UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
VICINAGE OF NEWARK

George RILEY, et al.,
Plaintiffs,

v.

Devon BROWN, et al.,
Defendants

HON. DICKINSON R. DEBEVOISE, USDJ

CIVIL ACTION: 06-0331 (DRD)

REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

James J. Krivacska, 106128C, 2W
George Riley, 133229B, 2W
Richard A. Gibbs, 232215C, 3W
Adult Diagnostic
& Treatment Center
8 Production Way
Avenel, NJ 07001
No Phone
Pro Se Plaintiffs

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT[1]

In reply to Plaintiffs' motion, the State has filed a brief that significantly misrepresents the New Jersey Statute governing the sentencing of those convicted of a sexual offense and found to be compulsive and repetitive and therefore in need of treatment (N.J.S.A. 2C:47-3 et seq), and otherwise distracts this court's attention away from the core of the controversy with non-sequitors and irrelevant argument. Additionally, the conduct of State Actors towards Mr. Krivacska in the last two weeks raises the specter of retaliatory interference with Plaintiffs' access to the courts.

PROCEDURAL HISTORY AND COUNTER-STATEMENT OF FACTS[2]

Respondents were served with the complaint and TRO motion in this action on February 9, 2006. Subsequently, the State requested and received a short adjournment from the Feb. 14, 2006 return date for Plaintiffs' TRO motion, and were given until Feb. 17, 2006 to submit a brief. Mr. Krivacska, in turn, requested until March 3, 2006 to file a reply brief[3]. Plaintiffs seek to clarify several relevant misstatements of fact in the State's brief, as well as revise the Statement of Facts to reflect recent developments.

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[1] Because of time constraints, and the fact that the various Plaintiffs are housed on different housing units, this reply brief is being signed by Plaintiffs Riley, Krivacska and Gibbs, but is believed to accurately represent the interests of all Plaintiffs.
[2] The Procedural History and Counter-Statement of Facts have been combined for the convenience of the Court as they are inextricably intertwined.
[3] Declaration of James J. Krivacska, 2/27/06, at ¶29, hereinafter "Krivacska Decl. 2/27/06."

Plaintiffs Krivacska, Riley and Gibbs were all specifically and exclusively sentenced to the A.D.T.C. for specialized treatment, subsequent to being found to be compulsive and repetitive offenders. Id. at ¶3. See also Declaration of Richard Gibbs, 2/27/06, at ¶4 (hereinafter "Gibbs Decl. 2/27/06") and Declaration of George Riley, 2/27/06, at ¶4 (hereinafter "Riley Decl. 2/27/06")[4]. The version of N.J.S.A. 2C:47-3 under which they were sentenced compelled their sentence to A.D.T.C. and did not permit, as the State seems to argue, the DOC discretion to house them with the general prison population.

The State in its brief states that Plaintiff Krivacska claimed that he had been subject to abuse during a Court trip in August 2002 because of his "status as a convicted sex offender." p. 4 of State's Brief, citing to p. 7 of Plaintiffs' Memorandum of Law, dated 1/10/06 (hereinafter "Memo of Law"). Similarly, the State attributes Mr. Braun's concerns to DOC officers revealing his status as a sex offender, again citing Plaintiffs' Memorandum. State Brief at 6.

However, Plaintiffs' Memorandum clearly claims the harm was caused by the DOC revealing Plaintiffs' status as "an A.D.T.C. inmate and convicted sex offender." Memo of Law at 7 (emphasis added). See also at 16. As will be argued below, it is the Plaintiffs' status as residents of the A.D.T.C. that is critical

[4] The sentences for each defendant as reported by the State are incorrect. Mr. Riley is serving a 20 year term, Riley Decl. 2/27/06 at ¶3, Mr. Krivacska a 26 year term, Krivacska Decl. 2/27/06, at ¶3 and Mr. Gibbs a 45 year sentence, Gibbs Decl. 2/27/06, at ¶3.

to the complaint and requested relief, not solely their status as sex offenders.

In addition, since the filing of the complaint and TRO motion, the situations of Mr. Gibbs and Mr. Krivacska have changed as recorded in the accompanying Declarations.

