No. 09-1424

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EVERETT HADIX, et al,

Plaintiffs-Appellants,

v.

PATRICIA CARUSO, et al,

Defendants-Appellees.

Appeal from the United States District Court
Western District of Michigan, Southern Division

CORRECTED RESPONSE BRIEF FOR DEFENDANTS-APPELLEES

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Statement in Support of Oral Argument

Defendants-Appellees request that they be allowed oral argument as this appeal involves substantial history, factual and legal complexity, such that oral argument may assist the Court in evaluating this appeal.

Jurisdictional Statement

Defendants-Appellees accept Plaintiff-Appellants' Jurisdictional Statement, adding only that, with SPSM-CC closed, all of the Plaintiff class members have been removed from SPSM-CC. Accordingly, the case below should be dismissed as moot.

Counter-Statement of Issues Presented

I. **Should the Trial court's findings that Defendants complied with the November 13, 2006 preliminary injunction, after considering five days of testimony and several volumes of records, be affirmed?**

Defendants say:"Yes"

Plaintiffs say: "No"

(This discussion responds to Plaintiffs' issues I, II, IV, and V)

II. **Should the trial court's determination that the prisoner populations of the Egeler Correctional Facility and the Duane Waters Health Center were not subjected to deliberately indifferent mental health care, be affirmed?**

Defendants say:"Yes"

Plaintiffs say: "No"

(This discussion responds to Plaintiffs' issues I, II, IV and V)

III. **Should there be a modification of the *Hadix* Consent Decree where there has been a determination based on the facts presented that no constitutional violation exists?**

Defendants say:"No"

Plaintiffs say: "No"

(This discussion responds to Plaintiffs' issue III)

Counter-Statement of the Case

As of November 2, 2007 all of SPSM-CC was closed and no *Hadix* class members, as defined in the *Hadix* Consent Decree, remained at the facility. Therefore, enforcement of the few remaining, unterminated, provisions of the *Hadix* Consent Decree is moot and this case should be dismissed.

A. All of SPSM-CC has been closed. Accordingly, Duane Waters Hospital and the Egeler Correctional Facility, which were made a part of this case as support facilities to SPSM-CC, no longer have Consent Decree facilities to support.

In the section of the *Hadix* Consent Decree entitled "Introduction" ¶1, the 1985 Consent Decree states the purpose of the Consent Decree:

> [T]his was an action brought pursuant to 42 USC §1983 and as 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 as SPSM-CC).

The "Reception and Guidance Center" referred to above was the former 7-Block. 7-Block was one of the boundary cell blocks (cell blocks 3, 4, 5, 6, 7, and 8) of the Central Complex of the SPSM-CC.

The Consent Decree defines the plaintiff class members as "prisoners at the SPSM-CC and represent themselves and the class of all prisoners who are now or will be confined within said institution."[1]

[1] 1985 Consent Decree, Introduction, ¶2.

On May 13, 1985 the district court accepted the Consent Judgment and entered an Order applying the Consent Decree to the following facilities:

> Due to anticipated structural changes which may result in renaming of certain portions of the facility at issue in this lawsuit, State Prison of Southern Michigan, Central Complex, including the Reception and Guidance Center, shall be defined as "all areas within the walls of the State Prison of Southern Michigan at the time this cause commenced and all areas which will supply support services under the provisions of this consent judgment, for example food service and the boiler plant operating." (E.D. R. 213).

At the time of the 1985 Order, the parties contemplated the possibility that some of the portions of the SPSM-CC would be separated into different facilities but stay within the walls of the overall complex. Nevertheless, the area that was targeted by the Consent Decree was clearly all areas within the walls of the State Prison of Southern Michigan (SPSM) at the time this cause commenced in 1980. Using the home plate shape from a baseball diamond to describe the shape of the greater State Prison of Southern Michigan, then SPSM-CC consisted of that area inside the home plate shape that was bounded by four cell blocks (4, 5, 6 and 7) making up the base of the home plate and then one of three cell blocks extending up each side of home plate (3 block on the left and 8 block on the right). At the time this action was filed in 1980, all of the prisoners housed in those cell blocks exited from those cell blocks into the central space that is the interior of home plate. This was known as Central Complex (SPSM-CC).

The May 13, 1985 Order included those areas subject to the provisions of the Consent Decree which would ".... supply support services under the provisions of this Consent Judgment, e.g. food service and boiler plan operations." (E.D. R. 213). For such time as the facilities of the SPSM-CC were open, Defendants concede that the Duane Waters Health Center (DWHC) would be an area which supplied services to SPSM-CC and its population of prisoners under the provisions of the Consent Judgment.

An October 5, 1989 Order (E.D. R. 656) quotes the May 13, 1985 Order describing the facilities covered by the Consent Decree and further extends the *Hadix* Consent Decree to all facilities supporting SPSM-CC: "It is hereby ordered that these areas specifically include all work areas within the Egeler Facility, all food service areas, housing unit Block 3 and the Duane Waters Hospital." This October 5, 1989 Order recognized that these additional areas were subject to the Court's oversight within the context of the Consent Decree because they provided support to SPSM-CC.

In an appeal from the trial court's 2002 decision regarding fire safety, the Defendants raised the question of whether cell blocks 1 and 2 of the Egeler Correctional Facility should be subject to the Court's oversight of the *Hadix* Consent Decree. This Court stated at page 8[2]:

[2] *Hadix, et al v Johnson, et al*, 367 F 3d 513, 518 (6th Cir, 2004).

