IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHARLES AUSTIN, et al.,	)	CASE NO. 4:01-CV-71
	)	
Plaintiffs,	)	
	)	
v.	)	Judge James S. Gwin
	)	
REGINALD WILKINSON, et al.,	)	
	)	ORDER
Defendants.	)	
	)	

On August 1, 2001, the plaintiffs filed a motion for a preliminary injunction in this action challenging the conditions of confinement at the Ohio State Penitentiary [Doc. 58]. The plaintiffs represent a class of the prisoners who "who were confined at the Ohio State Penitentiary as of January 9, 2001, or who have come to be confined there since that date, or who may be confined there during the pendency of this litigation."[1/] Included among those represented by the class plaintiffs are "those inmates who were at Ohio State Penitentiary on January 9, 2001, but have since been transferred to other facilities." In their underlying action, the plaintiffs challenge the constitutionality of a broad range of conditions and practices.

[1/] On October 5, 2001, the Court granted the plaintiffs' motion for class certification.

They seek injunctive and declaratory relief. After considering testimony and evidence, [2/] the Court grants in part and denies in part the plaintiffs' motion for relief.

I. Background

With their motion for a preliminary injunction, the plaintiffs try to stop defendants from placing seriously mentally ill inmates into administrative control when transferred from Ohio State Penitentiary to another Ohio prison. In addition, the plaintiffs ask the Court to order certain mental health care for the plaintiffs.[3/] Finally, the plaintiffs seek to stop defendants from transferring seriously mentally ill inmates back to Ohio State Penitentiary.[4/]

The plaintiffs' motion makes several arguments. First, the plaintiffs argue that the Ohio State Penitentiary denies inmates with serious mental condition their right to be free from cruel and unusual punishment because of its design and staffing. Next, the plaintiffs say the defendants violated their constitutional rights after transferring them to the Southern Ohio Correction Facility. As to this, the plaintiffs say the defendants violated their rights when it placed the plaintiffs into administrative control, or solitary

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[2/] The Court conducted evidentiary hearings on August 27, September 11, September 24, and September 25, 2001. The September 11, 2001, hearing was interrupted by news of the tragic events in New York, Washington, D.C., and Pennsylvania.

[3/] In response to the Court's question at the hearing upon the plaintiffs' motion for preliminary injunction, the plaintiffs indicated that they sought: "some intensive group programming" and an end to "the whole administrative segregation." August 27, 2001, hearing at 8.

[4/] At the hearing on the plaintiffs' application for preliminary injunction, the counsel for the defendants stated that the defendants intended to exclude the seriously mentally ill from the Ohio State Penitentiary, although some may have mistakenly slipped through: ". . . We took the lead there right off the bat when [Ohio State Penitentiary] was opened, . . ., we excluded the seriously mentally ill, and if some slipped by, and that's noticed, they are sent out. They are immediately transferred out to the Ohio -- to the Southern Ohio Correctional Facility." August 27, 2001, hearing at 11.

confinement, because of their mental illness and failed to provide mental health care. With this argument, the plaintiffs seem to say they have a right to mainstream into the general prison population. Finally, the plaintiffs challenge the defendants' right to return them to the Ohio State Penitentiary.

Responding, the defendants deny they have violated any constitutional right. Regarding placement into mental health programs, the defendants say that all "decisions are made by the treating doctors."[5/] As to inmates transferred to the Southern Ohio Correctional Facility, the defendants say they house and treat the inmates consistent with their diagnosis and their security risk. Defendants contend they only place inmates in administrative segregation when they present a risk. While in administrative segregation, known as J-4, the defendants say the inmates continue to receive intensified mental-health services.

In April 1998, Ohio opened the Ohio State Penitentiary, Ohio's first "supermax" prison in Youngstown. The Ohio Department of Rehabilitation and Correction designed the Ohio State Penitentiary to house the "worst of the worst."[6/]

Generally, the crime causing incarceration does not control placement into the Ohio State Penitentiary supermax facility. Instead, the inmate's conduct within the prison system most affects whether he is placed to the Ohio State Penitentiary. Often placement to the Ohio State Penitentiary results from assaults upon other inmates, riots, or assaults upon correctional officers. Sometimes, the Ohio Department of Rehabilitation and Correction places inmates at Ohio State Penitentiary as a form of protective custody. Restating, a placement at Ohio State Penitentiary "it's not what you came in for. It's what you've done

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[5/] August 27, 2001, hearing at 14.