Subsequent to the filing of the complaint and TRO motion, Mr. Gibb's court appearance of January 30, 2006 was adjourned to February 17, 2006. Mr. Gibbs was able to waive his appearance and secure proof of the waiver and provide it to DOC and thus was able to ensure he was not transported that day. Gibbs Decl. 2/27/06 at ¶5-9. The motion for recusal of Judge LeBon was heard without Mr. Gibbs' presence; as a result Mr. Gibbs was unable to provide any testimony in support of his motion, and the motion was denied by the court. Id. at ¶10. On February 22, 2006, Mr. Gibbs' attorney informed him that his PCR petition would be heard in May of 2006, at which time Mr. Gibbs will again be faced with the choice of risking assault, injury or death at the hands of a State prisoner because of his status as an A.D.T.C. inmate and convicted sex offender in order to protect his First Amendment right of access to the court, as well as his 5th and 14th Amendment Right, or waive those rights to ensure his safety. Id. at ¶11-12.

Mr. Krivacska also had a court date scheduled for February 17, 2006. However, Mr. Krivacska, who, like Mr. Gibbs, also waived his appearance, was unable to obtain independent confirmation of that waiver and cancellation of the writ prior to the 17th and was forced to rely on the good faith conduct of DOC not to act on a

vacated writ[5]. However, he informed A.D.T.C. Administration in writing of the cancelled writ on February 10, 2006 and requested they confirm the status of any documentation of an order for him to appear in court. No response was received. Id. at ¶7.

On February 17, 2006, the day the State was to file its brief in opposition to the TRO motion, Mr. Krivacska was awoken at 6:15 AM and ordered to prepare for transport to Monmouth County Courthouse. Mr. Krivacska attempted to advise both DOC custody supervisors and officers of the Central Transport Unit (CTU) that there was no valid writ for his transport, but they refused to make any attempt to verify the writ. Id. at ¶8-10.

Mr. Krivacska was transported to the Monmouth County Court and placed in a holding tank at the courthouse; he was transported and held with state prisoners, although CTU officers did not reveal his status as an A.D.T.C. inmate at this time. On arriving at the courthouse, Mr. Krivacska told the Sheriff's officer that he had no court appearance scheduled and asked him to contact Judge Neabsey's chambers to confirm that he could be returned to A.D.T.C. He repeated this request several times that day to different officers and was rebuffed each time. Id. at ¶11-15.

In the meantime, other State prisoners in the holding tank made their court appearances and were taken to the county jail to be picked up by CTU for the return trip to state prison. Ibid. Finally, at 3:00 PM, approximately 1 1/2 hours after CTU left the

[5]Krivacska confirmed that no writ existed for his transport via direct communication with the secretary to Judge Neabsey on February 10, 2006. Id at ¶5.

county jail, Mr. Krivacska was moved to the jail, consigned to await pickup by CTU the following week. Id. at ¶15-16.

Mr. Krivacska was held in a holding tank at the Monmouth County Jail with other state prisoners, newly sentenced state and county inmates, individuals arrested that day on the street and awaiting processing, and INS detainees; a total of about 20 other individuals. Mr. Krivacska was held in booking from 3:00 PM until 1:30 AM Saturday morning. Thus, Mr. Krivacska was kept in a holding tank for 16 1/2 hours from 9:00 AM Friday, to 1:30 AM Saturday. Id. at ¶16-18. Despite identifying himself as a state prisoner from A.D.T.C., and requesting to either be placed in a protective custody unit or "M Pod – the unit at the Monmouth County Jail where those arrested, convicted and/or sentenced for sex offenses are housed and segregated from the generation population – Mr. Krivacska was housed as the third man in a two man cell (sleeping on the floor) with the general population in the reception Pod. Id. at ¶17-18. His cellmates were two other newly sentenced state inmates. Ibid.

CTU delivered several more state prisoners to the county courthouse on Tuesday, February 21, 2006, (the 22nd having been a state holiday), however, CTU again left Mr. Krivacska in the county jail. Id. at ¶21. Through his family, Mr. Krivacska informed A.D.T.C. administration that he had pending court matters that required his return to the A.D.T.C. and which he was being deterred from by being held in the county. Id. at ¶22.