> At the time of the entry of the Consent Decree, April 1985, SPSM-CC consists of blocks 3-6, 8, 11, 12 and its Administrative Segregation. [2 Block was a reception block, cell blocks 11, 12 and segregation were free standing cell blocks inside SMSM-CC's walls]. Blocks 1 and 2, on the other hand, were part of the north complex. Nevertheless, as stated above, at that time, the *Hadix* facilities were defined as "all areas within the walls of the State Prison of Southern Michigan at the time this cause commenced and all areas which will supply support services under the provisions of the Consent Judgment.

This Court was citing the "Order Accepting Consent Judgment" of May 13, 1985. This Court stated that "within [the] walls of the State Prison of Southern Michigan meant the Central Complex." Accordingly the question was whether blocks 1 and 2 are "areas which will supply support services." The court then noted: "While, of course, the delivery of support services may change over time, there is no need on the present record to declare those facilities as non-*Hadix* facilities." Therefore, this Court did not find that the trial court abused its discretion in holding cell blocks 1 and 2 of the Egeler Correctional Facility covered by the Consent Decree as support services to the SPSM-CC.

The 1985 Consent Decree describes the conditions of the facility that the Consent Decree was meant to remedy and the prison population meant to benefit by improvement in the conditions of incarceration at that location. Specifically, the Consent Decree states:[3]

> [T]he provisions contained herein are intended by the parties to ensure the constitutionality of the conditions under which prisoners are

[3] 1985 Consent Decree, Introduction, ¶3.

> incarcerated at SPSM-CC. The parties further recognize that this consent judgment in certain respects incorporates the present practice and procedures of the Michigan Department of Corrections.

Now, this Court is presented with a situation where the entire SPSM-CC has been emptied for nearly two years. The last prisoner left the "Central Complex" on November 2, 2007. Plaintiffs raise the argument that 3 block was originally "turned in" and part of Central Complex because, in 1980, its prisoners exited from their cells to the yard/recreational area into the interior of the home plate shape that comprised the SPSM-Central Complex. At present, however, 3 block has been completely changed and is merged with the support units of Egeler's 1 and 2 blocks. 3 block does not house any general population prisoners as it did in 1980. All of the remainder of SPSM-CC is closed and all of the SPSM-CC prisoners have been transferred. The result, for all practical pruposes, is that SPSM-CC no longer exists.

While some of the facilities meant to support SPSM-CC remain open, such as cell blocks 1, 2, and 3 and the DWHC, the only reason those support facilities were covered by the Court's oversight of the Consent Decree was because they supported the *Hadix* class members housed within SPSM-CC. Consistent with the trial court's reservation of the question in its March 31, 2009 Opinion and Order (W.D. R. 2903) this Court should dismiss this case as moot, as the population that

was subject to the terms and relief of the *Hadix* Consent Decree are no longer present in the SPSM-CC.

B. Before SPSM-CC was closed, the *Hadix* Consent Decree provisions related to mental health care were re-opened and a remedy ordered.

The 1985 *Hadix* Consent Decree contained provisions regarding mental health care (section II.B.). The *Hadix* Consent Decree mental health provisions were dismissed (terminated) in January 2001. More than 5 1/2 years later, the trial court entered its November 13, 2006 Opinion and Preliminary Injunction. (W.D. R. 2187). That Opinion and Preliminary Injunction stated:

> IT IS HEREBY ORDERED that Plaintiffs' Motion to Reopen Judgment Regarding Mental Health Care and Issue a Preliminary Injunction (dkt #2102) is granted and section II.B. of the Consent Decree is reopened **limited**[4] to the provisions of this Order and Preliminary Injunction.[5]

The reopening of section II.B. of the Consent Decree was limited to the following four issues:

a. Mandatory cessation of using any form of punitive mechanical restraints within *Hadix* facilities and the development of practices, protocols and policies to enforce the limitation.

b. Defendants were required to work to develop a staffing plan for adequate psychiatric and psychological staffing at *Hadix* facilities

[4] Emphasis added.

to ensure that routine and emergent psychiatric and psychological services were provided in a timely way.

c. Defendants were to immediately work to provide daily psychologist or psychiatrist rounds in the segregation unit at the *Hadix* facilities.

d. Defendants were to work to develop protocols for the coordination of mental health and medical staff, and were to require weekly conferences of the two disciplines which would include, but not be limited to, the treatment of prisoners in the segregation unit and would include necessary training to prevent staff and administrative indifference to the provision of care.

No other aspect of section II.B. of the *Hadix* Consent Decree provisions regarding mental health, that had been completely terminated in January 2001, were reopened by the Court's November 13, 2006 Order and Preliminary Injunction. The Court's November 13, 2006 Order and Preliminary Injunction allowed Plaintiffs discovery as to mental health care in advance of a final injunctive hearing. That final injunctive hearing was held on April 28-30 and June 11-12, 2008.

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[5] Docket No. 2187, ¶1.

When the trial court entered the November 13, 2006 Order and Preliminary Injunction, the *Hadix* facilities included the following: a) Reception and Guidance Center (RGC) cell blocks 1, 2, 3 and 7, the Duane Waters Health Center (DWH); b) Southern Michigan Correctional Facility (JMF) (cell blocks 4, 5 and 6) (Part of 6-block of JMF was an administrative segregation unit); and c) Parnall Correctional Facility's (SMT) 8-block.

On April 2, 2007, the Defendants permanently closed SMT's 8-block in accord with the Court-approved Defendants' Alternative Fire Safety Plan (DAP). That DAP has been completed and is fully operational in cell blocks 1-3 of RGC. The parties stipulated that all prospective injunctive relief could be terminated regarding fire safety, (W.D. R. 2833) and the trial court accepted the stipulation under an entry dated September 16, 2009.

