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U.S. DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION

GEORGE RILEY, et al,
Plaintiffs

v.

DEVON BROWN, et al,
Defendants.

CLASS ACTION

No.

06-0331(DRD)

MEMORANDUM OF LAW IN SUPPORT OF
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES I

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

ARGUMENT 21

POINT I – PLAINTIFFS ARE ENTITLED TO A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION 21

 A. PLAINTIFFS ARE THREATENED WITH IRREPARABLE HARM 21

 B. THE BALANCE OF HARDSHIPS FAVORS THE PLAINTIFFS 25

 C. THE PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS 26

 D. THE RELIEF SOUGHT WILL SERVE THE PUBLIC INTEREST 28

POINT II – THE PLAINTIFF SHOULD NOT BE REQUIRED TO POST
SECURITY 30

CONCLUSION 31

TABLE OF AUTHORITIES

STATE STATUTES

N.J.S.A. 2C:47-3 5, 7, 17

RULES

Fed. R. Civ. P. 23 5

Fed. R. Civ. P. 65(c) 27

FEDERAL CASES

Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 521 L.Ed.2d 72
(1977) 24

Duran v. Anaya, 642 F.Supp. 510 (D.N.M. 1986) 23

Elrod v. Burns, 427 U.S. 347 (1976) 22

Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285,
50 L.Ed.2d 251 (1976) 24

Heller v. McKinney, 509 U.S. 25, 113 S.Ct. 2475,
125 L.Ed.2d 22 (1993) 24, 25

Hutto v. Finney, 427 U.S. 678, 98 S.Ct. 2565,
57 L.Ed.2d 522 (1978) 25

J.L. v. Parham, 412 F.Supp. 112 (D.Ga. 1976),
rev'd on other grounds, 442 U.S. 584, 99 S.Ct. 2493 (1979) 27

Mitchell v. Cuomo, 748 F.2d 804 (2nd Cir. 1984) 22, 23

Newsom v. Norris, 888 F.2d 371 (6th Cir. 1989) 22

Orantes-Hernandez v. Smith, 541 F.Supp. 351, (C.D.Cal. 1982) 27

Memorandum of Law in Support of Motion for TRO

Philips v. Michigan Dept. of Corrections,
731 F.Supp. 792 (W.D.Mich. 1990), aff'd,
932 F.2d 969 (6th Cir. 1991) 22

Williams v. Lane, 646 F.Supp. 1379 (N.D.Ill. 1986),
aff'd, 851 F.2d 867 (7th Cir. 1988) 22

Wilson v. Seiter, 501 U.S. 294, 111 S.Ct. 2321,
115 L.Ed.2d 271 (1991) 24

Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452,
73 L.Ed.2d 28 (1982) 25

FEDERAL STATUTES

42 U.S.C. § 1983 5

42 U.S.C. § 1997e(a) 15

STATEMENT OF THE CASE

This is a civil rights Class Action complaint brought under 42 U.S.C. § 1983 and Fed. R. Civ. P. 23 by New Jersey inmates housed at the Adult Diagnostic and Treatment Center (hereinafter "A.D.T.C."), the designated facility in New Jersey for offenders who have been found to suffer from a mental abnormality that predisposes them to commit sexual offenses in a compulsive and repetitive manner pursuant to N.J.S.A. 2C:47-3 et seq. The complaint upon which this action is based alleges violation of Plaintiffs' and class members' constitutional rights under the First, Eighth and Fourteenth Amendments to the Constitution of the United States. Specifically, the complaint alleges denial of right of access to the courts under the First Amendment; imposition of cruel and unusual punishment in violation of the Eighth Amendment resulting from interference with the exercise of inmates' rights to necessary medical treatment, and from subjecting inmates to serious physical injury, or threat of such injury; and denial of protected property and liberty interests under the Fourteenth Amendment.

Plaintiffs allege that Defendants, acting under the color of state law, have failed and continue to fail to provide the Plaintiffs with protection from risk of serious assault, injury and even death at the hands of violent and dangerous state

prisoners, during medical, court and other trips outside of the A.D.T.C. facility.