Finally, CTU returned to the county on Wednesday, February 22, 2006 and picked up Mr. Krivacska and the State prisoners who had arrived the previous day. When CTU officers surveyed which inmates had to be returned to which institution, Mr. Krivacska's status as an A.D.T.C. inmate was revealed which led to a prisoner from Bayside prison engaging in verbal harassment of Mr. Krivacska. Id at ¶23.

Mr. Krivacska was finally returned to the A.D.T.C. at 7:00 PM that Wednesday. Id. at ¶24. While held in the county, Mr. Krivacska was kept in lockdown status in his cell for 22 hours a day, allowed out for showers, collect phone calls and recreation only one hour each morning and one hour each afternoon/evening. Mr. Krivacska had no access to the law library, and though he requested to make a legal call to the court, was never provided that call. He had no access to any of his property and was confined in conditions equivalent to punitive detention in state prison (no property, isolation and sensory deprivation for 22 hours a day, no change of clothing for six days). Id. at ¶19-20.

After being returned to A.D.T.C., Mr. Krivacska contacted Judge Neabsey's office and confirmed again that the writ had been cancelled and that he should not have been transported. He also learned that the Judge's secretary had, between 9:15 and 9:30 AM on the 17th, notified the Sheriff's officers in the court house that Mr. Krivacska could be returned to State prison, which notice gave the officers numerous opportunities to return Mr. Krivacska to CTU's custody (three trips moving inmates from the court house

to the county jail took place between the time of that notice and CTU leaving the jail at 1:30 PM). Id. at ¶25-27.

Finally, Mr. Krivacska did not receive a copy of the State's brief while in county, and was effectively prevented from responding to it or taking any other action to advance his claims on this § 1983 claim, during his confinement in Monmouth County. To date DOC has still not provided Mr. Krivacska with his legal mail containing the State's brief, and has instead had to rely upon a copy obtained from another Plaintiff. Id. at ¶28.

LEGAL ARGUMENT

PLAINTIFFS HAVE ALLEGED SUFFICIENT FACTS TO SUPPORT A PRIMA FACIA CASE FOR THE NEED FOR THE TEMPORARY RESTRAINING ORDER

A. POSSIBLE RETALIATION AGAINST PLAINTIFF SUPPORTS PLAINTIFFS' REQUEST FOR COURT INTERVENTION TO PROTECT PLAINTIFFS' RIGHTS

At the outset, the unusual events surrounding Mr. Krivacska's removal from A.D.T.C. during the same period during which Plaintiffs expected to receive the State's brief in opposition to the TRO Motion, and expected to reply to that brief, raise concerns about the use of state power to disable a state inmate litigant. While it may be impossible to ever prove a nexus between this complaint and the events of the 17th through the 22nd, the coincidences give one pause.

Mr. Krivacska and Mr. Riley, members of the Legal Subcommittee of the Inmate Resident Committee, drafted the complaint, declarations, TRO motion and supporting memorandum and other legal document, in this action. Krivacska Decl. 2/27/06 at

¶2. Mr. Krivacska's court date of February 17, 2006 is prominently featured in Plaintiffs' complaint, Mr. Krivacska's declaration of January 10, 2006, and the memorandum of law supporting the TRO motion. The State sought a delay in this court's decision on the motion which was originally scheduled to be decided on February 14, 2006. Without prejudging how the court will ultimately rule, had the court decided the motion for the Plaintiffs on the 14th, the State would have been forced to segregate Mr. Krivacska on the 17th, no matter whether the writ had been cancelled or not.

But the State's request for a delay so it could submit an opposing brief on February 17th, ensured that no order would be in place to protect Mr. Krivacska should he be transported on that day. Despite the writ being cancelled, despite his alerting DOC to the cancellation of that writ five days earlier, despite advising DOC and CTU staff of the absence of a writ and a request they verify the writ before transporting him, Mr. Krivacska was, in fact, removed from state prison without a writ and transferred to Monmouth County.