On July 13, 2007, Defendants permanently closed RGC's cell block 7, leaving only cell blocks 1, 2 and 3 (the entire left side of home plate) still in use. On November 2, 2007, the Defendants permanently closed JMF, including all of cell blocks 4, 5 and 6. This action also closed JMF's administrative segregation unit. As a result of this closure and the previous closures of the old segregation cell blocks in the early 1990s, the closure of 11 and 12 blocks in 2001, the closure of 8-block in April 2007, the July 13, 2007 closure of 7-block and the November 2,

2007 closure of 4, 5, and 6 blocks, SPSM-CC described in the 1985 *Hadix* Consent Decree no longer existed. These closures are permanent.

Even 3 block, which as not been part of SPSM-CC since it was "turned out" in the 1990s, ceased being a general population cell block in July 2001. After 7-block closed on July 12, 2007, there was no longer any SPSM-CC reception function. After November 2, 2007, there was no longer any SPSM-CC at all. Since November 2, 2007 there have been no general population prison facilities subject to the *Hadix* Consent Decree. RGC is the location at which new commitment prisoners and parole violation prisoners are returned to the Michigan Department of Corrections (MDOC). There, the prisoners undergo intake processing and health care and security classification screening. On average, within 21 days, these reception prisoners are then transferred to general population prisons throughout the State.

Since SPSM-CC no longer exists, the 1985 *Hadix* Consent Decree intented to address the conditions of confinement in SPSM-CC for the prisoners residing in SPSM-CC, should be terminated in its entirety.

However, both the November 13, 2006 order and the schedule for a hearing on the Defendants' compliance with the remedy required in that order were issued and scheduled before the November 2, 2007 closure of JMF. Therefore, the

Defendants were required to develop a mental health plan to address the shortcomings the trial court found in its November 13, 2006 decision.

Defendants developed such a plan and throughout the second half of 2007 and the first two and one half months of 2008, the parties conducted discovery and Defendants continue to refine this mental health plan and its implementation. The evidentiary hearing held in April and June of 2008 was to review the adequacy of the Defendants' Mental Health Plan, which was required to address the short-comings found in the November 13, 2006, decision.

Statement of Facts

Requirements of the Defendants' Mental Health Plan under the November 13, 2006 Order

Observation Cells

Defendants, having formerly used observation cells in the administrative segregation unit in JMF for placement of prisoners who were on a suicide watch, ended that practice in the summer of 2007. Defendants have established four suicide observation cells in DWH so that prisoners on suicide watch would not be moved to a segregation unit for observation. Defendants established a procedure requiring prompt mental health consultation and/or assessment of a prisoner on suicide watch to determine that prisoner's suicide risk and also to determine whether the prisoner needed to be transferred to a more formal mental health setting. (Defendants' Mental Health Plan, W.D. R. 2601).

Mechanical In-Cell Restraints

As required by the November 13, 2006 Order, the Defendants ceased any form of mechanical in-cell restraints within RGC and, before it closed, or JMF. There is no dispute between the parties on this point. Associate Monitor for Health Care, Dr. Cohen, agrees that no mechanical in-cell restraints are being used in any "*Hadix*" facility. (Cohen Tr. V, p. 786) For the purpose of this discussion, Defendants are using *Hadix* facility as shorthand for RGC and DWHC.

Mental Health Staffing Plan

Defendants developed and submitted a plan for adequate psychiatric and psychological staffing at *Hadix* facilities to ensure that routine and emergent psychiatric and psychological services are timely provided. Defendants have added at least three psychologist positions at RGC and implemented an on-call psychiatrist process so that at least one psychiatrist is available to RGC and DWHC within an hour on an on-call basis after business hours and holidays. Defendants maintain psychiatrist on-call logs to record the times when the on-call psychiatrists are called to consult on or assess a patient. (Defs' Trial Exhibit F) There is no dispute that Defendants' on-call psychiatrist process has been implemented and is working. (Cohen Tr. V, p. 804).

Daily Psychologist Rounds

Defendants provided daily psychologist rounds in the "segregation" unit of the *Hadix* facilities until the only true segregation unit, the one in JMF, closed November 2, 2007. The only remaining unit that remotely compares to a segregation unit are the 23 Special Management Housing Unit (SMHU) cells in cell block 1 of RGC. In addition to the case manager's office in the unit, which occupies one of those 23 cells, Defendants have established psychologist's office, which occupies another of the 23 cells. At the time of the April 2008 hearing, daily, PSU rounds had been made in RGC's SMHU for 17 months. After the rounds are made, a daily report is prepared and distributed. A copy of those reports for the month of March 2008 had been filed as Defendants' Trial Exhibit D. There is no dispute that Defendants have met this requirement of the November 13, 2006 order as carried out through the Defendants' Mental Health Plan.

Prisoners newly placed in the SMHU are called out by the psychologist for an out of cell evaluation. Those out of cell evaluations are noted on the daily rounding reports. (Defendants' Trial Exhibit D). Prisoners are placed in SMHU cells for a variety of reasons (Defendants' Exhibits MM-PP) with mental status review or observation being a very infrequent reason. (Baker, Tr. III, pp. 465-472, 473; Metzner, Tr. I, pp. 44-50, 51-52; Rome, Tr. VI, pp. 968-972).