Specifically, the complaint alleges that inmates housed at the A.D.T.C. (hereinafter "A.D.T.C. inmates") are not segregated from or otherwise protected from violent and dangerous prisoners housed at other state prisons (hereinafter "State Prisoners") who have in the past and will continue in the future, to verbally and physically assault A.D.T.C. inmates during periods when State Prisoners and A.D.T.C. inmates are held and transported together on court, medical and other trips. Such State Prisoners harbor particular enmity toward A.D.T.C. inmates because of the nature of their crimes (sexual offenses), and seek to cause them physical and psychological harm in the absence of protection by New Jersey Department of Corrections (DOC) officials.

The failure of Defendants to adopt and implement policies, practices, and procedures that segregate and protect A.D.T.C. inmates from assault by State Prisoners, has in the past resulted in A.D.T.C. inmates suffering serious physical injury at the hands of State Prisoners. The absence of such protective policies, practices and procedures creates an imminent and substantial risk of injury to any A.D.T.C. inmate who requires a court, medical or other trip outside of A.D.T.C.

Out of fear of being seriously injured or even killed by State Prisoners in the absence of such protective policies,

Memorandum of Law in Support of Motion for TRO

practices and procedures, many A.D.T.C. inmates, including the Plaintiffs, have foregone needed medical treatment and court appearances which have placed them at risk of suffering serious medical problems, and sacrificing significant property and/or liberty interests.

In the case of mandatory court appearances which Plaintiffs cannot waive, Plaintiffs are at imminent and substantial risk of serious injury at the hands of State Prisoners in the absence of protective policies, practices and procedures to ensure their safety.

The failure of the defendants to act to protect A.D.T.C. inmates on court, medical and other trips compromises those inmates constitutional rights under the First, Eighth and Fourteenth Amendments.

STATEMENT OF FACTS

As alleged in the verified complaint and the declarations of George Riley, James J. Krivacska, Paul Cornwell, Vincent Macrina, William Vansciver, Richard A. Gibbs and Peter Braun filed contemporaneously with and in support of this motion for a Temporary Restraining Order (TRO), Plaintiffs are inmates currently housed at the A.D.T.C. in Avenel, New Jersey. The A.D.T.C. was originally designated as the DOC facility for those convicted of sexual offenses and found to be compulsive and repetitive offenders pursuant to N.J.S.A. 2C:47-3 et seq. As

Memorandum of Law in Support of Motion for TRO

declared by Plaintiff William Vansciver, DOC has begun to house at A.D.T.C. inmates who, though convicted of a sex offense, were not found to be compulsive and repetitive and thus sentenced to the A.D.T.C.

However, irrespective of whether sentenced to the A.D.T.C. or not, only inmates serving sentences for the commission of a sexual offense are housed at the A.D.T.C.

The recitation of facts contained herein, are drawn from and supported by the verified complaint and individual declarations submitted on behalf of the Plaintiffs along with this motion

Dating back to at least 1989, A.D.T.C. inmates have complained about verbal and physical abuse suffered at the hands of State prisoners, and even, at times, DOC corrections officers, while being transported to court, medical and other trips outside of the A.D.T.C. More recently, an assault upon an A.D.T.C. inmate, Todd Becka, instigated activity by the Legal Subcommittee of the A.D.T.C. Inmate Resident Committee (I.R.C.)¹. As detailed in the verified complaint, Mr. Becka was struck in the head by a State Prisoner during a medical trip, and subjected to an incessant barrage of invective and insults designed to intimidate and frighten him. Subsequent to complaints made by Mr. Becka and

¹The Inmate Resident Committee is an administration-sanctioned inmate organization comprised of inmates who are elected by their peers on their housing units to represent their interests and concerns to the administration.

Memorandum of Law in Support of Motion for TRO

the IRC, no actions were taken by DOC officials to protect A.D.T.C. inmates during such trips.

Then on May 24, 2005. Plaintiff Paul Cornwell, on the return leg of a medical trip, was seriously injured by a State Prisoner while being held in a holding area at the Garden State Correctional Facility. He was placed, along with another A.D.T.C. inmate, Zhi-men Chen, into a holding tank with about a dozen State Prisoners. While his wrist shackles were being removed, one of the corrections officers announced that the two inmates were from "Avenel," which in the parlance of the New Jersey Prison system is understood to be the A.D.T.C. facility which houses sex offenders. In deciding to leave the two inmates' leg irons on, one of the officers commented that doing so would make it a "fair fight." The two officers then left the holding area, secured the door, and watch what transpired next from behind a Plexiglas partition.