Upon arrival at the courthouse, Mr. Krivacska repeatedly alerted Sheriff's officers as to the situation and requested they confirm his status with Judge Neabsey so that he could be returned to A.D.T.C. that day. The officers refused to contact the court. As it turns out, they didn't have to. According to Judge Neabsey's Secretary, sometime between 9:15 and 9:30 AM, she advised the Sheriff's officers that Mr. Krivacska wasn't needed and should be returned to State prison. Despite being so informed, Mr. Krivacska

was held in the courthouse until 3:00 PM, well after CTU left on its return trip, thus ensuring that Mr. Krivacska would be held at least until the following Tuesday. Yet, even though CTU made a trip to Monmouth County to deliver nine state prisoners to the courthouse, on Tuesday, the 21st, Mr. Krivacska was again left in the County jail by CTU. Only, apparently, after family and friends of Mr. Krivacska contacted administration at the A.D.T.C. to advise them that Mr. Krivacska's detention in the county was interfering with his access to the courts on pending, time-sensitive legal matters, did CTU finally return Mr. Krivacska to A.D.T.C.

It is unknown at this time whether State actors knew that Mr. Krivacska would be kept in 22 hour a day lockdown with no access to his legal papers, no access to a law library and no way to contact the court. However, it is somewhat disturbing that in addition to the fact that Mr. Krivacska was rendered legally impotent during a critical period in the presentation of a TRO motion, even upon his return to the A.D.T.C., he remains the sole Plaintiff who has not received a copy of the State's opposition brief.

To be clear, Plaintiffs are not suggesting any malfeasance on the part of the Attorney General's office, and there is no evidence that DAG Scott, herself, acted in any way inappropriately. However, DOC officials were directly served on February 9, 2006, and it is fair to assume that in preparation to defend the action, the information in the complaint, including the

identities of the Plaintiffs, was shared with CTU staff. It may have been coincidence, or it may have been that the opportunity to send a message to one of the Plaintiffs was too much to resist.

In either event, Plaintiffs would request that this court make a strong statement about its intolerance for any act of retaliation or retribution against inmates who choose to exercise their constitutional right of access to the court, to prevent the propagation of a chilling effect on the ability of the Plaintiffs' to develop their case.

B. STATE MISREPRESENTS THE PURPOSE, INTENT AND EFFECT OF THE SEX OFFENDER ACT

New Jersey's Criminal Code provides for a dual track system of dealing with those convicted of sexual offenses. All defendants convicted of certain enumerated sexual offenses are required, by statute, to be evaluated at the A.D.T.C. to determine if they are compulsive and repetitive offenders (N.J.S.A. 2C:47-1 et seq.). If not found to be compulsive and repetitive, they are sentenced the same as other defendants and serve their time in state prison. If they are found to be compulsive and repetitive, then a variety of sentencing options are available depending on what other findings the court makes.

This section of the code, Title 2C, Chapter 47, otherwise known as the Sex Offender Act or SOA, has been amended frequently over the last decade, and different Plaintiffs have been sentenced under different versions of this Act (with the exception of Mr. Vansciver who was never sentenced to the A.D.T.C. under N.J.S.A.

2C:47, but who was nevertheless transferred to the A.D.T.C. last year).

Messrs. Riley, Krivacska and Gibbs were sentenced under a version of N.J.S.A. 2C:47-3 in effect prior to 1998, which requires only a finding of compulsive and repetitive sex offending behavior, and which requires, upon such a finding, that the defendant be sentenced to the A.D.T.C. for a program of specialized treatment for their mental condition. Messrs. Cornwell, Braun, and Macrina were sentenced under a version of the law passed in 1998 which requires, in addition to a finding of compulsive and repetitive offending behavior, a finding of amenability to and willingness to participate in sex offender specific treatment. Contrary to the State's position, all six of these Plaintiffs, under either version of the SOA, are mandated to be segregated at ADTC as long as they cooperate in treatment (the time parameters of N.J.S.A. 2C:47-3(h) not applying to any of the Plaintiffs). If sentenced to ADTC, the state is required to provide treatment for the Plaintiffs' compulsive and repetitive behavior. Once sentenced to the A.D.T.C., as was the case with Messrs. Riley, Krivacska and Gibbs, the State has no statutory authority to remove the inmate from A.D.T.C. as long as they cooperate in their treatment.

