners arriving at RGC who have a confirmed psychotropic medication prescription or who have a history of being prescribed psychotropic medications are automatically put on the OPMHT case load. March 2008 is the first full month in which the mandatory bridge order was in effect. In that month the admissions to the OPMHT case load in RGC went from 141 in February to 163 in March. (Defendants' Exhibit SS; Calley deposition, pp. 147-176).

35. For the most recent three-month period for which data was available (January-March 2008) there were 515 referrals to the OPMHT representing 18.7% of the reception population. Of those 515 referrals, 428 were admitted to the OPMHT case load. That admission rate equals 83% of the referrals and 15.5% of all of the reception prisoners arriving in RGC in that three-month period. (Defendants' Exhibit SS; Calley Tr. I, pp. 156-158).

Relief

Wherefore, for all of the above stated reasons and for those reasons previously set forth in Defendants' initial Proposed Finding of Fact and Conclusions of Law and Plaintiffs' post hearing brief, Defendant respectfully requests that this court find that the Hadix consent decree should be terminated in its entirety because the Hadix class as originally defined nor the conditions of confinement meant to remedy any longer exist.

If the court is not inclined to reach the complete termination issue at this time, then the court should at least terminate all prospective relief for mental health for the reasons that the Defendants have meant the requirements of November 13, 2006 there is not current and ongoing

constitutional violation concerning the provision of mental health care to the prisoners in the RGC, DWHC, or C unit.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on August 4, 2008, the foregoing paper was presented and uploaded to the United States District Court ECF System which will send notification of such filing to the attorneys of record listed herein and I hereby certify that a copy of this same document(s) was mailed by US Postal Service to any involved non-ECF participant.

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