A State Prisoner first struck Mr. Cornwell in the chest, and then delivered a blow to his head which knocked him unconscious. For several minutes, the State Prisoner then continued to pummel and kick Mr. Cornwell, while he was unconscious and laying on the floor. Only after the State Prisoner had tired of the assault and stopped did the officers call for assistance and enter the holding area. Mr. Cornwell was thereafter taken to the infirmary for treatment, and subsequently was hospitalized for 55 days for

injuries incurred from the assault, which hospitalization included two week-long stints at St. Francis Hospital where he underwent surgery for the injuries sustained to this arm. He continues to suffer from the injuries sustained in that attack and has had to undergo additional medical trips to treat those injuries during which he has feared for his safety.

As a result of this assault, Mr. Cornwell suffered severe psychological trauma as well, displaying symptoms including night terrors, nightmares, hypersensitivity to his environment, flashbacks, and fear of being around other people and of leaving his bed area in his dorm. These symptoms were so severe, he was referred to one of the A.D.T.C. staff psychiatrists, Dr. Harris, who diagnosed him as suffering from Post-traumatic Stress Disorder (PTSD). Dr. Harris treated Mr. Cornwell, prescribing medication for his PTSD (Remeron) and assigning him to group psychotherapy in one of the A.D.T.C. mental health treatment groups. Mr. Cornwell filed an administrative grievance and a Tort Claims Notice regarding this incident. His request for greater protection of A.D.T.C. inmates during transport with State prisoners - sought in the administrative grievance - was disregarded, and his request for compensation for his injuries, pain and suffering - sought in the Tort Claim Notice - was denied.

Memorandum of Law in Support of Motion for TRO

A week after the assault on Mr. Cornwell, Plaintiff James Krivacska was scheduled to be transported to the oral surgery clinic at New Jersey State Prison (NJSP) to have a tooth extracted. Mr. Krivacska had only one prior experience with being transported out of the A.D.T.C. In August of 2002, he was transported to Monmouth County Superior Court for a court proceeding. During that trip, he was seated in a van next to State Prisoners who were aware of his status as an A.D.T.C. inmate because they were already in the van when Mr. Krivacska was picked up at the A.D.T.C. While held at the Monmouth County Jail and Courthouse, Mr. Krivacska was not segregated from these State Prisoners. Nor was he segregated on the return trip or for the approximately two hour period he was held with State Prisoners in a holding area at Garden State Correctional Facility. As a result, throughout this trip and while being held in various holding tanks, Mr. Krivacska was subjected to verbal abuse and threats of physical assault because of his status as an A.D.T.C. inmate and convicted sex offender.

Scheduled for the medical trip to extract his tooth on May 31, 2005, Mr. Krivacska was confronted with his fear of again being subjected to the risk of verbal and physical abuse, as compared to the excruciating pain he was suffering from the tooth that needed to be extracted. Concluding that the incident involving Mr. Cornwell the prior week might have sufficiently

chastened DOC officials that they would be taking additional precautions while the Cornwell assault was still being investigated, he decided to risk the trip.

On the trip from A.D.T.C. to NJSP, which Mr. Krivacska took with three other A.D.T.C. inmates, the A.D.T.C. inmates were kept separate from inmates from Northern State Prison by an empty row in the vehicle, and strict enforcement by the officers of the rule that inmates must remain in their seat during the transport. As a result, the A.D.T.C. inmates were physically protected from contact with the State Prisoners, although they were nevertheless exposed to verbal abuse.

Throughout the five hours Mr. Krivacska and the A.D.T.C. inmates remained at NJSP, they were kept in holding areas separate from other State Prisoners. When being loaded or unloaded from vehicles, A.D.T.C. inmates, who were seated in front of the State Prisoners, were loaded last and unloaded first to ensure no physical contact would occur. While being moved between areas at the NJSP, the officers in charge, who may at times call for inmates based on where they are housed, shuffled the paperwork so that all other State Prisoners were called first, so as to avoid identifying A.D.T.C. inmates and where they were from.

At any time State Prisoners and A.D.T.C. inmates were not separated (in corridors, or clinic waiting areas), a DOC

Memorandum of Law in Support of Motion for TRO

corrections officer(s) was physically present. On the return trip from NJSP, the A.D.T.C. inmates were transported directly back to A.D.T.C. without stopping at the Garden State Correctional Facility.