Case Management Meetings

Defendants have developed protocols for the coordination of mental health and medical staff and require weekly conferences of the two disciplines which have included, but are not limited to, the treatment of prisoners in the "segregation unit" (SMHU). A sample of the case management meeting minutes from January 1, 2008 to April 15, 2008 have been submitted as Defendants' hearing Exhibit E. During these case management meetings, staff from the different disciplines, including medical, custody, psychological services unit (PSU) and psychiatry Outpatient Mental Health Team (OPMHT) meet to discuss cases that are of interest to any of the individual disciplines represented. (Crawford, Tr. VI, p. 927; Cohen, Tr. V, p. 788).

Staff Training

Defendants have also provided training to prevent staff and administrative indifference to the provision of care. This training, called "Offenders in our Care" (identifying prisoners in distress), was provided to all staff who would have contact with prisoners in the JMF administrative segregation unit (prior to its closure) 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).

RGC received 12,273 prisoners in 2005, 13,260 prisoners in 2006, and 12,039 prisoners in 2007. For the first three months of 2008, RGC received 2,775

prisoners. While the total number of prisoners who will be sent to RGC in 2008 was unknowable until it had happened, the trend made it reasonable to believe that RGC would receive between 11,100 and 12,000 prisoners in 2008. This represents an approximate 10% decline in prisoners arriving at RGC in 2008 as compared to 2006, while the PSU unit has three more psychologists than at the end of 2006, (Defendants Exhibit RR), which was the time period evaluated in the Trial court's November 13, 2006 decision.

Reception Processing

At present, the RGC intake process begins with the arriving prisoner's identification and an initial health intake screen. The initial screen is conducted by a registered nurse in a face to face interview with the prisoner. The nurse collects and enters information into the Electronic Medical Record (EMR) known as SERAPIS. This initial health screen is designed to determine present suicide risk, along with identifying current physical health status. As of June 30, 2008, a new intake screen was implemented by adding the last page of Defendants' Exhibit K onto the existing screen, which includes a mental status assessment of the prisoner. This addition to the screen has been normed for jail inmates as a mental status screen. (Defendants Trial Exhibit M).

Following the prisoner's initial health care and mental status screen, prisoners identified as a suicide risk are referred to the OPMHT and moved six feet

from the nurse's office into a glass-fronted observation room. Other RGC prisoners who have an acute/emergent health care need are referred to a medical practitioner (MP) right in the "bubble".[6]

After the initial intake health and mental status screening is complete, and assuming no acute problems are identified, the prisoner proceeds to "dress-in" and formal identification, including issuance of identification card. If a prisoner arrives at RGC with psychotropic medications that the prisoner brings with him from jail, or reports that he has a current prescription for psychotropic medication and these medication orders can be confirmed, the prisoner is referred to MP so that his medications may be immediately continued for at least ten days after the prisoner arrives at RGC. This continuation of medication process is known as a "bridge" medication order.[7]

Identification of Prisoner Requiring Mental Health Services

Prisoners arriving at RGC who have a confirmed psychotropic medication prescription or who have a history of being prescribed psychotropic medications

[6] The bubble is the term used to describe the whole intake area including the several holding rooms and the smaller rooms that branch out from those holding rooms where this initial screening process takes place.

[7] The bridge medication practice was initially implemented in mid 2007. Before then 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, Tr. I, pp. 128-129). This bridge order process had been vigorously pushed by Monitor Cohen and supported by Plaintiffs.

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' Trial Exhibit SS; Calley Tr. I, pp. 155-175, 188-194).

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' Trial Exhibit SS).

During that same period, there were 442 prisoners who arrived at RGC with combined psychotropic medications. For those 442 prisoners, it took an average of less than a day before they were seen by a psychiatrist and had their medications renewed. (Defendants' Trial Exhibit SS).

Between January and March 2008, there were 81 prisoners who arrived at RGC with psychotropic prescriptions, where those medications were discontinued after review by a psychiatrist. (Defendants' Trial Exhibits RR and SS) These medication discontinuations are expected titrating the dosage; and after at least one follow-up assessment with the psychiatrist.

Defendants use a quality assurance technique to determine that prisoners with a major mental disorder are adequately identified. This quality assurance technique is called a "Treatment Not Required" (TNR) study. The most recent complete study (data and analysis) covered the time period of March 31, 2007 through July 31, 2007. Since then, other TNR data has been collected but has not been reported in analyzed form. (Defendants' Trial Exhibit QQ).

From the data for the first quarter of 2008, there were 416 TNRs. That means that 416 prisoners were determined by either the PSU staff or the Corrections Mental Health Program staff (CMHP) to not require further treatment. Review of the TNR decisions out of RGC and DWH for that same time period showed that a very low percentage of prisoners referred to the OPMHT for evaluation and then determined to not need further treatment, were found within the next 60 days to have a major mental disorder. This low rate could, at most, be called the "omission rate" representing those prisoners who got through the screening process with a major mental disorder without detection. Such a conclusion, however, fails to consider that not all major mental disorders have constant symptoms that manifest themselves. Therefore, examples of subsequent admissions of prisoners initially found to be TNR may actually represent those prisoners' mental disorder subsequently manifesting itself and then being

discovered or recognized rather than "missed" or disregarded earlier. (Metzner, Tr. I, pp. 33-39; Calley, Tr. I, pp. 138-142 and 156-159).

The low post-TNR admission rate when compared to the entire TNR population represents a small proportion of those prisoners screened. Currently, approximately 18% of the RGC intake population is referred to the OPMHT. The number of prisoners initially evaluated and determined to be TNR, and then subsequently found to be expressing a major mental disorder, is substantially less than 0.1% of the entire intake population at RGC. (Defendants' Trial Exhibit QQ; Calley , Tr. I, p. 135-136).