[6/] August 27, 2001, hearing, Testimony of Monitor Fred Cohen, at 104.

while in prison."[7/]

Although many inmates suffer from mental illness, [8/] the Ohio Department of Rehabilitation and Correction did not design or staff the Ohio State Penitentiary to house mentally ill inmates, especially seriously mentally ill inmates. The defendants' expert, Monitor Fred Cohen [9/] described this:

> Well, it's a fairly punitive environment, not a lot of cell time, not a lot of time out of cell, and the primary motivating factor was that if you were going to -- if you were going to allow the seriously mentally ill to be housed there, you were going to have to staff up in ways that were not currently in the plans. So I put -- you could have it either way. I mean, if you were going to go with seriously mentally ill, I will monitor for it, but I will tell you right now you can't do it with one psychiatrist one day a week or so on. [10/]

Because it inadequately staffs the Ohio State Penitentiary to treat seriously mentally ill inmates, the Ohio Department of Rehabilitation and Correction adopted policy 111-07, effective August 31, 1998. That policy says, in part:

> Inmates who are seriously mentally ill or seriously physically ill will not be placed at Ohio State Penitentiary. . . . Any inmate who is seriously mentally ill and has been inadvertently transferred to Ohio State Penitentiary shall be transferred to another institution in an expeditious manner

Instead of staffing the Ohio State Penitentiary to adequately treat seriously mentally ill inmates, the Ohio Department of Corrections decided to house such inmates at the Southern Ohio Correction Facility. This decision is consistent with the concentration of mental health resources at the Southern Ohio

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[7/] *Id.*

[8/] Nationally, about sixteen percent of the prison and jail population suffers from mental illness. *See* Paula M. Ditton, Mental Health and Treatment of Inmates and Probationers, Bureau of Justice Statistics Special Report, July 1999, at 1, <http://www.umaryland.edu/behavioraljustice/issues/inmatetreatment.html> (visited November 16, 2001).

[9/] Professor Cohen is a former law professor who specializes in, and is highly regarded with regard to, prison litigation.

[10/] September 24, 2001, hearing, testimony of Fred Cohen, at 64.

Correction Facility.[11/]

After the plaintiffs filed this action, defendants reviewed the mental health status of inmates at the Ohio State Penitentiary on February 20-22, 2001. After Drs. Sarah McIntyre, Tim Callahan and Robin Hoffman reviewed inmate files and interviewed inmates, the Ohio Department of Rehabilitation and Correction transferred several inmates to the Southern Ohio Correctional Facility. The doctors transferred the inmates for mental health reasons. Inmate James Mitchell transferred to the Southern Ohio Correction Facility around March 15, 2001, inmate Fred Harris transferred in May 2001, inmate David Easley transferred in February or March 2001, and inmate James Newell transferred in late April 2001.

After being transferred to the Southern Ohio Correction Facility, the defendants assigned inmates Mitchell, Harris, Easley and Newell to the residential treatment unit, also known as K-5. The K-5 residential treatment unit is a general population cell block area that is a designated unit for the treatment of mentally ill inmates. The residential treatment unit structures its program around group counseling sessions. Inmates participate in these group programs with members of the mental health team.

Within the residential treatment unit, prison officials restrain inmates at varying levels. Prison officials assign inmates to the residential treatment unit based upon mental health, not security considerations. After assignment to the residential treatment unit, inmates can progress through various levels of restraint. Level 1 provides a highly restrictive, almost 23-hour lock-down. Inmates can then progress to "level 2, level 3, and then level 4 with increasing out of cell time, with increasing freedoms, you

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[11/] Gary Beven, the principle Southern Ohio Correction Facility psychiatrist testified:

> SOCF has very rich mental health resources. I'd be very surprised if many other institutions have the capabilities that we do.

September 24, 2001, hearing, testimony of Dr. Gary Beven, at 222.

might say. Level 4 eat outside the unit and program outside the unit." [12/]

Residential treatment unit level 3 inmates spend eight to nine hours a day outside their cells. "They program; they mingle. . . . It's very relaxed, very relaxed environment."[13/] The residential treatment unit uses a high degree of treatment and a high degree of programming.

Inmates Mitchell, Harris, and Newell responded well to placement in the residential treatment unit. Moreover, inmates Harris, Easley and Newell had no disciplinary infractions while placed into the residential treatment unit. Inmate Mitchell broke prison rules by creating a disturbance. He says a panic attack caused him to kick his cell door, resulting in disciplinary isolation in the J-2 administrative control block. Apart from this incident, Inmates Mitchell, Harris, and Newell had no other disciplinary infractions when housed in the relatively unrestricted J-5 administrative control block.

Inmate Easley had problems in the residential treatment unit. While in the residential treatment unit, Easley harassed other patients. When admonished by a sergeant to stop, inmate Easley punched the officer. After being taken to disciplinary confinement pending disciplinary action, he assaulted other officers.[14/]

On July 2, 2001, Deputy Director of Institutions Terry Collins established a policy directing that high maximum security classified inmates released from the residential treatment unit were to be placed in the J-4 administrative control unit. In a letter directed to all those concerned, Collins stated, "[a]t the time when mental health clinicians determine that the inmate no longer requires residential treatment unit

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[12/] September 24, 2001, hearing, testimony of Monitor Fred Cohen, at 28-29.

[13/] *Id.* at 30.

[14/] September 24, 2001, hearing, testimony of Stephen Dillon, at 137.

placement, he will be placed in J4 on the mental health range."