Also under the pre-1998 version of the law, those sentenced to the A.D.T.C., notwithstanding any period of parole ineligibility, are entitled to be paroled when it appears to the Special Classification Review Board that the inmate is "capable of

making an acceptable social adjustment to the community," N.J.S.A. 2C:47-5, a standard that has been characterized by the New Jersey Courts as a "treatment-success release standard." Gerald v. Com'r New Jersey Dept. of Corrections, 201 N.J.Super. 438, 447 (App.Div. 1985). The Third Circuit Court of Appeals has ruled that A.D.T.C. sentenced inmates sentenced under that standard, have a liberty interest in receiving treatment that can not be abridged without due process protections. Leamer v. Fauver, 288 F.3d 532 (3d Cir. 2003).

The State relies heavily on N.J.S.A. 2C:47-3(h) for its argument that the State legislature specifically intended that sexual offenders not be segregated from the general population. That argument contorts both the legislative intent and plain reading of the statute beyond any recognition.

First, it should be noted that aside from Mr. Vansciver, all of the other Plaintiffs are serving sentences under the various versions of N.J.S.A. 2C:47-3 (the paragraph (h) referred to by the state having been added in 1998). Each of these versions mandate that they be housed at the A.D.T.C. as long as they cooperate in their therapy. So, even with the more recent versions of the SOA, it is clear that once the mandatory treatment component of the SOA kicks in, the Legislature did intend for sex offenders sentenced under the law to be segregated from the general prison population. In fact, the law specifically mandates that sex offender specific treatment not be made available at any institution other than the

A.D.T.C. (with the exception for female offenders housed at the Wagner Correctional Facility). L. 1998, c72.

So contrary to the State's position, the versions of the SOA under which Messrs. Riley, Krivacska and Gibbs were sentenced, and even the version currently governing Messrs. Cornwell, Braun and Macrina, mandate their segregation from a general prison population. The State's argument that N.J.S.A. 2C:47-3(h) supports its contention that the Legislature never intended to segregate A.D.T.C. inmates from the general population is also contradicted by the Statute that created the Diagnostic Center over fifty years ago. The enabling legislation for the Diagnostic Center required it to be "centrally located in the state and not adjacent or contiguous to any existing mental, penal or correctional institution." N.J.S.A. 30:4A, et seq. Though passed a half-century ago, this law remains in effect and has never been repealed or amended. In fact as recently as 1991, this Chapter was amended and this provision survived the amendment. And the Diagnostic Center is included in the list of Health Care facilities listed at N.J.S.A. 44:5-2a, last revised in 1991.

More importantly, though, this case turns not on the status of Plaintiffs as sex offenders, but on their status as residents of A.D.T.C. It is their placement at the A.D.T.C. that labels them sex offenders. They are the only class of State prisoners the State groups by offense; thus it is their classification and placement by the State that uniquely identifies them as sexual offenders. When the State seeks to label, segregate and stigmatize

a subpopulation of inmates that are hated by other state inmates, it has an obligation to protect the inmates it has so identified from harm.

The State challenges Plaintiffs' prima facia case for a temporary restraining order. In addition to the arguments advanced in Plaintiffs' memorandum of 1/10/06, Plaintiffs respond to the State's arguments as follows.

C. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

The State argues that Plaintiffs are unlikely to succeed on the merits because the statutory scheme embodied in N.J.S.A. 2C:47-3, particularly paragraph (h), demonstrates the State Legislature did not intend to so segregate A.D.T.C. inmates. Aside from the fact that Plaintiffs are seeking segregation and protection during trips, not in housing at state prison facilities, as shown in Point I.B. above such a reading of the Statute flies in the face of reason. The whole statute is about segregation, even the more recent enactment of paragraph (h) that the State relies on. Even under that paragraph, Messrs. Cornwell, Braun and Macrina, are mandated to be segregated from state prisoners for the purpose of treatment at the A.D.T.C. as long as they cooperate in their treatment. As for Messrs. Riley, Krivacska, and Gibbs sentenced under earlier versions of the SOA, that segregation is mandated as well.