Implement Revised Mental Health Appraisal

Defendants have implemented an additional mental health screening appraisal. (Defendants' Trial Exhibit L). This screen is used some time between the second and fourth day after a prisoner arrives at RGC. This mental health/functionality appraisal is used to identify prisoners who require further follow-up through either psychological, personality, or some other psychometric testing, and/or could benefit from referral to a medical specialist or to a psychiatrist or psychologist for a full mental status and functionality assessment. Additionally, this mental health appraisal allows Defendants to identify those prisoners who do not need further intensive psychological, psychiatric, or other mental function-related medical testing, thereby conserving resources Defendants have added these

screens to the existing EMR and will add them to the new EMR that they will use to replace the current SERAPIS EMR. Defendants have also created document templates that are now being filled out and copied directly into the SERAPIS EMR.

Summary of Argument

The trial court's November 13, 2006 decision reopening the mental health provisions of the Consent Decree, limited in scope to the issues identified in that decision, also mandated a remedy to resolve those same issues. At the time, portions of the SPSM-CC remained open and populated. The Defendants submitted their mental health plan in August 2007 covering the delivery of mental health services in SPSM-CC and facilities supporting SPSM-CC. Those supporting facilities were Egeler Correctional Facility (RGC) and the Duane Waters Health Center (DWHC).

By November 2, 2007 all of SPSM-CC had closed and all of the prisoner population had been permanently transferred out of SPSM-CC. SPSM-CC remains closed and there are no *Hadix* class members, as defined in the 1985 Consent Decree.

The evidentiary hearing held in April and June 2008 addressed whether the Defendants' Mental Health Plan, as implemented, complied with the trial court's November 13, 2006 decision. After the presentation of the parties' lay and expert

witnesses, and considering the presentation of the Associate Monitor for Medical Issues, the trial court made findings of fact and conclusions of law.

The trial court's unified findings of fact and conclusions of law issued March 31, 2009. The trial court found that Defendants' Mental Health Plan, as submitted and implemented, met the requirements of resolving the mental issues re-opened by the November 13, 2006 decision for the prisoner population covered by the plan. The trial court found there was no current and on-going constitutional violation for the population covered. The trial court terminated the mental health issues that had been re-opened, ordered the Associate Monitor's Jackson office closed, and reserved the question of whether the litigation should be ended based on the closure of SPSM.

These decisions should be upheld, as the trial court did not abuse its discretion on its credibility determinations, the trial court did not clearly err when it determined that the Defendants' response to serious mental health needs were not deliberately indifferent.

Argument

I. The trial court's findings that Defendants complied with the November 13, 2006 preliminary injunction, after considering five days of testimony and several volumes of records, should be affirmed.

A. Standard of Review

The trial court's findings are reviewed from an abuse of discretion.[8] The findings of the trial court should not be overturned unless there is a definite and firm conviction of clear error.[9]

B. Discussion

The trial court's November 13, 2006 order specifically limited the reopening of the *Hadix* Consent Decree section II.B. to the provisions of the [November 13, 2006] Order and Preliminary Injunction. (Dkt #2187) There is nothing in the November 13, 2006 order that allows Plaintiffs to ask for further relief beyond the five issues "reopened" by the November 13, 2006 order.

Since the November 13, 2006 preliminary injunction issued, until the March 31, 2009 decision finding Defendants in compliance with that preliminary injunction and terminating the mental health provisions, Defendants operated under the preliminary injunctive relief ordered by this Court. Defendants did this

[8] *US v Boring*, 557 F3d 707, 711 (6th Cir, 2009).
[9] *In re Scrap Metal Antitrust Litigation*, 527 F3d 517 (6th Cir, 2008).

by developing and implementing a Mental Health Plan. The applicable provision of the Prison Litigation Reform Act, 18 USC § 3626(a)(2), deals with preliminary injunctive relief. That section states: "In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires the preliminary relief, and be the least intrusive means necessary to correct that harm…."

The trial court recognized the restrictions of 18 USC §3626 (a)(2), and limited its review to the five limited areas set forth in its November 13, 2006 order.

PLRA, 18 USC §3626(b)(3) states: "Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the federal right, extends no further than necessary to correct the violation of the federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation."

The Plaintiffs are required to show that there is a class-wide injury before they can seek a class-wide remedy.[10]

[10] *Lewis v Casey*, 518 US 343; 116 S Ct 2174; 135 L Ed 2d 604 (1996).

During the five day evidentiary hearing before the trial court, and in their Brief on Appeal, Plaintiffs attempt to show a class wide injury as a risk of being denied adequate mental health services. To support their position, Plaintiffs offer the testimony of Dr. Kupers, but Dr. Kupers admits that he cannot put any number on the risk of harm to the current population. (Kuper Tr. II, pp. 409-424). Plaintiffs also rely on Dr. Walsh for the assertion that there will be harm in the present system because Defendants do not routinely request and receive mental health treatment records for the RGC prisoners.

Dr. Walsh then testified that even as a highly skilled clinical diagnostician with more than 30 years of clinical experience, he could do no better than a provisional diagnosis of a person when he was evaluating face to face, without that person's pre-incarceration mental health records. But, Plaintiff's expert, Dr. Kupers, said he could reach a diagnosis of a person during a personal evaluation without their pre-incarceration mental health record. (Kuper Tr. II, pp. 374-376). Dr. Metzner, Dr. Rome and psychologist Crawford also testified, like Dr. Kupers, that pre-incarceration mental health records were not necessary to diagnose a person during a personal evaluation. (Metzner Tr. I, pp. 96-97; Rome Tr. VI, pp. 956-957; Crawford Tr. VI, pp. 904-905).