Other than some verbal abuse on the morning trip from A.D.T.C. to NJSP, Mr. Krivacska was not subjected to any threats of physical harm, or risk of physical harm because of the efforts of DOC officials to keep A.D.T.C. inmates physically separate from State Prisoners.

Despite demonstrating that such segregation was possible and could be accomplished with minimal effort, Mr. Krivacska learned from other inmates going on court or medical trips that, within a few weeks, DOC staff had returned to mixing A.D.T.C. inmates and State Prisoners, and had, in some cases, even returned to the practice of informing State Prisoners of where the A.D.T.C. inmates were from, again placing A.D.T.C. inmates at risk. As a result, Mr. Krivacska delayed the extraction of a broken tooth for six months, until he was able to arrange to have the tooth pulled by an oral surgeon who visits the A.D.T.C. periodically to care for inmates at a half-way house the A.D.T.C. infirmary services.

Mr. Krivacska currently has pending before the Monmouth County Superior Court, a Post-Conviction Relief Petition (the New Jersey equivalent of federal habeas corpus). In light of the

risks associated with being transported with State Prisoners. Mr. Krivacska has, against the advice of counsel, waived his right to appear at status conferences, or pre-hearing proceedings. Mr. Krivacska's attorney has advised him that absenting himself from those proceedings could compromise his representation of Mr. Krivacska, as questions might come up during a conference or proceeding that he would need to ask Mr. Krivacska about. However, Mr. Krivacska's fear of serious physical assault or injury is so severe that he would rather waive his rights to appear in court than risk such injury. Currently, an appearance before the Monmouth County Court is scheduled for February 17, 2006. an appearance Mr. Krivacska will be forced to waive if the relief sought is not granted.

Mr. Krivacska is also the defendant in a lawsuit filed by his ex-law firm for an alleged outstanding balance of over \$100,000 in legal fees. That action, pending in Essex County Superior Court, will soon move into the pre-trial stage, as the discovery period has nearly concluded. Mr. Krivacska answered this complaint by raising several valid defenses which he believes he could succeed with if the matter is taken to trial. However, for fear of serious injury or death if he is not segregated from State Prisoners during trips to the Essex County Jail and while held in Essex County Jail or the court house, Mr. Krivacska is preparing to waive his right to a trial and accept a judgment

Memorandum of Law in Support of Motion for TRO

against him in the amount of \$100,000. Mr. Krivacska will be faced with making this decision within the next few weeks unless the relief sought by the TRO and preliminary injunction is granted.

Mr. Krivacska formally grieved the practice of mixing State Prisoners and A.D.T.C. prisoners during medical, court and other trips in an Administrative Remedy Form dated June 4, 2005. The Administrative Remedy Form (ARF) is the only approved procedure for an inmate to file a formal grievance with the DOC. That ARF was responded to by Associate Administrator Mr. Goodwin on June 14, 2005, in which he noted that A.D.T.C. had no authority over the transport policies of Central Transport. Mr. Krivacska then appealed that decision using the appeal process in place for inmate grievances, requesting that his grievance be forwarded to the Central Transport Unit or other administrator who had the authority to change policies regarding the segregation and transport of A.D.T.C. inmates. That appeal was submitted on June 23, 2005.

Mr. Goodwin responded on July 10, 2005 again asserting that A.D.T.C. does not have the authority to change transport policies. Though stating that Central Transport was aware of the concerns of the A.D.T.C. inmates, he gave no indication in his response that any action in response to those concerns was

forthcoming or that he had forwarded Mr. Krivacska's grievance to Central Transport or a higher level administrator as requested.

Having filed a formal grievance and having pursued that grievance through appeals to its conclusion, Mr. Krivacska exhausted all administrative remedies available to an inmate in the New Jersey Department of Corrections, with regard to the issues being presented in this complaint. Thus, the Plaintiffs have complied with the exhaustion requirements of 42 U.S.C. § 1997e(a).