Secondly, it is the act of segregation at the A.D.T.C. that creates the need for segregation during court trips. Mr. Vansciver's situation proves the point. While he served his

sentence in a state prison, he had no problems on court or medical trips, because nothing about him, where he housed, or what institution he was locked down in, revealed the nature of his offense. No inmate knew he was convicted of a sex offense whom he did not himself tell. But as soon as he was transferred to the A.D.T.C., and even though he is not sentenced as a compulsive and repetitive sexual offender, he is nevertheless stigmatized not only as a sex offender, but, albeit falsely, as a particularly dangerous and mentally disordered offender. As a result, it was not the nature of his conviction, but the fact that DOC segregated him in a treatment center for mentally disordered sex offenders that placed him at risk of abuse at the hands of state prisoners who despise the inmates housed at the A.D.T.C.

For this reason, the Plaintiffs' distinction is not imaginary as claimed by the State, State Brief at 13, but quite real. And it is unmistakable in the Complaint and the TRO motion, memorandum and accompanying declarations, that it is not the Plaintiffs' status as sex offenders that is creating the risk, but their State initiated segregated status as A.D.T.C. sex offenders that poses the risk.

The State next introduces in its brief a non-sequitor argument about liberty interest, or the lack of such an interest in where an inmate is housed. The court should not be distracted by this irrelevant argument. Again, Plaintiffs are arguing about safety during trips, not where they are housed. In fact, Plaintiffs do have a liberty interest in being provided therapy

and treatment in a safe and secure environment, as found by the Third Circuit in Leamer, supra. And Mr. Cornwell has already suffered a loss to that liberty interest as he was unable to participate in therapy and thus advance toward attaining parole during the period of his hospitalization after being seriously injured by a State prisoner on a trip. Moreover, Mr. Braun suffered psychological trauma (he was diagnosed by an A.D.T.C. psychiatrist as suffering from Post-traumatic Stress Disorder or PTSD after the assault) as a result of his treatment at the hands of state prisoners during a trip. He has had to devote therapy time to the treatment of this State induced trauma which has set him back in his sex offender therapy and impeded progress toward his sex offender treatment goals, thus implicating his liberty interest in advancing toward parole through treatment.

Moreover, by virtue of the fact that N.J.S.A. 2C:47-3 does mandate segregation from State prisoners – a conclusion supported by N.J.S.A. 30:4A as noted above – it is clear that the Legislature intended A.D.T.C.-sentenced offenders to be segregated from State prisoners, a conclusion opposite of that advanced by the State.

So, in fact, Plaintiffs have clearly established a reasonable probability of success on the merits of this claim.

D. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF REQUESTED RELIEF IS NOT GIVEN

The State alleges that the DOC "continues to make transport available to Plaintiffs..." and blames Plaintiffs' voluntary

choice not to exercise their access to legal and medical trips for any harm that may ensue. This argument is disingenuous at best. First, voluntary choice implies a choice free from fear, threat or coercion. Plaintiffs' allege the presence of fear, threat and coercion resulting from the actions of the State in identifying them as A.D.T.C. residents during such trips, nullifies any claim of voluntary choice. By the State's argument, forcing an inmate to play Russian Roulette with a single bullet in a six chamber gun in order to gain access to a court or medical trip, constitutes a free choice because the inmate can always choose between putting the gun to his head, pulling the trigger and trying his luck versus refusing the trip. That is what it means for an A.D.T.C. inmate to get on a CTU van for a court or medical trip. Mr. Cornwell cocked the gun one too many times and paid the price for it. A.D.T.C. sentenced inmates should not be forced to make such a macabre choice.