Plaintiffs try to distinguish between the different clinical judgments of Defendants' Dr. Thai and other psychiatrists, but by presenting Dr. Walsh and Dr.

Kuper, they demonstrated their own acceptance of differences in professional judgment. These differences in professional judgment are a far cry from the "deliberate indifference" necessary to show a current and on-going violation. The trial court heard these witnesses' testimony and considered their credibility and the weight to be given to their views. The evaluation of conflicting testimony is not an abuse of discretion.

In regard to individual prisoners being able to refuse medical care that Plaintiffs, Plaintiffs' experts, or any person other than the prisoner patients themselves determines would be in that prisoner's best interest, the trial court looked to Michigan's law applicable to the right of a prisoner to refuse medical care. MCL 700.1105(a) defines an incapacitated individual as an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions. Michigan has long held to the principle that a competent adult patient has the right to decline any and all forms of medical intervention, including life-saving or life-prolonging treatment.[11] Also, in Michigan, if a physician treats or operates on a patient without consent, he has

[11] *Worth, et al v Taylor, et al,* 190 Mich App 141 (1991) citing *Cruzan v Director, Missouri Department of Health,* 497 US 261; 110 S Ct 2841; 111 L Ed 2d 224 (1990).

committed an assault and battery and may be required to respond in damages.[12] If there is a question about whether or not the person is incapacitated to the extent that they lack sufficient understanding or capacity to make or communicate informed decisions, Michigan law has provided a means to seek a determination through the filing of a petition for the appointment of guardian for incapacitated individual under MCL 700.5303.

Many of Plaintiffs' allegations of mental health shortcomings are in reality allegations that Defendants' staff either did not, or could not, overcome a patient's resistance or refusal of medical care, and that the Defendants' staff did not act sufficiently vigorously to persuade the prisoner patient to grant that consent, or did not act sufficiently vigorously to take the necessary steps to file a petition in a Michigan probate court seeking to have a judge determine that the person was incapacitated. Plaintiffs preface this argument upon the assumption that if the patient does not agree with the physician's treatment recommendation and there is any limitation in that prisoner's mental, emotional, or cognitive capacity, that it is Defendants' constitutional obligation to overcome that resistance in order to accomplish the care Plaintiffs, Plaintiffs' experts, or the Associate Monitor believe was appropriate. Defendants do not agree that this is their constitutional obligation

[12] *Banks v Wittenberg*, 82 Mich App 274, 279 (1978).

or even the proper course of action under Michigan law. The trial court agreed with Defendants. (March 31, 2009 Opinion, p 20-21, W.D. R. 2903).

Much of Plaintiffs' medical expert Dr. Walden's testimony was directed at the point. He said he reviewed all of the death cases he cited in his 2006 report. (Walden Tr. VI, p. 1015) from 2005 and part of his 2006 medical care report. Most prisoner deaths in the Michigan prison system occur at DWHC or at area hospitals because prisoners with severe or near-death health conditions are sent to DWHC. All death case files occurring at these *Hadix* facilities are provided to Plaintiffs.

Dr. Walden's review of these cases led him to conclude that he, as a family practice physician, would have preferred more palliative and counseling type social worker or psychologist care in about one half of those cases. (Dr. Pandya and psychologist Crawford disagreed with Dr. Walden's assertion of the need for more intervention by psychologists in these cases, or that it would have made a difference in the medical outcome of the cases).

The Defendants are required to not be deliberately indifferent to a prisoner's medical need.[13] If a serious medical need exists, and the Defendants identify that serious medical need and offer appropriate treatment, and the prisoner rejects the treatment, it is not a constitutional obligation for Defendants' to browbeat the

[13] *Estelle v Gamble*, 429 US 97 (1976).

prisoner into submission in order to obtain the prisoner's consent to provide treatment that the prisoner has indicated he did not want. This conclusion, of course, presumes that the prisoner is not incapacitated. If the physician believes that the prisoner is incapacitated, Defendants admit that steps should be taken in accord with Michigan's guardianship status to secure a determination of that incapacity. However, Defendants contend that the failure to accomplish an intervention guardianship in sufficient time to overcome a prisoner's refusal for medical care, which can only be initiated once the physician concludes that the prisoner really is incapacitated, does not constitute cruel and unusual punishment in violation of the Eighth Amendment. This is especially true where, in the examples cited in Plaintiffs' brief, the prisoner and his appointed counsel are contesting the determination of his lack of capacity and resisting the loss of the prisoner's right to object to the treatment.

Absent the requirement that the physicians, psychologists and psychiatrists always have a constitutional obligation to secure their version of appropriate treatment towards a prisoner patient, the issue of whether there is a current and ongoing constitutional violation in the form of a deliberate indifference to the class of *Hadix* prisoners' serious medical need as represented by the mental health needs of that class, must surely be concluded in the negative.

The trial court reviewed the four mental health issues to be addressed by the November 13, 2006 preliminary injunction. As to each issue, the trial court's opinion contains, in separate sections, its findings of fact. (March 31, 2009 Opinion, §E.1 "Mechanical Restraints", p 9-10; §E.2, "Mental Health Care Staffing" p 10-11; §E.3 "Daily Rounds", p 11-12; and §E.4 "Coordination of Mental Health and Medical Staff", p 12-13, E.D. R. 2903.) In each instance, the trial court summarized the evidence relied on in reaching its conclusion that Defendants had complied with the November 13, 2006 preliminary injunction. This factual determination was soundly supported at the hearing and should not be reversed on appeal.[14]

[14] *In Re Scrap Metal Antitrust Litigation*, 527 F3d 517, 528 (6th Cir, 2008).