Plaintiff Richard Gibbs has the most pressing claim before this court and is most critically in need of a temporary restraining order. With a court appearance in Burlington County Court scheduled for January 30, 2006, he will confront almost immediately the choice of either sacrificing constitutionally protected rights or risking severe bodily injury or even death if he chooses to exercise those rights. Mr. Gibbs has pending before the Burlington County Superior Court, a Post-conviction Relief Petition. As part of the proceedings on that petition, his attorney, appointed by the Office of the Public Defender, has filed a motion seeking to recuse Judge LeBon, before whom the PCR petition is pending, from continuing to hear or rule on the petition. A hearing to receive testimony on that motion is scheduled just a few days away, on January 30, 2006. Mr. Gibbs' attorney has advised him that his [Mr. Gibbs'] testimony may be

Memorandum of Law in Support of Motion for TRO

critical to winning this motion and has advised him to attend this hearing and offer testimony. As with Mr. Krivacska, Mr. Gibbs is very fearful of being assault, injured or even killed during a court trip if he is not segregated from state prisoners, and has thus advised his attorney that absent assurances of his safety, or an order of a court that he be kept separate from State prisoners at all times, he feels compelled to waive his rights to appear and participate in this hearing.

Future proceedings may also require Mr. Gibbs to choose between his safety and preserving his constitutional rights, but at the moment, the January 30th date looms large for Mr. Gibbs' interests.

Plaintiff George Riley is a long-time inmate at the A.D.T.C. and has been informed about the physical and verbal abuse A.D.T.C. inmates are subjected to during court and medical trips for many years. He is aware of prior attempts to get DOC officials to take these concerns seriously and to take action to protect A.D.T.C. inmates during such trips.

Mr. Riley is an elected member of the Inmate Resident Committee (IRC), representing his housing unit, and is also chairman of the IRC's legal subcommittee. In that capacity he has received information from many inmates of the physical and verbal abuse to which they are subjected on court and medical trips from not only State Prisoners, but, at times, from DOC employees. This

abuse is solely attributable to their status as inmates of the A.D.T.C., and the related fact revealed by their housing location: that they are convicted sex offenders.

Records retained by the IRC indicate that complaints about verbal and physical abuse of A.D.T.C. inmates at the hands of state prisoners date back at least to 1989; complaints which were ignored by DOC officials, including the then A.D.T.C. administrator and current Director of Operations, William Plantier.

Mr. Riley also has an appeal of a PCR petition currently pending before the Superior Court-Appellate Division, which, if remanded to the trial court, will require him to be transported to and to appear at in Monmouth County Court. Mr. Riley fears that he will be exposed to a substantial risk of severe physical injury should he attend those proceedings. He is subject to a remand by the Appellate Court at any time.

In his capacity as Chairman of the IRC's Legal Subcommittee, Mr. Riley wrote to A.D.T.C. Administrator Grace Rogers in June of 2005, requesting that steps be taken to ensure the safety of A.D.T.C. inmates during court and medical trips, particularly in light of the recent assault on Paul Cornwell. Mr. Bernard Goodwin, Associate Administrator of the A.D.T.C. responded and informed Mr. Riley that A.D.T.C. has no control or authority over how A.D.T.C. inmates are transported. Mr. Riley then wrote to Mr.

William Plantier, former administrator/superintendent at the A.D.T.C. and currently DOC Director of Operations, requesting information regarding current policies, practices and procedures regarding transport of A.D.T.C. inmates during court and medical trips. No corrective action has been taken.

Plaintiff Peter Braun has been diagnosed with cancer and has had to have surgery as part of his treatment for this condition. Mr. Braun will require medical follow-up care for this condition which will require his transport to medical facilities outside of the A.D.T.C. He also is currently involved in legal proceedings requiring his appearance in Union County Superior Court – Family Part, again necessitating his transport out of the A.D.T.C. Mr. Braun has two sons, one of whom has been in a coma for two years as a result of a traffic accident when he was 13 years old. His other son is 14 years old. Both are in foster care under the supervision of the State. The only means by which Mr. Braun is able to learn about how his sons are doing, and in particular obtain any information about the medical status of his gravely injured son, is through his attendance at compliance conferences in Union County Family Court.

As noted above, A.D.T.C. administrators responded to Mr. Krivacska's ARE by indicating that CTU was aware of the concerns of the A.D.T.C. residents regarding safety on medical and court trips. Despite this, on December 13, 2005, Mr. Braun was

transported to Union County Courthouse for a compliance hearing, hopeful of obtaining information about the status of his children, without any provision being made to keep him safe and secure.

