

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

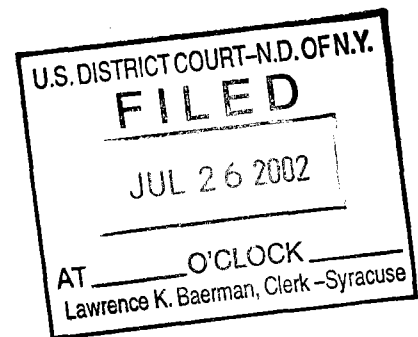
DAVID DONHAUSER,

Plaintiff,

-against-

GLENN S. GOORD, Commissioner, N.Y. DOCS
MARTHA E. YOURTH, CSW Guidance Spec.,
DOMINIC MARTINELLI, Sex Offenders Program
Counselor
SUE CARTER, S.C.C. Oneida Correctional
Facility

Defendants,



NOTICE OF MOTION FOR
PRELIMINARY AND
PERMANENT INJUNCTION
RELIEF [F.R.C.P. 65]

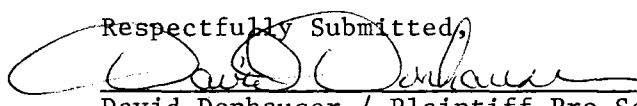
CASE NO.: 9:01-CV-1535
(DNH)(GLS)

SIRS:

PLEASE TAKE NOTICE, that upon the annexed Affirmation of DAVID DONHAUSER, sworn to or affirmed on this 26 day of ~~June~~, 2002, and upon the complaint herein, plaintiff will move this Court, Gary L. Sharpe, U.S.M.J., in room _____, United States Courthouse, 100 South Clinton Street, Syracuse, New York 13261-7367, on the _____ day of _____, 2002, at the forenoon or as soon thereafter as motion can be heard, for an order pursuant to Rule 65 (a) of the Federal Rules of Civil Procedures, granting injunctive relief to Plaintiff and/or Plaintiffs class.

DATED: Oneida, New York
July 25, 2002

Respectfully Submitted,


David Donhauser / Plaintiff Pro-Se
99B-1868
Oneida Correctional Facility
P.O. Box 4580
Rome, New York 13442-4580

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DAVID DONHAUSER,

Plaintiff,

-against-

GLENN S. GOORD, Commissioner N.Y. DOCS
MARTHA E. YOURTH, CSW Guidance Spec.,
DOMINIC MARTINELLI, Sex Offenders Program
Counselor
SUE CARTER, S.C.C. Oneida Correctional
Facility

Defendants,

AFFIRMATION IN SUPPORT OF
MOTION FOR PRELIMINARY OR
PERMANENT INJUNCTION
[F.R.C.P. 65]

CASE NO.: 9:01-CV-1535
(DNH) (GLS)

STATE OF NEW YORK)

)ss.:

COUNTY OF ONEIDA)

I, DAVID DONHAUSER, make the following affirmation under the penalties
of perjury:

I, DAVID DONHAUSER, am the plaintiff in the above entitled action, and
respectfully move this Court to issue an order granting plaintiff's motion
for preliminary and/or permanent injunction, to plaintiff and plaintiff's
class.

The reason for the relief I seek is the following:

1. Enjoined from taking any action(s) in retaliation or in retribution

against plaintiff for having filed and commenced the instant action, or from taking any action in an attempt to, or which would serve to, render the instant action moot, including, but not limited to; transferring plaintiff to another facility; or harassing him through the use of unwarranted searches and frisks of his person or property, or through the use of the inmate disciplinary process; or withholding plaintiff's good time for failure to participate in the sex offenders program; or, any other actions of a similar nature aimed at, or with the intentions of punishing plaintiff for having commenced the instant action or at preventing litigation on the instant action from proceeding.

2. Enjoined from continuing the current practice of requiring a detailed written account of an SOP participant's personal sexual history, biography, and description of the instant offense, where said participant is a recognized member of the class.

3. ENjoined from disseminating and information currently in existence which has been obtained from any document or information derived exclusively through SOP participation to inmate program facilitators, to corrections officers, to the Board of Sex Offender Examiners, to any District Attorney or other Prosecutor, to any Court for any purpose other than the instant action, or to any person, agency or entity not specifically identified herein.