II. Prisoners, as a whole, at RGC and DWHC were not subjected to deliberately indifferent mental health care

A. Standard of Review

Trial court's findings are reviewed for an abuse of discretion.[15] The findings of the Trial court should not be overturned unless there is a definite and firm conviction of clear error.[16]

B. Discussion

Plaintiffs contend that the trial court misunderstood the legal standard of deliberate indifference when applied to this class action litigation in the face of prospective injunctive relief. Notwithstanding its claims, however, the March 31, 2009 decision makes it very clear that the trial court did not base its decision on a finding that the mental health workers of the Defendant were unaware that prisoners may have a mental illness or may need mental health care. The trial court discussed in detail its reasons for finding that Defendants were not deliberately indifferent. Moreover, Plaintiffs' discussion of the bridge medication order process is but one example of how Plaintiffs misstate the appropriate legal review.

For example, the trial court determined that the bridge medication process did not constitute deliberate indifference. The purpose of the bridge order is to avoid sudden changes in psychotropic medications or sudden cessations of

[15] *U.S. v Boring*, 557 F3d 707, 711 (6th Cir, 2009).

psychotropic medications. The bridge medication order has been a significant success in doing just that. While the Plaintiff's argue that Defendants' expert Dr. Metzner, a Board Certified Psychiatrist, suggested that the extension of psychotropic medication without any clinical evaluation is not a "best practice", such an argument misses the point. The question before the court is whether the Defendants are deliberately indifferent to a prisoner's serious medical need. When a prisoner arrives at the RGC and informs the staff that he is on a certain psychotropic medication and the staff confirms that and continues that medication without interruption, the question is not whether that is the best possible psychiatric practice, but rather whether that continuation of the psychotropic medication constitutes deliberate indifference to his serious mental health needs. The trial court found that the bridge medication order quite obviously was not a deliberately indifferent practice.

The parties' presentations with regard to the 22 cell special management housing unit in Cell Block 1 of the Reception Center, and the trial court's discussion of that evidence, also highlights the Plaintiff's misunderstanding of the applicable legal standard to the issues before the court. Plaintiffs contend that if the Defendants learn that a prisoner could have a serious mental health need and that person is placed in the special management housing unit, the Defendants have

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[16] *Supra*.

committed per se deliberate indifference. Defendants contend, however, that a prisoner placed in the special management housing unit, but who also happened to have a mental health need, is not treated with deliberate indifference by the mere fact of being placed in the special management housing unit. A person is given an initial placement assessment by a trained clinical psychologist and is still seen during the daily psychologist's rounds of that unit. Moreover, the actual experience of the rounding psychologist (psychologist Baker) and psychologist Baker's supervisor, Crawford is that the Defendants' staff was anything but deliberately indifferent to any serious mental health needs of any prisoners in the special management housing unit. The psychologists and supervisors are well acquainted with the prisoners in the unit, are well attuned to their psychological needs, spend time during both their initial assessment and the rounds getting to understand the prisoners and make appropriate recommendations for follow up care or transfers when necessary.

While the parties' witnesses offered various interpretations of their own personal speculations, observations or the data collected during discovery, the trial court spent some time discussing how and why it evaluated the credibility of the witnesses in the way that it had. On pages 18 and 19 of its March 31, 2009 Opinion, the trial court explains specifically why it found the testimony of SMHU psychologist rounder Baker credible. On pages 19 and 20, the trial court explains

why it found credible the testimony of the Unit Chief of the Out Patient Mental Health Team, Craig Crawford, noting in both cases that that these persons were hands-on, provided direct treatment to the prisoners in these units, and that they expressed a good working knowledge of the prisoners and their conditions, including many of the subtleties and nuances of the prisoners' care along with an obvious and demonstrable concern for their well-being. The trial court contrasted this hands-on, practical awareness with that of Plaintiffs' expert, Dr. Kupers, who the trial court understood to be an advocate for a best practices level of care, which is quite different than simply whether or not deliberate indifference was present.

The trial court expressly discredited the testimony of Plaintiffs' medical expert, Dr. Waldon (March 31, 2009 Opinion, p. 21-22, E.D. R. 2903). The trial court noted that Plaintiffs' psychological expert, Dr. Walsh offered testimony that was more germane to the past practices [of the 1980's and early 1990's] in the *Hadix* facilities than the situation that presently existed.

For the first time in years the parties were provided the opportunity for a full hearing without any time limits. The trial court gave the parties the opportunity to call the witnesses they wanted, the experts they wanted, provided the parties the opportunity to discovery, to receive expert reports and to depose those experts. The trial court gave the parties the opportunity to review the Associate Monitor's report and to depose the Associate Monitor and his co-workers. The court gave

the Associate Monitor the opportunity to make a presentation to the court and let the parties cross examine him. The trial court gave the parties the opportunity to submit post findings of fact and conclusions of law and after that submission, the parties had the opportunity in August 2008 to present oral argument to the court to help further illuminate the meaning of the testimony and documentary exhibits that had been offered.