Consistent with Collins' directive, the Ohio Department of Rehabilitation and Correction assigned inmates Mitchell, Harris, Easley and Newell to administrative control after they released them from the residential treatment unit.[15/] In reassigning inmates Mitchell, Harris, Easley and Newell to the J-4 administrative control unit, the defendants relied upon their classifications at the Ohio State Penitentiary. Deputy Director Collins explained his reasons:

> It was my intention that when those people are out of residential treatment unit, that they be placed in the J-4 simply for this reason: The individuals that are being returned from OSP are still considered a risk. They have not been released from OSP because their behavior has been good. They have been released because of some mental health issue.[16/]

On July 11, 2001, the defendants transferred nine former Ohio State Penitentiary inmates from the residential treatment unit to the J-4 administrative control unit. In recommending that inmates Mitchell, Harris, Easley and Newell be placed in the J-4 administrative control unit, prison psychiatrist Dr. Abul Hasan testified:

> Q. When you discharge an inmate from the residential treatment unit, what do you base that decision on?
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> A. Well, how they're doing, not whether they're mentally ill or not, because most of the inmates admitted to the residential treatment unit would be mentally ill and would still have the same diagnosis at the time of discharge. So the main thing is whether they're stable and whether they're able to deal with maximum security prison . . . [17/]

In recommending placement in the J-4 administrative control unit, Hasan did not consider the

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[15/] Inmate Newell was subsequently reassigned to the Warren Correctional Facility.

[16/] August 27, 2001, hearing testimony of Terry Collins, at 84.

[17/] September 25, 2001, hearing, testimony of Abul Hasan, M.D., at 311.

inmates cured:

> Q. With respect to these nine inmates, when you say that they no longer needed the services of the residential treatment unit, did you believe they no longer needed the psychiatric services?
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> A. No, sir. I think almost all of them I resolved that they need psychiatric treatment all along.[18/]

Dr. Hasan recommended that each inmate coming to the Southern Ohio Correctional Facility residential treatment unit from Ohio State Penitentiary be moved to the J-4 administrative control block after stabilizing in the residential treatment unit. He made these findings on the same day, on the same form, and using the same standard language for each of them. He gave little justification for his opinion that they should transfer inmates Mitchell, Harris, Easley and Newell to the J-4 administrative control block.

The Ohio Department of Rehabilitation and Correction opened the J-4 administrative control block at the Southern Ohio Correctional Facility in February 1998. It developed the J-4 unit because of the inability of the Ohio Department of Rehabilitation and Correction to treat seriously mentally ill inmates at the Ohio State Penitentiary.

The J-4 unit looks the same as the other cell blocks. It has 80 cells back to back. The cells have open fronts with bars instead of a solid door. They have a bed and a unitized stainless steel toilet in them. Without contradiction, Stephen Dillon, the deputy warden of special services, described the J-4 administrative control unit as "fairly bright, tiled, airy confinement facility." [19/]

Of the 80 cells in the J-4 range, 60 cells have been designated for use by inmates identified as

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[18/] *Id.*

[19/] September 24, 2001, hearing, testimony of Stephen Dillon, at 115.

having a severe mental illness. With the development of the J-4 administrative control unit, the Ohio Department of Rehabilitation and Correction consolidated inmates with serious mental illness. Previously, the Ohio Department of Rehabilitation and Correction scattered these inmates in seven different cell blocks at Southern Ohio Correction Facility. Dispersion of the serious mentally ill inmates made it difficult to keep track of them. Consolidating inmates in the J-4 range helped the delivery of mental health services. Because the staff would be more accustomed to working with a seriously mentally ill population, they could provide better custody care and treatment.

Within the J-4 administrative control unit, the defendants provide mental health services through psychiatrists, psychologist, mental health nurses, and, to a lesser degree, correctional officers. Psychologist Richard Shellenberger, PhD., sees each inmate weekly. Dr. Shellenberger sees patients at their cell block or in a private setting in his office. In addition, Dr. Shellenberger "walk[s] the ranges and discuss different aspects with the different inmate patients . . . usually three or more times during a week." [20/]

Beyond seeing psychologist Shellenberger, inmates in the J-4 administrative control unit see psychiatrist Dr. Gary Beven at least monthly. Dr. Beven additionally participates in a monthly group meeting with an inmate that usually includes Dr. Shellenberger, the nurse and the inmate. At these treatment meetings, Dr. Beven designs or adjusts the inmate's treatment program, a written guide of how the treatment team plans to help that person. Dr. Beven updates the treatment plan at least every 90 days.

Besides being seen by psychiatrist Beven and psychologist Shellenberger, nurses make daily rounds distributing medication and checking on the inmates. The correctional officers, who have received some training, also check on inmates.

[20/] September 24, 2001, hearing, testimony of Richard Shellenberger, PhD., at 248.

Finally, inmates in the J-4 administrative control unit sometimes participate in group programs, including programs to help inmates better control their anger.

The Ohio Department of Rehabilitation and Correction provides greater mental health treatment to inmates assigned to the J-4 administrative control unit than inmates in other units. Among inmates receiving mental health care, about 80% live in the general population. Inmates with a mental illness in the general population receive medication, including anti-psychotic drugs, and receive a psychiatric review at least every 90 days. Inmates in the general population do have weekly psychological sessions or monthly sessions with a psychiatrist.

The Court now considers the plaintiffs' motion for a preliminary injunction.