4. Enjoined from utilizing any information obtained through participation in the SOP for any reason other than rehabilitative treatment, including, but not limited to, seeking an increased risk level determination; seeking criminal prosecution for uncharged or criminal actions of any member of the class or participant of the SOP which have come to light through said participation, seeking to withhold good time credits based upon said information, seeking to prevent release on parole, conditional release or maximum expiration date based upon use of said information; or, of any other used information which is intended to negatively affect or impact any member of the class or any

participant of the SOP in his reputation, ability to function in and out of society as a normal participant, eligibility to participate in or obtain programs, services, privileges, ect.

5. From taking any other action against the plaintiff which the Court deems to be inappropriate, unwarranted, arbitrary, injurious, until such time as a final disposition on the merits in this action has been reached.

WHEREFORE, I respectfully request that the Court issue a preliminary and/or permanent injunction as described above, as well as such other and further relief and may be just and proper to plaintiff and plaintiff's class.

EXECUTED THIS DATE: June 26, 2002



David Donhauser / Plaintiff Pro-Se
99B-1868
Oneida Correctional Facility
6100 School Road
P.O. Box 4580
Rome, New York 13442-4580

I hereby declare under penalties of perjury that the foregoing is true and correct to the best of my knowledge and belief.

EXECUTED THIS DATE: June 26, 2002



David Donhauser / Plaintiff Pro-Se

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DAVID DONHAUSER,

Plaintiff,

-against-

CASE NO.: 9:01-CV-1535

(DNH) (GLS)

GLENN S. GOORD, Commissioner, NY DOCS,
MARTHA E. YOURTH, CSW Guidance Spec.,
DOMINIC MARTINELLI, Sex Offenders Program
Counselor,
SUE CARTER, S.C.C. Oneida Correctional
Facility

Defendants,

MEMORANDUM OF LAW

Submitted by,



David Donhauser / 99B-1868

Oneida Correctional Facility

6100 School Road / P.O. Box 4580

Rome, New York 13442-4580

DATED: July 23, 2002

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE of AUTHORITIES	i
STATEMENT of the CASE	1
STATEMENT of the FACT	1-2
ARGUMENT: The Court should Grant the Motion for Injunctive Relief	2-3
CONCLUSION	3

TABLE OF AUTHORITIES

CASES:

	<u>PAGE</u>
CITIBANK NORTH AMERICA v. CITYTRUST 756 F2d 273 (2nd Circuit 1985)	2
JAYARAY v. SCAPPINI 66 F3d 36 (2nd Circuit 1995)	2
MARKOVITS v. VENTURE INFO CAPITOL INC. 129 F.Supp2d 647 (S.D.N.Y. 2001)	2
McKUNE v. LILE 536 U.S. _____ (2002)	3
TOM DOHERTY ASSOC. INC. v. SABAN ENTERTAINMENT INC. 60 F3d 27 (2nd Circuit 1995)	2

OTHER AYTHORITIES

Federal Rules on Civil Procedures Rule 65 (2) (b) (1)	2
United States Constitution Fifth Amendment	3
Black's Law Dictionary (7th Ed. 1999)	2

STATEMENT OF THE CASE

This is a civil rights case filed under 42 U.S. 1983 by a state prisoner DAVID DONHAUSER, asserting claims that the Sex Offenders Program in the New York State Department of Correctional Services are in violation of the Fifth Amendment guarantee against self-incrimination, the Fourteenth Amendment guarantee of Due Process, and equal protection, and the First Amendment guarantee of the right to privacy. The Plaintiff also claims allegations of punitive actions by the defendants in that they appropriate Good-Time for non-participation in the Sex Offenders Program, and other punitive actions such as new Criminal charges for revelations made during participation in the Sex Offenders Program.

The Plaintiff requests that the above referenced individuals be granted injunctive relief as members of a class of individuals who have been convicted of a sex related crime and who may suffer irreparable harm as a class from the respondents in the form of inappropriate, unwarranted arbitrary and/or injurious sanctions.