Second, the State has not contested a single fact advanced by the Plaintiffs. It has submitted no affidavits or declarations from any DOC official challenging the veracity of the allegations set forth in the complaint. Consequently, this Court, in evaluating whether to grant this TRO, should consider as true all of the facts asserted by the Plaintiffs, which facts, on their face, establish the long standing nature of the risk to A.D.T.C. inmates. The fact that no one can predict when the next assault will take place is inconsequential. The reality is that another assault will take place; it's just a matter of time.

While the State relies on Continental Group v. Amoco Chem. Corp., 614 F.2d. 351, 359 (3rd Cir. 1980), in which the court noted that injunctions should not be granted to "allay fears and apprehensions," it makes no mention of Plaintiffs' reliance on the more recent Heller v. McKinney, 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) which made it clear that an inmate need not wait for a threat to be realized to seek injunctive relief. And here, Plaintiffs have shown the fears to be grounded in a long history of such assaults. Finally, the State claims any injuries suffered were "not the result of any action or inaction of the State defendants". Yet in the case of Cornwell and Braun, Plaintiffs allege it was specifically the action of the State defendants in purposefully identifying them as A.D.T.C. inmates and egging on State prisoners to abuse them, that instigated the abuse.

The detailed nature of Plaintiffs' claims, the fact that the claims involve deprivation of First Amendment Rights which inherently constitute irreparable harm, and the risk of serious injury, are exactly the types of harm injunctive relief is intended to avert. In fact, under 42 U.S.C. § 1983, inmates are barred from seeking monetary recovery for the infliction of psychological or emotional trauma absent a physical injury. In such cases, such as Mr. Braun, the only available remedy under § 1983 is injunctive relief to remove the source of the trauma.

Plaintiffs have clearly demonstrated they are likely to suffer irreparable harm to their legal rights if relief is not granted.

E. BALANCE OF HARDSHIPS WARRANTS GRANT OF RELIEF TO PLAINTIFFS

The State again attempts to discount the hardships suffered by the Plaintiffs by framing any injury or loss resulting from the Plaintiffs' refusal of a court or medical trip as one suffered as a result of a voluntary choice. Plaintiffs disposed of that argument in Point I.D. above, and won't repeat the argument or the Russian Roulette analogy here, incorporating that argument here, by reference. Suffice it to say that Plaintiffs like Mr. Macrina and Mr. Vansciver, both elderly and sickly, should not have to make the Hobson's choice between risking death from their illnesses if they don't go on a trip, and risking death from another inmate as a result of an assault if they go on the trip. And for mandatory court trips, there is no choice, only risk; which the State has failed to take any actions to mitigate.

Moreover, it cannot be a hardship for the State to perform its constitutional duty. Even the State cites Farmer v. Brennan, 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) for the proposition that the state has an obligation to "take reasonable measures to guarantee the safety of inmates." Plaintiffs' are asking for nothing more, and providing inmates with the safety to which they are constitutionally entitled constitutes not a hardship, but an obligation.

The State again offers no affidavit or declaration either asserting that granting the relief sought by Plaintiffs would create a hardship, or how, in particular, each form of relief requested would impose a hardship on the state. They have advanced

no rationale for how ensuring the presence of a corrections officer whenever segregation is not possible creates a hardship. Nor have they explained what hardship would ensue from directing DOC staff to refrain from identifying A.D.T.C. inmates as such, or the hardship involved in providing A.D.T.C. inmates with clothing that doesn't identify them as A.D.T.C. inmates.

The State does offer a conclusory argument that segregating A.D.T.C. inmates on trips would create a hardship, and particularly points to the absurd and incomprehensible claim that segregating A.D.T.C. inmates during trips would "undue N.J.S.A. 2C:47-3(h) ... [and] granting Plaintiffs' relief would render N.J.S.A. 2C:47-3(h) useless and place the Department of Corrections back in the position in which is [sic] prior to the enactment of N.J.S.A. 2C:47-3(h)" State brief at p. 20-21. Such a bold, conclusory statement begs explanation by the State as it is inconceivable how segregating a few A.D.T.C. inmates during court and medical trips would possibly undermine the Sex Offender Act, especially since the act specifically calls for the segregation of the Plaintiffs from the general prison population, and their placement in a separate facility: A.D.T.C.