II. Discussion

A. Legal Standard

The factors a district court uses in deciding whether to grant a preliminary injunction are well-established: "(1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction." *Washington v. Reno,* 35 F.3d 1093, 1098–99 (6th Cir. 1994); *see also Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Unsecured Creditors' Comm. of DeLorean Co. v. DeLorean* (*In re DeLorean Motor Co.*), 755 F.2d 1223, 1228 (6th Cir. 1985). "None of these factors, standing alone, is a prerequisite to relief; rather, the court should balance them." *Golden v. Kelsey-Hayes Co.,* 73 F.3d

648, 653 (6th Cir. 1996).

B. Assigning Inmates to J-4 Administrative Control

With their motion for a preliminary injunction, the plaintiffs ask this Court to restrain defendants from assigning inmates returned from Ohio State Penitentiary for mental health reasons to administrative control solitary confinement. The plaintiffs give some complaint that their assignment to administrative control was done without procedural due process. More persuasively, the plaintiffs argue that assignment of seriously mentally ill inmates to administrative control solitary confinement denies them their right not to be subjected to cruel and unusual punishment.

1. Procedural due process

In reviewing the plaintiffs' claim that the defendants denied them procedural due process, the Court first examines whether they had a liberty or property interest that the defendants impaired. If they have such an interest, the Court then examines whether the procedures given them were constitutionally sufficient. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989).

In general, inmates do not have a liberty interest in a particular security classification or in freedom from segregation. *Olim v. Wakinekona*, 461 U.S. 238, 245 (1983); *Newell v. Brown*, 981 F.2d 880, 883 (6th Cir. 1992); *Beard v. Livesay*, 798 F.2d 874, 876 (6th Cir. 1986). Inmates have a liberty interest sufficient to support a procedural due process claim with regard to their classification only when that classification "imposes atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 483–84 (1995). The inquiry into the severity of confinement

considers whether differences in conditions between a restrictive housing status and the general population or other restrictive statuses are a significant hardship.

In *Jones v. Baker*, 155 F.3d 810 (6th Cir. 1998), the Sixth Circuit found that an inmate's two and one-half years confinement in administrative segregation was not an "atypical and significant" hardship for due process purposes. 155 F.3d at 812–13. In *Jones*, the prison authorities transferred the plaintiff and other inmates to Mansfield Correctional Institute after the 1993 Lucasville prison riot. At Mansfield, the prison officials put the plaintiff in segregation while the authorities investigated the circumstances of the riot at the Southern Ohio Correction Facility. In June 1993, the prison officials put Jones in administrative control, a more restrictive classification than segregation. Later, the prison returned him to segregation. But after a prosecutor said there was insufficient evidence to implicate the plaintiff in the murder of a prison official in the 1993 riot, officials brought administrative charges against Jones. Jones challenged the prison officials holding him in administrative segregation for two and one-half years.

In rejecting the claim, the Sixth Circuit described the general rule:

> Plaintiff contends that the extraordinarily long time during which he has been held in segregation establishes the "atypical and significant" hardship necessary under *Sandin* [*v. Conner*, 515 U.S. 472 (1995),] to create a liberty interest. First, administrative segregations have repeatedly been held not to involve an "atypical and significant" hardship implicating a protected liberty interest without regard to duration. Second, we note that under Ohio law, administrative segregation may continue for an "indefinite time period." Admittedly, few cases of segregation extend to the length of plaintiff's stay here. However, we agree with the district court that under *Sandin* a liberty interest determination is to be made based on whether it will affect the overall duration of the inmate's sentence and there is no evidence here that the segregation will impact plaintiff's sentence.

Jones, 155 F.3d at 812 (internal citations omitted).

The plaintiffs are unlikely to prevail on the merits of their procedural due process claim because the

plaintiffs do not show that the defendants subjected them to conditions different from those found constitutional in *Jones*. Even if the plaintiffs had a liberty interest in staying out of administrative control, which the Sixth Circuit has found they do not, the plaintiffs fail to show that the defendants denied them a sufficient hearing. This Court considers the private interests at stake in a governmental decision, the governmental interests involved, and the value of procedural requirements in determining what process is due under the Fourteenth Amendment. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

Each plaintiff received an Administrative Control hearing to decide whether they should be placed or remain in administrative control. The Ohio Department of Rehabilitation and Correction conducts administrative control hearings before three individuals. As described by Deputy Director of Institutions Terry Collins, the individuals see an inmate and look at a multitude of factors including "past behavior, current behavior, how serious the past behavior has been, assaultive, predatory, drugs, whatever it may be, that would place somebody in administrative control placement, which is typically defined who, are a threat to security in prison or assaultory/predatory-type individuals."[21/]

The defendants show that Ohio has a significant interest in maintaining discipline within its correctional facilities. In the circumstances presented by inmates Mitchell, Harris, Easley and Newell, the classification committee hearing, with a right to appeal, and with significant input from mental health professionals, supplies a procedural structure suited for the purpose of the determination. As subsequently described, each of inmates Mitchell, Harris, Easley and Newell have a significant mental health illness. Each has a history of disciplinary rule violations. Therefore, a correctional official, with the input of mental health professionals, appropriately decides an inmate's administrative classification. Importantly, the defendants

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[21/] September 25, 2001, hearing, testimony of Terry Collins, at 350.

review an inmate's administrative classification every 90 days.