In fact, Mr. Braun was subjected to over two hours of harassment, threats, intimidation and psychological torture by two very dangerous and violent State prisoners, one from Northern State Prison in Newark, the other from East Jersey State Prison in Rahway, while in the care and custody of officers of the CTU. During this period, not only was Mr. Braun not segregated for the transport, he was forced by the CTU officers to sit next to the State prisoners despite the fact that there was empty seating elsewhere in the van that would have kept him physically isolated from these State prisoners. Because he was seated next to these prisoners, who repeatedly touched his person and search his body looking for jewelry, he remained terrified that he would be physically assaulted and potentially seriously injured, a risk enhanced by his weakened status because of his medical condition and recent surgery.

Of especial concern to Mr. Braun, and contributing significantly to his fears for his safety, Mr. Braun was informed by the State prisoners that his identity as an inmate from the A.D.T.C. and the fact that he was a convicted sex offender was revealed to them by the CTU officers in control of the van, who

then also encouraged them to "have fun with him." Because Mr. Braun had been transferred from another van in the parking lot of the Garden State Youth Correctional Facility and because he did not identify where he was from, the State prisoners could only have known he was an A.D.T.C. inmate from the CTU officers. Mr. Braun's worst fears were confirmed when he heard the CTU officers laughing and joking about the abuse he was enduring.

Mr. Braun suffer such severe psychological trauma as a result of his experience, that he was held in the A.D.T.C. infirmary overnight for observation, medicated, and, when finally released to the general population, was kept under close observation for two more days. Mr. Braun is terrified of having to again be subjected to threat of psychological and physical abuse when he next goes on a court or medical trip, trips which are inevitable and unavoidable because of on-going judicial review of his sons' status and his medical needs.

Plaintiff Vincent Macrina is an inmate at the A.D.T.C. who suffers from numerous, serious medical conditions including heart disease and serious arthritis in the shoulder and neck. The latter condition causes Mr. Macrina to suffer several chronic symptoms, including pain in the neck and shoulder, shooting pain from his shoulder to the fingertips of his right hand, and poor circulation to his right arm, all probable symptoms of a pinched

nerve. Mr. Macrina has previously taken trips to NJSP and St. Francis Hospital to receive physical therapy to relieve many of these symptoms. However, in light of the assaults on Mr. Cornwell, the continued practice of DOC corrections officers identifying that Mr. Macrina is from the A.D.T.C. to State Prisoners during his medical trips, and the fact given his age, 70 years old, and declining health, Mr. Macrina does not believe he could adequately defend himself if assaulted, he has concluded that going on these trips creates too substantial a risk of serious physical harm, or death. Thus, despite chronic, ongoing pain, Mr. Macrina has and will continue in the future, to refuse medical trips.

Plaintiff William Vansciver is an inmate at the A.D.T.C. who suffers from a chronic, severe, seizure disorder and neurological disability. Mr. Vansciver is the only named Plaintiff who was not sentenced to the A.D.T.C. for treatment as a compulsive and repetitive sex offender. Though convicted of a sex offense, Mr. Vansciver was not found compulsive and repetitive pursuant to N.J.S.A. 2C:47-3, and thus was sentenced to State Prison, not the A.D.T.C. Despite being sentenced to state prison, Mr. Vansciver was administratively transferred to the A.D.T.C. Prior to this transfer Mr. Vansciver was housed at South Woods Correctional Facility (SWCF). Mr. Vansciver received medical treatment at various medical facilities outside of SWCF while housed there. As

Memorandum of Law in Support of Motion for TRO

his status as a convicted sex offender was not known by the inmate population at SWCF and as that status was not revealed to other State Prisoners by reason of being from SWCF during medical trips, Mr. Vansciver, prior to his transfer to the A.D.T.C., was free to participate in those trips and receive needed treatment without fear of being physically injured or killed. He would receive neurological consults at NJSP approximately every three months and neurological evaluations at St. Francis approximately twice a year.

Upon his transfer to the A.D.T.C. however, that situation changed. Mr. Vansciver, because of his neurological problems and seizure disorder, is at particular risk of serious brain damage or death should he suffer a blow to the head. After learning of the assault on Paul Cornwell, in particular the blow he suffered to his head, Mr. Vansciver became fearful for his life if he continued on these trips and no effort was made to segregate or protect him from State Prisoners. Consequently, Mr. Vansciver has not been receiving the neurological consults or monitoring via EEG evaluation (Electro-encephalogram), he needs to monitor his medication and control his seizures. As a result, Mr. Vansciver continues to suffer and will continue to suffer grand mal and petite mal seizures. These seizures result in physical injuries to his head, hands, shoulders, and legs, and has also caused and

will continue to cause, permanent memory loss and other neurological impairment.