The State again offers no affidavits or declarations attesting to any hardship placing A.D.T.C. inmates into separate holding areas would impose, nor any sworn statements refuting Plaintiffs' contention that adequate holding areas exist in each correctional facility to permit such segregation. Finally, the manner in which Mr. Krivacska was segregated during his dental

trip as described in his 1/10/06 declaration, demonstrates that such segregation is certainly feasible and can be readily accomplished without significant hardship.

G. RELIEF SOUGHT IS IN THE PUBLIC INTEREST

As argued in Plaintiffs' memorandum of law, there is a strong public interest in keeping prisoners safe from assault, even sex offenders. But the public interest goes farther.

The State contends that CTU would be required to provide additional transports to and from A.D.T.C. to grant this relief. This does not seem logical. The same number of transports to and from A.D.T.C. would occur with or without the relief granted. The difference is that if the relief is granted the vehicle traveling to and from A.D.T.C. may not be making additional stops to pick up inmates from other state prisons. But even that is not certain. As Mr. Krivacska reported in his Declaration of 1/10/06, when he was transported to New Jersey State Prison for dental work, he was separated on the vehicle from prisoners from other institutions by an empty row of seats and strict enforcement of the DOC policy that inmates remain in their seats during transport. While this does not necessary eliminate verbal harassment, the verbal harassment suffered by Mr. Krivacska in August 2002 and Mr. Braun in December 2005, was made particularly onerous and traumatizing because Mr. Krivacska and Mr. Braun were forced to sit next to the state prisoners making the threats, creating the very real risk that the verbal threats would be carried out. This is a considerably more psychologically traumatic threat than an empty

threat tossed from a couple of rows away when there is no way for the State prisoner to have physical contact with the A.D.T.C. inmate.

So even if DOC is concerned about having more vehicles on the road, that would be more the exception than the rule. And again, the State has offered no affidavit or declaration from anyone at DOC or CTU indicating that transporting A.D.T.C. inmates on separate vans would pose any problem for DOC at all. The DAG is offering unsupported conclusions in opposing the relief sought.

Finally, the status quo actually creates a public safety risk that is certainly not in the interest of the public, one which the relief sought easily remedies. Placing A.D.T.C. inmates within physical reach of state prisoners, creates the risk of an assault breaking out on the transport vehicle, as occurred during Todd Becka's trip. See Complaint, 1/10/06, ¶157-169. Such an assault could break out into a melee if the A.D.T.C. inmate attempts to defend himself. Fighting between DOC inmates on a moving vehicle poses an enormous risk to the public as a distracted DOC officer driving such a vehicle now has his attention divided between what is happening in the back of his vehicle and the road he is trying to navigate, increasing the risk of an accident. Clearly, the relief sought, by reducing the risk of confrontations on court and medical trips between A.D.T.C. and state inmates, is in the public interest.

CONCLUSION

It is difficult to fault the patience exhibited by A.D.T.C. inmates on the issue of safety during court and medical trips. Identified as a problem as long as 17 years ago, Complaint, 1/10/06, ¶27, A.D.T.C. residents have repeatedly sought to work with DOC officials to resolve this problem. Even after Mr. Cornwell's assault, members of the Inmate Resident Committee's legal subcommittee wrote to various DOC officials seeking to find a resolution addressing both DOC and inmates' concerns. Id. at ¶31-33, ¶49-61. Those concerns were ignored and in December Mr. Braun was subjected to two hours of mental torture at the hands of state prisoners and at the instigation of CTU officers. The State has had 17 years to find a solution that protects A.D.T.C. inmates from the enmity of state prisoners. And clearly the problem was created by the State when it decided to segregate inmates found to be in need of treatment for their mental condition at the A.D.T.C. It might as well have put a target on their backs. The relief sought by the Plaintiffs seeks only to remove that target, or at the very least, shield Plaintiffs from the verbal and physical assaults that target attracts.

Date: February 27, 2006

James O. Krivacska

Date: February 27, 2006

George Riley

Date: February 27, 2006

Richard Gibbs