2. Eighth Amendment claim

In their more persuasive argument, the plaintiffs contend that the placement of mentally ill prisoners in segregation environments violates their Eighth Amendment right to be free from cruel and unusual punishment. With this claim, the plaintiffs suggest two tracks. First they say that having successfully completed the residential treatment unit, there is no grounds for placing plaintiffs in the more restrictive J-4 administrative control unit. Second, they argue that placing seriously mentally ill inmates in administrative control is cruel and unusual punishment.

The Eighth Amendment prohibits cruel and unusual punishment, i.e., punishment that runs afoul of evolving societal standards or involves the unnecessary and wanton infliction of pain. *See* U.S. Const. amend. VIII; *see also Hutto v. Finney,* 437 U.S. 678, 685 (1978) ("Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards."); *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976).

A "punishment" for Eighth Amendment purposes need not come in the form of a criminal penalty. Conditions of incarceration may also constitute punishment actionable under the Eighth Amendment. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) ("The Constitution does not mandate comfortable prisons . . . but neither does it permit inhumane ones, and it is now settled that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.") (internal quotations omitted).

In the prison context, an Eighth Amendment claim includes both objective and subjective

components. *See, e.g.*, *Thaddeus-X v. Blatter*, 175 F.3d 378, 401 (6th Cir. 1999).

> [T]he deliberate indifference standard embodies both an objective and a subjective prong. Objectively, the alleged deprivation must be "sufficiently serious," in the sense that "a condition of urgency, one that may produce death, degeneration, or extreme pain" exists. Subjectively, the charged official must act with a sufficiently culpable state of mind.

Hathaway v. Coughlin, 99 F.3d 550, 553 (2d Cir. 1996) (internal citations omitted).

The objective component requires a prisoner to show the conditions of his incarceration posed "a substantial risk of serious harm." *Id.*

To make out an Eighth Amendment claim resulting from prison conditions, a party must also show culpable conduct of the prison official. *See Wilson v. Seiter*, 501 U.S. 294, 298–303 (1991) (Eighth Amendment prohibits only "cruel and unusual punishment," and "[t]he infliction of punishment is 'a deliberate act intended to chastise or deter.'") (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)). The *Wilson* Court held that "if the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify" as punishment. *Id.* at 300.

To satisfy the subjective component, a prisoner must establish that the prison official responsible for these conditions acted with "deliberate indifference." *Farmer*, 511 U.S. at 834. An official acts with deliberate indifference when the official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837.

"Deliberate indifference," as used in the Eighth Amendment context, comprehends more than mere negligence but less than the purposeful or knowing infliction of harm. *See Farmer*, 511 U.S.

at 836; *Estelle*, 429 U.S. at 106. Deliberate indifference requires that a prison official know of and disregard a substantial risk of serious harm to inmate health or safety. *See Farmer*, 511 U.S. at 837. The deliberate indifference standard is a subjective one. It is not enough that there was a danger of which a prison official objectively should have been aware. "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.*

The plaintiffs do not succeed with their Eighth Amendment claim. As a matter of policy, Collins directed that inmates leaving the residential treatment unit were to return to the classification they enjoyed before coming to the residential treatment unit, subject to later reclassification. Therefore, when inmates Mitchell, Harris, Easley and Newell completed the residential treatment unit program, the defendants assigned them to administrative control.

The defendants had good reason to be cautious about returning inmates Mitchell, Harris, Easley and Newell to the general prison population. Each had a combination of mental illness and past misconduct.

Inmate James Mitchell is incarcerated for involuntary manslaughter that involved the beating death of a young woman before she was thrown off a balcony. He is also incarcerated for the April 1999 aggravated arson at the Marion Correctional Facility. While incarcerated, Mitchell has violated prison rules often. At the Marion Correctional Facility, he twice set fires that caused evacuations. In April 2000, he broke windows and mirrors. He fought with other inmates in November 1997, and November 1998. He disobeyed correctional officer orders on many occasions.

Mitchell suffers from dysthymia, a form of depression. He also reports auditory hallucinations,

typical for a schizophrenic disorder. Mitchell also has an intermittent explosive disorder when he becomes angry and enraged. He receives mood stabilizing and anti-psychotic medications.

Fred Harris, Jr. is incarcerated for having weapons under disability arising from his killing a man during a fight in 1994. He also is serving a sentence for harassment by an inmate. While incarcerated, Harris has often violated prison rules. He fought with other inmates at least twice. He has refused orders or made disrespectful remarks, often of a sexual nature when speaking to female officers, on at least twenty-four occasions. On other occasions he has broken prison property.

Regarding Harris's mental condition, he suffers from a dysthymic disorder, which is a form of depression. He is chronically depressed and discouraged. He has an antisocial personality disorder. He has very low self-esteem and, at the same time, has a tendency to call attention to himself by unseemly acts.

David Easley is serving a sentence for aggravated robbery and felonious assault, among other crimes. The aggravated robbery charges come from the hold-up of food and convenience stores with the use of a weapon. The felonious assault charge arises from Easley shooting at police officers while commandeering a stolen vehicle. While incarcerated, prison officials have disciplined Easley for fighting with other inmates at least seven times. He threatened or assaulted correction officers at least nine times. He has started fires on a number of occasions.