Moreover, with the lack of monitoring and treatment of his disorder, on October 22, 2005, he suffered a severe seizure which required his emergency transport to Rahway General Hospital by ambulance, for which he was later billed \$518.00.

Plaintiffs Riley, Krivacska, Gibbs and Braun have docketed cases pending before the Superior Courts of this state, which cases will require their appearance in the next few weeks and months. Absenting themselves from those proceedings jeopardizes their claims before these courts, while attending these proceedings by accepting transport with State Prisoners places each of these Plaintiffs at substantial risk of serious physical harm. These Plaintiffs are then subject to irreparable harm, either in the form of forfeited legal claims, or serious bodily injury, if the requested TRO is not forthcoming.

Plaintiffs Cornwell, Macrina, Vansciver and Braun suffer medical conditions that require immediate and continued medical treatment. Denial of access to that treatment because of an unsafe transport system, risks serious and permanent injury to these plaintiffs. Conversely, if these Plaintiffs seek this medical treatment, they are at high risk for suffering serious and permanent injury if assaulted by State Prisoners, in the absence of procedures to segregate A.D.T.C. inmates during

medical trips. In either case, these plaintiffs are being subjected to irreparable harm, either in the form of neglected medical treatment and a worsening of their condition, or serious bodily injury, if the requested TRO is not forthcoming.

ARGUMENT

POINT I

PLAINTIFFS ARE ENTITLED TO A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

In determining whether a party is entitled to a temporary restraining order or a preliminary injunction, courts generally consider several factors: whether the party will suffer irreparable injury, the "balance of hardships" between the parties, the likelihood of success on the merits, and the public interest. Each of these factors favors the grant of this motion.

A. PLAINTIFFS ARE THREATENED WITH IRREPARABLE HARM

Plaintiffs Riley, Krivacska, Gibbs and Braun face irreparable harm with respect to the various civil cases they have pending before Superior Court if they choose to waive appearances at those proceedings out of fear of being assaulted or killed by a State Prisoner while being transported to court. In Mr. Riley's case, that irreparable harm would be, at worse, dismissal of his PCR petition, irrespective of its merits, or waiver of rights or arguments at a pre-hearing proceeding. Mr. Krivacska and Mr. Gibbs face a similar form of irreparable harm with respect to their PCR petitions, including waiving arguments or relevant

facts by not being available to assist in their own defense by conferring with counsel during actual proceedings in court.

Mr. Gibbs' situation is the most critical with an important hearing scheduled for January 30, 2006 before Judge LeBon. Mr. Gibbs' attorney has filed a motion seeking recusal of Judge LeBon from hearing Mr. Gibbs' PCR Petition. This attorney has communicated to Mr. Gibbs that it is very important that Mr. Gibbs attend so that his testimony can be taken, in absence of which he risks having the motion denied. Against his counsel's recommendation and solely because of fear for his safety and life, Mr. Gibbs will have to waive his right to appear on this motion unless the motion for the TRO is granted.

For his part, Mr. Krivacska additionally faces irreparable harm in the form of a binding judgment against him for over \$100,000 in a pending civil action in Essex County Superior Court, should he waive appearance at trial.

For Mr. Gibbs, Mr. Krivacska, Mr. Braun and Mr. Riley, the irreparable harm would ensue from the dangerous conditions in which DOC would require the Plaintiffs to be transported, so dangerous as to effectively deny them their right to access to the courts under the First Amendment. This harm is imminent as Mr. Gibbs, Mr. Riley, Mr. Braun or Mr. Krivacska could be called to appear in court at any time in their respective civil actions,

Memorandum of Law in Support of Motion for TRO

and the fact that a required appearance for these Plaintiffs is all but assured in the next few months.

Mr. Gibbs has the most pressing and time sensitive claim. He has a court appearance on a recusal motion scheduled for January 30, 2006 and is immediately confronted with the choice of waiving his constitutionally protected rights and relinquishing valid claims he may have regarding the need for his PCR judge to recuse herself from further involvement in the proceedings, or risk serious injury or death if he chooses to make his appearance. For Mr. Gibbs the irreparable harm would ensue from the dangerous conditions in which DOC would require Mr. Gibbs to be transported, so dangerous as to effectively deny him his right to access to the courts under the First Amendment. This harm is very imminent as Mr. Gibbs has been called upon to appear in court on January 30, 2006, just a few days away, and there is insufficient time for Mr. Gibbs to pursue any other form of relief.