STATEMENT OF FACTS

The Plaintiff was charged with a sex related crime, but for convenience purposes he chose an " ALFORD " plea and never admitted guilt to the aforementioned crime. However, as per the state wide policy of the New York State Department of Correctional Services, an inmate who has been convicted of a sex related crime is required to participate in the Sex Offenders Program, There are other individuals similarly situated, in that they have taken an " ALFORD " plea, pled not guilty, but nevertheless found guilty after a jury trial, or charged, but never convicted of, any sex related crime, or found guilty after an administrative tribunal.

These individuals members in this class face the distinct possibility of irreparable harm and/or loss, which is imminent, and would/could occur prior

to a decision being made on the merits of this case.

ARGUMENT

Plaintiff submits that the individual members in this class (see Memorandum of Law dated June 26, 2002, submitted to this court) seek protection as a class in the form of temporary or permanent injunctive relief, in that the respondents may seek inappropriate, unwarranted, arbitrary and/or injurious sanctions against the individuals as a class.

Pursuant to Federal Rules on Civil Procedure, Rule 65 (2) (b) (1), the plaintiff seeks this relief in that he/as the class will suffer irreparable injury and/or loss. He is cognizant that as the movant he has the burden to justify the issuance of the injunction.

In MARKOVITS v. VENTURE INFO CAPITAL INC. (129 F.Supp2d 647, 655 [S.D. N.Y. 2001]) the Court held the legal standard to justify the issuance of a preliminary injunction, a movant has the burden of proving two factors: 1) the demonstration that if not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered. (see JAYARAY v. SCAPPINI 66 F3d 36,39 [2nd Circuit 1995], citing CITIBANK, NORTH AMERICA v. CITYTRUST 756 F2d 273,275 [2nd Circuit 1985]), and 2) the movant must show either; a) a likelihood of success on the merits, or b) sufficiently serious questions going to the merits to make them fair ground for litigation (see JAYARAY, supra @ 38).

The ase of the irreparable harm requirement may be met by showing that the harm is unquantable in monetary terms, and that the specter of harm must not be " remote or speculative, but actual and imminent". (see TOM DOHERTY ASSOC.INC. v. SABAN ENTERTAINMENT 60 F3d 27,37 [2nd Circuit 1995]). Further, the term irreparable harm as defined by Black's Law Dictionary (7th Ed. 1999) and quoting Elias Merwin's Principles of Equity and equity Pleading pages 426 - 427 (H.C. Merwin Ed. 1896) states: (... and if the loss of inconvenience to the plaintiff

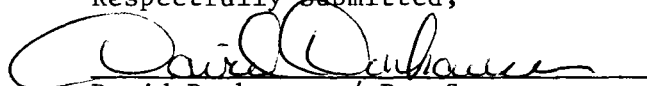
if the injunction should be refused would be much greater than any which can be suffered by the defendant...) most assuredly applies in this instant case. The harm which one would incur includes but is not limited to is, harassment (ie: unwarranted search of the body and property), or withholding " GOOD TIME " , for the inability to participate in the Sex Offenders Program (SOP) due to the probability of perjury prosecution associated with the requirement that one admit to the culpability of the crime. However, the deprivation of liberty (GOOD TIME), for non-participation SOP by the Parole Board remains one of the most unquantable factors relative to this request for relief. Further, the plaintiff contends that there is a direct and automatic causal connaction between non- participation in SOP and failure to gain discretionary release by the Parole Board and/or the loss of GOOD TIME. (SEE EXHIBIT A). This further supports the plaintiffs contention that the injunctive relief requested is sufficient to merit grounds for litigation.

In McKUNE v. LILE 9 536 U.S. ____ [2002] the Supreme Court made reference to the fact that the respondents decision not to participate in the Kansas SATP did not extend his incarceration or affect his eligibility for good time or parole (224 F3d 1182). This is not representative of the issues in this instant case. A major consequence of not participating in the NYS SOP is the loss of good time (SEE EXHIBIT B). This consequence for non-participation shows compulsion regrading self - incrimination and thus is a violation of the Fifth Amendment, which in turn makes it fair ground for litigation.

CONCLUSION

WHEREFORE, for the above stated reasons the plaintiff respectfully requests this Court to grant the relief as requested, and for any other such relief deemed just, appropriate, and proper by this Court.