Easley suffers from major depressive disorder with psychotic features. Dr. Beven describes him as "a disgruntled, discouraged, angry, potentially violent man and he admits this."[22/] Beven relates that

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[22/] September 24, 2001, hearing, testimony of Gary Beven, M.D., at 201.

Easley has expressed intentions to hurt "some of the officers that he had had run-ins with in the past." [23/]

Inmate Emanuel Newell is serving sentences for felonious assault and weapon offenses. At an earlier time he served time for voluntary manslaughter. In the felonious assault offense, Newell shot a gun at police officers after a traffic stop. In the earlier offense, Newell shot and killed an individual after a traffic accident. While incarcerated, he has threatened other inmates and correction officers. In October 1998, Newell struck another inmate in the head with an iron and then stabbed the inmate.

Inmate Newell was assaulted in the 1993 Lucasville riot at the Southern Ohio Correctional Facility, apparently upon the belief that he cooperated with prison officials. Because of the belief that he had cooperated during and after the riot, the Ohio Department of Rehabilitation and Correction placed Newell in protective custody at an institution other than the Southern Ohio Correctional Facility.

Newell suffered from posttraumatic stress syndrome and major depressive disorder. While able to function generally, he has a strong potential to decompensate under certain circumstances.

Each of inmates Mitchell, Harris, Easley and Newell have various levels of mental dysfunction. Each is a discipline risk. As to their mental condition, the plaintiffs fail to clearly show that placement in J-4 administrative control block risks serious damage to them. First, the J-4 block provides the inmates more access to mental health treatment then the general population. Second, the J-4 block lay out reduces isolation. As described by Deputy Director Terry Collins, inmates in the J-4 block can converse or interact with other inmates, 24-hours a day, seven days a week. With all cells having open fronts, inmates in the J-4 block can talk to the persons above, below, or next to them at will: "So there's constant

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[23/] *Id.*

conversation and talking in that cell block."[24/]

As described above, an Eighth Amendment claim requires a two-part showing of both objective and subjective components. As to the objective test, the deprivation must pose a substantial risk of serious harm. Regarding the subjective component, the plaintiffs must also show culpable conduct of the prison officials. To show such culpable conduct, the plaintiffs must show a deliberate act or "deliberate indifference."

The Constitution "does not mandate comfortable prisons," *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981), but neither does it permit inhumane ones, *Farmer*, 511 U.S. at 832. *See also*, *Helling v. McKinney*, 509 U.S. 25, 31 (1993). The Eighth Amendment imposes on prison officials the duty to provide humane conditions of confinement, including adequate food, clothing, shelter, and medical care. *Farmer*, 511 U.S. at 832. Prison officials must take reasonable measures to guarantee the safety of the inmates. *Id.*; *Hudson v. Palmer,* 468 U.S. 517, 526–27 (1984).

A party who shows that prison officials acted with deliberate indifference to the serious medical needs of prisoners sufficient to inflict unnecessary pain or suffering, make out a violation of the Eighth Amendment. *Estelle*, 429 U.S. at 104; *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 660 (6th Cir. 1994).

Deliberate indifference to mental health or physical needs, can make out an Eighth Amendment claim. *Greason v. Kemp*, 891 F.2d 829, 834 (11th Cir. 1990) (claim stated for failure to provide psychotropic medication); *Young v. City of Augusta,* 59 F.3d 1160, 1171–72 (11th Cir. 1995) (claim stated because inmate alleged that city's failure to adequately train guards to accommodate mentally ill

[24/] August 27, 2001, hearing, testimony of Terry Collins, at 81.

prisoners represented deliberate indifference to inmate's mental health).

Serious psychological conditions that show themselves in suicidal tendencies are serious medical needs for purposes of the due process analysis. *Horn*, 22 F.3d at 660; *Barber v. City of Salem, Ohio*, 953 F.2d 232, 239–40 (6th Cir. 1992) (identifying the proper inquiry in suicide cases as "whether the decedent showed a strong likelihood that he would attempt to take his own life in such a manner that failure to take adequate precautions amounted to deliberate indifference to the decedent's serious medical needs"); *Molton v. City of Cleveland*, 839 F.2d 240, 243 (6th Cir. 1988).

Regarding the plaintiffs' burden of showing that the defendants acted objectively unreasonable, the Supreme Court observed in *Farmer* that "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." 511 U.S. at 844.

Here, the defendants must place inmates Mitchell, Harris, Easley, Newell and others who have both a mental illness and long-standing discipline problem in an environment that reasonably reduces risk to them, to corrections officers, and to other inmates. Under the Eighth Amendment, prison officials must "ensure reasonable safety." Accordingly, "prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Id.* at 845.

Seeking to show the defendants acted unreasonably in assigning inmates Mitchell, Harris, Easley and Newell to the J-4 administrative control unit, the plaintiffs offered the testimony of Dr. James Gilligan, M.D., a psychiatrist who once served as the Director of Mental Health Services for the State of Massachusetts. Broadly summarized, Dr. Gilligan believes that inmates should never be subjected to administrative control except when an inmate is "absurd or acutely violent who may have to be placed

behind a locked door for perhaps a few hours at a time until he can calm down enough and talk about what happened."[25/] Dr. Gilligan believes that administrative control exacerbates bad conduct by demeaning inmates, especially when restraints are used.