The trial court was presented with conflicting testimony and evidence. As the trier of fact, the trial court is responsible to fairly resolve these conflicts, to weigh the evidence, and to draw reasonable inferences from the facts to reach the ultimate factual conclusions.[17]

Based on the evidence presented, the trial court did not abuse its discretion in determining that Defendants did comply with the terms of the November 13, 2006 preliminary injunction, and that Defendants were not deliberately indifferent to the mental health care needs of the prisoner class members. Accordingly, the trial court's March 31, 2009, opinion and order should be affirmed.

[17] *U.S. v Boring*, 557 F3d 707, 711 (CA 6, 2009). (quoting *Tibbs v Fl.*, 457 US 31, 45 note 21 (1982).

III. There should be no modification of the Consent Decree where there is no Constitutional violation.

A. Standard of Review

Whether to modify a consent decree is a question of law and is reviewed de novo.[18]

Defendants do not contest the *Rufo v Inmates of Sufolk Co. Jail*,[19] standard for modifying a consent decree. However, absent a finding of a current and on-going constitutional violation, PLRA 18 USC §3626(a), there is no basis for modification. Here, the trial court found no constitutional violation. Therefore, no modification could or should be considered. To support their request that the Consent Decree needs to be modified, Plaintiffs argue that there may be a shortage of psych services in a non-*Hadix* facility (HVMF—Huron Valley Men's Facility) and that shortage could make it more difficult to transfer a *Hadix* mental health patient from a *Hadix* facility to HVMF. The constitutional violation Plaintiffs ask this court to make is that the possible shortage of beds at HVMF poses a theoretical, but unquantified risk to prisoners at DWHC and RGC that if they need

[18] *Miller v Currie*, 50 F3d 373, 377 (CA 6, 1995); *O'Brien v City of Grand Rapids*, 23 F3d 990, 998 (CA 6, 1994).
[19] *Rufo v Inmates of Sufolk Co. Jail*, 502 US 367, 381-82 (1992).

crisis stabilization, they may not be able to be moved immediately to HVMF. Even with a finding of a constitutional violation, the modification requested (Appeal Brief at p 47) requiring monitoring of beds available to *"Hadix"* prisoners asks, in reality, for the *Hadix* Court overseeing the empty SPSM-CC, to monitor the availability of mental health beds at the Huron Valley Center in Ypsilanti, Michigan to ensure that there are enough beds in Ypsilanti to receive prisoners from the empty SPSM-CC's "support facilities" (RGC and DWHC) in the event some prisoners there may need them. This makes no sense in the context of this litigation and should be understood for what it is – a request to use the *Hadix* litigation as a vehicle for a general, open-ended monitoring program over the MDOC. Plaintiff's argument should be rejected.

Conclusion

In 2001, the Mental Health provisions of the *Hadix* Consent Decree had been terminated. On November 13, 2006, the trial court issued an order reopening the Mental Health provisions of the *Hadix* Consent Decree on a limited basis to address the specific limited short-comings it found to exist. At the same time, the trial court entered a preliminary injunction requiring the Defendants to develop and implement a plan designed to address the issues the trial court found existed with regard to prisoner plaintiffs' mental health. In August 2007, Defendants submitted their Mental Health Plan, which they had begun implementing and continued to

implement. On November 2, 2007, the last of the SPSM-CC housing units closed and the last of the *Hadix* class members as defined in the Consent Decree permanently left the premises. After the evidentiary hearing related to prisoner mental health issues, the trial court found that the Defendants had complied with the obligation to submit a Mental Health Plan and that the Mental Health Plan and the Defendants' compliance with that Plan had satisfied the four issues of the November 13, 2006 preliminary injunction. Because the Plaintiffs asked for additional relief at this hearing, the trial court also considered whether the population in RGC and DWHC were subjected to deliberately indifferent mental health care. The trial court considered the evidence and the testimony, including the credibility of the witnesses, and determined that the prisoners residing in RGC and DWHC were not being subjected to deliberately indifferent mental health care. On March 31, 2009, the trial court terminated the prospective relief with regard to the Mental Health issues in the *Hadix* Consent Decree that had been reopened in the November 13, 2006 decision. Defendants contend that this decision should be affirmed.

Relief

WHEREFORE, for all of the above stated reasons, Defendants respectfully request that this Court affirm the March 31, 2009 decision of the trial court, which terminated all prospective relief with regard to Mental Health issues in the *Hadix* Consent Decree. Defendants also request that this Court recognize that the original SPSM-CC, having been closed, and all those persons who could be defined as class members under the *Hadix* Consent Decree having been transferred from the former SPSM-CC, the litigation involving the *Hadix* Consent Decree should be terminated as moot.

Respectfully submitted,

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Dated: October 5, 2009

Addendum – Designation of Record on Appeal

Defendants-Appellees, per Sixth Circuit Rule 28(d), 30(b), hereby designates the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.
EASTERN DISTRICT OF MICHIGAN 2:80-cv-73581		
Consent Decree	5/13/1985	R. 213
Order	10/5/89	R. 6560
WESTERN DISTRICT OF MICHIGAN 4:92-cv-110		
Order and Preliminary Injunction	11/13/06	R. 2187
Revised Mental Health Care Plan	8/20/07	R. 2601
Stipulation and Order	8/14/08	R. 2833
Opinion	3/31/09	R. 2903

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v.

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Defendants-Appellees.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed R Civ P 32(a)(7), the undersigned certifies that the accompanying brief complies with the typeface proportionally spaced 14 point Times New Roman with a type-volume limitation of no more than 14,000 words. There are a total of 7,936 words.

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CERTIFICATE OF SERVICE

I certify that on October 5, 2009, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will provide electronic copies to counsel of record.

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