Respectfully Submitted,


David Donhauser / Pro-Se

(3)

DATE: July 23, 2002

Exhibit

A

Name: DONHAUSEN, DAVID
DIN: 98B1866
NYSID: 05682654J

Facility: ONEIDA
Interview Date: 01/23/2002
Interview Type: INITIAL

Earned Eligibility Certificate: DENIED
Supervision Fee: ELIGIBLE
Certificate of Relief from Disability: INELIGIBLE

Parole Decision:
DENIED - HOLD FOR 24 MONTHS, NEXT APPEARANCE DATE: 01/2004

Conditions of Release/Staff Instructions/Reasons for Denial:

PAROLE IS DENIED. YOU ARE PRESENTLY SERVING TERMS FOR 2 COUNTS
BURGLARY 3RD DEGREE AND 1 COUNT RAPE 3RD DEGREE. THE BURGLARY RELATES
TO STEALING PROPERTY AT 2 SEPARATE CAR WASHES. THE RAPE REFERS TO
ILLEGAL SEXUAL INTERCOURSE WITH A 16 YEAR OLD GIRL. YOUR PRIOR
RECORD EXTENDS BACK TO 1987 WITH A NO ADJUDICATION BASED UPON PETIT
LARCENY AND INCLUDED 1 PRIOR CONVICTION FOR BURGLARY 2ND DEGREE, 6
HIDEWEAPONS AND A PAROLE VIOLATION. THIS HAS BEEN A CONSTANT
PATTERN OF LARCENY, CRIME AND RESISTANCE TO AUTHORITY. WE ALSO NOTE
THAT YOU HAVE NOT YET BEEN ABLE TO BENEFIT FROM A SEX OFFENDER
TREATMENT PROGRAM OR ART. THESE FACTORS DEMONSTRATE THAT YOU PRESENT
A SERIOUS THREAT TO COMMUNITY SAFETY AND WELFARE AND BELIE
DISCRETIONARY RELEASE.

IF OR:

I WILL SEEK, OBTAIN, AND MAINTAIN EMPLOYMENT AND/OR AN ACADEMIC/
VOCATIONAL PROGRAM.

I WILL SUBMIT TO SUBSTANCE ABUSE TESTING AS DIRECTED BY THE P.C.

I WILL PARTICIPATE IN A SUBSTANCE ABUSE TREATMENT PROGRAM AS
DIRECTED BY THE P.C.

I WILL NOT OPERATE ANY MOTOR VEHICLE, DRIVE FOR, RENT, OR POSSESS
(continued)

INMATE COPY

Exhibit

B

NYS Department of Correctional Services
SEX OFFENDER
COUNSELING PROGRAM


POLICIES AND PROCEDURES

OCTOBER 2001

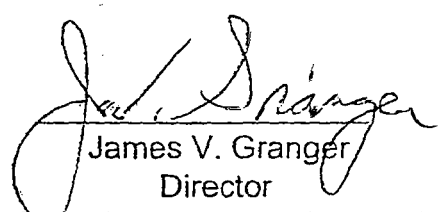
ONEIDA CORRECTIONAL FACILITY
LAW LIBRARY

FORWARD

The Policy and Procedure Manual for the Sex Offender Counseling Program embodies a statement of commitment and ethical standards towards the delivery of a quality sex offender counseling program in NYSDOCS. It is based upon the recognition that counseling and treatment programs for incarcerated sex offenders can be effective in reducing the re-offense rate, and that counseling efforts are focused on preventing victimization of the community and its citizens.



Frank R. Headley
Deputy Commissioner
Program Services



James V. Granger
Director
Office of Guidance & Counseling

October 2001

ONEIDA CORRECTIONAL FACILITY
LAW LIBRARY

Offenders and other treatment providers along the criminal justice continuum.

- That participants who disclose specific information regarding other sex crimes committed or anticipated will be reported to the appropriate authorities, so that victims will have closure and further victimization will be prevented.

Purpose of Policy and Procedure

The purpose of this Policy and Procedure is to ensure minimum standards of operation for NYSDOCS's Sex Offender Counseling Program. A variety of functions are served and have been established to:

- Provide concise, ethical standards to insure professionalism among those individuals working with the Sex Offender Counseling Program and thereby increase professional performance.
- Provide DOCS statewide consistency in its Sex Offender Counseling Program.
- Provide transferred offenders consistency between programs.
- Maintain efficiency and clarity in operation.
- Decrease the potential for legal suits by providing a framework within which DOCS can operate in a legally responsible fashion.