While he acknowledges that past conduct, including past bad conduct, is the best predictor of future conduct, Dr. Gilligan believes that inmates should have the least restraint because he believes this best socializes inmates:

> . . . What creates security is effective treatment. And that means not just in the technical sense of psychotherapy, but in the way people are treated by other people. In the more ordinary sense of the word, the way they are related to by other people.
>
> When an individual's dignity is respected, when he is treated as a human being and not an animal, when he is given a chance to talk and is not limited to having to act in order to have people pay attention to him or understand what he's trying to get at, under those conditions people are much more likely to drop violence as a way of coping and to relate to other people in non-violent ways. [26/]

While believing that a policy of least restraint is best, Dr. Gilligan acknowledges that such policy is not used in any prison and is "at the leading edge of progress in this area"[27/] More important, Dr. Gilligan does not show any conduct by the defendants inconsistent with mental health other than security measures. While disagreeing with the level of restraint, he does not say that defendants acted unreasonably in subjecting inmates Mitchell, Harris, Easley and Newell to the conditions in the J-4 administrative control unit. He does not criticize the nature or amount of mental heath treatment given J-4 administrative control unit inmates. He simply believes that the defendants should not restrain even the most dangerous inmates. The Court is not persuaded by Dr. Gilligan's testimony.

[25/] September 11, 2001, hearing, testimony of James Gilligan, M.D., at 37.

[26/] *Id.* at 36.

[27/] *Id.* at 43.

The plaintiffs fail to show the defendants acted unreasonably by assigning the inmates to the J-4 administrative control unit. As described, inmates Mitchell, Harris, Easley and Newell had stabilized after placement in the residential treatment unit. Because of the high cost associated with running the residential treatment unit and the greater potential for injury to other inmates from misconduct, the defendants reasonably decided inmates Mitchell, Harris, Easley and Newell should be placed elsewhere.

Once taken from the residential treatment unit, placement in the J-4 administrative control block was reasonable. First, the J-4 administrative control block had the highest concentration of mental health treatment at the Southern Ohio Correctional Facility outside the residential treatment unit. With ongoing treatment from psychiatrists, psychologists, mental health nurses, with some programming, the J-4 unit provides reasonable care.

As important, because of their history of past rule violations, many of which were serious, the defendants could reasonably believe that inmates Mitchell, Harris, Easley and Newell should be kept in administrative control. While inmates Mitchell, Harris, and Newell mostly avoided problems while in the residential treatment unit, Easley had the problems described above, including assaults upon correction officers and harassment of other inmates. The plaintiffs are unlikely to prevail on the objective component of their Eighth Amendment claim because they fail to show that defendants subjected plaintiffs to an unreasonable risk of serious harm by assigning them to the J-4 block.

As for the subjective component of their Eighth Amendment claim, the plaintiffs do not show that the defendants acted with a "sufficiently culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). To judge whether the defendants have such a culpable state of mind, the Court decides if the defendants were "deliberately indifferent."

The plaintiffs do not present evidence establishing that the defendants were deliberately indifferent to an unreasonable risk of serious harm. While not agreeing with plaintiffs that inmates should not suffer administrative control, the defendants have afforded significant effort to treat mental illness in the J-4 administrative control unit. The centralization of inmates subject to administrative control simplifies their treatment

As discussed above, the plaintiffs are unlikely to prevail on the legal merits of this claim. Without a likelihood of success on the legal merits of their claim, the Court need not address the other factors concerning this aspect of the plaintiffs' motion for a preliminary injunction. The plaintiffs fail to show entitlement to an order stopping defendants from placing inmates Mitchell, Harris, Easley, Newell or other seriously ill inmates into the J-4 administrative control unit.

C. Housing of Seriously Mentally Ill Inmates at Ohio State Penitentiary

In addition to their motion regarding administrative control, the plaintiffs ask the Court enjoin the defendants from returning seriously mentally ill inmates to the Ohio State Penitentiary. The plaintiffs seek to stop defendants from transferring patients to the Ohio State Penitentiary who are seriously mentally ill.

The defendants neither designed nor, more important, staffed Ohio State Penitentiary to house seriously mentally ill inmates. With only one psychiatrist and very limited mental health staffing, the plaintiffs say that housing seriously mentally ill inmates at Ohio State Penitentiary violates their right to be free from cruel and unusual punishment.