Program Goals

There are three main goals of the Sex Offender Counseling Program for offender participants. The sex offender is expected to:

1. Demonstrate acceptance of responsibility for his/her sexual offending behavior,
2. Develop and demonstrate an understanding of his/her cycle of sexual offending behavior,
3. Develop appropriate relapse prevention and intervention strategies.

ONEIDA CORRECTIONAL FACILITY
LAW LIBRARY

activities rather than rote memorization and verbalization of concepts.

- A willingness to abide by all prohibitions and restrictions ordered by the Court and/or recommended by the sex offender counseling staff.

By the end of Phase I of the Sex Offender Counseling Program, offenders should show substantial efforts toward achieving the qualities outlined above. If an offender cannot demonstrate the above, he/she is to be terminated from the program as unsatisfactory. While an offender may reapply for admission to the Program within a given time period, to be determined by sex offender counseling staff and not to exceed six months, the offender must demonstrate to counseling staff that attitudes, denial and behavior patterns counter-productive to the counseling process have changed.

ONEIDA CORRECTIONAL FACILITY
LAW LIBRARY

Program Refusal

An offender may choose to refuse participation in the Sex Offender Counseling Program. If the offender refuses to be available for the intake and assessment interview, or refuses to complete and sign all forms during the interview, or refuses to participate at any time before the Program begins, the Refusal Form should be completed. An offender who refuses the Program should be made aware of the negative impact his/her decision may have on the Earned Eligibility process, NYS Board of Parole decisions, Time Allowance Committee decisions, the Board of Examiners of Sex Offenders assessment, and other DOCS programs he/she may wish to participate in, such as the Family Reunion Program. The refusal of an offender to participate in the Sex Offender Counseling Program shall be noted clearly in a chrono entry in the offender's Guidance Unit file.

An offender who refuses the Sex Offender Counseling Program may be given one second and final opportunity to participate, after one year from his/her initial refusal but not within one year of his/her Conditional Release Date or thereafter, unless specified by a Time Allowance Committee that may withhold the earning of "good time" until the offender successfully completes the Sex Offender Counseling Program. In those instances where "good time" is withheld and the offender now wishes to participate, the offender will be referred to a Sex Offender Counseling Program but will not be given any priority status for admission and will be placed in the Program at the discretion of the sex offender counseling staff, when there may be a group opening not needed by another offender who has been awaiting placement in the Program and who has not previously refused the Program. It is the offender's responsibility to contact his/her assigned Corrections Counselor to ask for a second opportunity to participate. Until the offender makes this contact, he/she will continue to be considered as a refusal.

CORRECTIONAL FACILITY
SEX OFFENDER COUNSELING PROGRAM

WAIVER
OF
PARTIAL CONFIDENTIALITY

~~ONEIDA CORRECTIONAL FACILITY~~
~~LAW LIBRARY~~

I, _____, DIN # _____, understand that as a part of my Sex Offender Counseling Program and progress, it is necessary to share my progress and participation with others who will be supervising me on Parole or continuing to treat me in the community when I am released. This includes sharing any/all homework assignments, program evaluations, discharge summaries and other related materials of the Sex Offender Counseling Program. I understand that by signing this Waiver of Partial Confidentiality, I am granting permission to the Sex Offender Counseling Program staff to release these materials to the NYS Division of Parole, who will supervise my release, The Board of Examiners of Sex Offenders, who will evaluate my risk level, and any community organization or individual who engages me in sex offender treatment when I am released from NYSDOCS.

I also understand that any crime of detail I disclose, whether a crime I have previously committed and not been prosecuted for, or a crime that I am planning to commit, will be reported to the appropriate law enforcement agencies.

The Sex Offender Counseling Program Policy and the Waiver of Partial Confidentiality that I am signing has been explained to me to my satisfaction by the Sex Offender Counseling Program staff. I understand the policy and give my consent to waive partial confidentiality as set forth above.

Inmate's Signature

Counselor's Signature

Date

CC: Inmate Guidance File
Parole File Central Office File

SOP 3