The defendants give little opposition. As noted above, the Ohio Department of Rehabilitation and

Correction policy 111-07 stated that seriously mentally ill or seriously physically ill inmates were not to be placed at the Ohio State Penitentiary. Any such inmate inadvertently transferred to the Ohio State Penitentiary was to be transferred to another institution. The defendants own experts believe that the Ohio State Penitentiary poses a serious threat to the health of seriously mentally ill inmates housed there. Dr. Gary Beven, the psychiatrist at the Southern Ohio Correction Facility testified:

> Q. With regard to [Ohio State Penitentiary], at the present time, Dr. Beven, it's my observation of your treatment notes, for example, on Mr. Mitchell, Mr. Easley and Mr. Newell, that you have consistently recommended against the return of such prisoners to Ohio State Penitentiary because of the likelihood of decompensation and deterioration. Would you agree?
>
> A. Absolutely.[28/]

See also Plaintiffs' Exhibit H-22, June 6, 2001, Treatment Team Progress Notes ("At OSP, [Harris] resorted to harming himself by cutting and he actually began, at one point, to consume his own fecal material"); Plaintiffs' Exhibit M-14, May 30, 2001, Psychiatrist's Clinic Progress Note ("At OSP [Mitchell's] behavior deteriorated precipitously. . . . The isolation at OSP provoked quite serious decompensation with both self-destructive and aggressive behaviors"); Plaintiffs' Exhibit M-21, August 16, 2001, Treatment Team Mental Health Evaluation ("[Mitchell] is not to return to OSP . . . Apparently at OSP, the confinement at that institution intensified his propensity to become violent, aggressive, and self-destructive . . . His mental health problems contradindicate the transfer back to OSP in the future"); Plaintiffs' Exhibit N-6, June 7, 2001, Treatment Team Progress Note ("Regarding transfer back to OSP, although stable at the present time, it is perhaps to be anticipated that further deterioration and decompensation would occur if [Newell] were to be transferred back to that super maximum security

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[28/] September 24, 2001, hearing, testimony of Gary Beven, M.D., at 216.

prison.").

Monitor Cohen testified to like effect: "I thought the better way to go was to have a policy that specifically excluded the seriously mentally ill from Ohio State Penitentiary, from being sent there or if sent there by some accident, retained there."[29/]

In *Estelle*, the Supreme Court held that the Eighth Amendment prohibits the government from being deliberately indifferent to a prisoner's serious medical needs, and that the government has an obligation to provide medical care for people being punished by incarceration. 429 U.S. at 102–05. To make a claim under *Estelle* because of inadequate medical care in prison requires that there be deliberate indifference by prison officials and that the prisoner's medical needs be serious. *See id.* at 106.

As described by the Third Circuit in *Inmates of Allegheny County Jail v. Pierce,* 612 F.2d 754 (3d Cir. 1979):

> Thus, where the size of the medical staff at a prison in relation to the number of inmates having serious health problems constitutes an effective denial of access to diagnosis and treatment by qualified health care professionals, the "deliberate indifference" standard of *Estelle v. Gamble* has been violated. In such circumstances, the exercise of informed professional judgment as to the serious medical problems of individual inmates is precluded by the patently inadequate size of the staff.

612 F.2d at 763.

The plaintiffs' and defendants' evidence makes it clear that returning inmates Newell, Mitchell, Harris, Easley, or other seriously mentally ill inmates to the Ohio State Penitentiary would likely constitute a constitutional violation. Therefore, the plaintiffs are likely to succeed on the merits of this claim. The Court quickly turns to the other factors it must weigh when deciding to issue an injunction.

[29/] September 24, 2001, hearing, Fred Cohen, at 46–47.

There is also little dispute that the transfer of a seriously ill inmate to the Ohio State Penitentiary would cause irreparable harm. Dr. Beven testified that such a transfer could cause decompensation and deterioration to such an inmate's mental health. Regardless if treatment is available, the destruction of an individual's mental health constitutes an irreparable harm.

At the same time, issuing an injunction preventing the return of seriously mentally ill inmates to the Ohio State Penitentiary does not cause substantial harm to others. As previously discussed, the design of the J-4 block keeps the inmates away from the general population and allows correctional officers sufficient opportunities to observe and control the inmates. No evidence was presented of inmate overcrowding in the J-4 block or that the inmates represented a specific danger to the correctional officers or other inmates in the J-4 block.

Finally, an injunction prohibiting the inmates return to the Ohio State Penitentiary serves the public interest. The injunction ensures the inmates' right to be free from cruel and unusual punishment by housing them at facility that provides them adequate mental health care.

Therefore, for the reasons discussed above the Court grants the plaintiffs' motion for a preliminary injunction preventing the return of seriously mentally ill inmates to the Ohio State Penitentiary.

III. Conclusion

The Court denies the plaintiffs' motion for a preliminary injunction preventing seriously mentally ill inmates from being housed in the Southern Ohio Correctional Facility's J-4 administrative control block. The Court grants the plaintiffs' motion for a preliminary injunction preventing the defendants from returning seriously mentally ill inmates to the Ohio State Penitentiary.

Therefore, the defendants are enjoined from returning any of the seriously mentally ill class members to the Ohio State Penitentiary. This preliminary injunction will remain in effect until February 19, 2002, approximately a month and a half after the trial on the merits begins on January 7, 200 2, or until a permanent injunction order replaces the current injunction. *See* 18 U.S.C. § 3626(a)(2). After reviewing all of the testimony and evidence, the Court holds that the plaintiffs need not post a security bond. *See* Fed. R. Civ. P. 65(c); *UASCO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 100 (6th Cir. 1982).

IT IS SO ORDERED.

Date: November 21, 2001

s/ James S. Gwin
James S. Gwin
United States District Court