Mr. Braun will again shortly need to appear in Family Court in Union County and will again be at risk for suffering irreparable harm if he is again physically and psychological assaulted by dangerous and violent State prisoners should the CTU continue to refuse to segregate him.

Plaintiffs Cornwell, Macrina, Vansciver and Braun are likely to suffer irreparable harm of a different variety. In each case, these Plaintiffs suffer from serious medical conditions for which

Riley, et al v. Brown, et al
Memorandum of Law in Support of Motion for TRO

medical treatment is required. By denying them reasonably safe transport to that medical treatment, DOC is essentially denying them access to medical treatment in violation of the Eighth Amendment. The irreparable harm threatened is serious and permanent injury or disability caused by their untreated medical conditions, harm which may appear at any time, has already begun to appear, and will continue to appear absent appropriate treatment.

All the Plaintiffs are at risk of irreparable harm should they choose to go on, or in the case of mandatory court appearances, forced to go on, a court or medical trip. That irreparable harm would be serious bodily injury or death from an assault by a State Prisoner in the absence of segregating A.D.T.C. inmates from such prisoners.

Continuing violations and deprivations of constitutionally guaranteed rights constitutes immediate and irreparable harm. Elrod v. Burns, 427 U.S. 347, 373 (1976). This principle has been applied in prison litigation generally. See Newsom v. Norris, 888 F.2d 371, 378 (6th Cir. 1989); Mitchell v. Cuomo, 748 F.2d 804, 806 (2nd Cir. 1984); Williams v. Lane, 646 F.Supp. 1379, 1409 (N.D.Ill. 1986), aff'd, 851 F.2d 867 (7th Cir. 1988), cert. denied, 109 S.Ct. 879 (1989), and specifically in prison medical care cases. Philips v. Michigan Dept. of Corrections, 731 F.Supp. 792, 801 (W.D.Mich. 1990), aff'd, 932 F.2d 969 (6th Cir. 1991).

B. THE BALANCE OF HARDSHIPS FAVORS THE PLAINTIFFS

In deciding whether to grant TRO's and preliminary injunctions, courts ask whether the suffering of the moving party if the motion is denied will outweigh the suffering of the non-moving party if the motion is granted. See e.g., Mitchell v. Cuomo, 748 F.2d, supra at 808 (holding that dangers posed by prison overcrowding outweighed state's financial and administrative concerns); Duran v. Anaya, 642 F.Supp. 510, 527 (D.N.M. 1986) (holding that prisoners' interest in safety and medical care outweighed state's interest in saving money by cutting staff).

Here, Plaintiffs' suffering, if relief is not granted, substantially outweighs whatever minor inconvenience the State might suffer. Among the harms the Plaintiffs will suffer from are serious medical disability or death either from assault during a medical trip or court trip, or in the case of those with chronic, debilitating medical conditions, serious medical disability or death from untreated medical conditions. Those Plaintiffs forced to forego their constitutional rights under the First Amendment, face prejudicial dismissal of their claims, waiver or forfeiture of claims, defenses, or arguments in pending court cases, or in the case of Plaintiff Krivacska, a judgment against him for over \$100,000 in a civil action.

By contrast, defendants' hardship is minimal if not nonexistent. No facilities would have to be constructed as all the secure facilities operated at either the State or County level at which A.D.T.C. inmates may have to be transported, contain multiple, secure, holding areas in which A.D.T.C. inmates could be segregated. In fact, the ability of DOC to transport and hold A.D.T.C. inmates in a manner that segregates and protects them from State Prisoners was amply demonstrated in the wake of the assault on Paul Cornwell when, as reported by Plaintiff Krivacska, A.D.T.C. inmates were segregated or protected at all times during transport on May 31, 2005. Whatever reallocation of staff that might be necessary based on the number of inmates that need to be transported on a given date, constitutes routine administrative decisions regarding staff use that occur on a daily basis anyway.

The balance of hardships tips overwhelmingly in favor of the Plaintiffs.

C. THE PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

The constitutional rights of inmates to access to the courts is clearly established. Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 521 L.Ed.2d 72 (1977). So too is the right to adequate medical care, Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) and the liability attendant to a DOC Officials deliberate indifference to a serious medical need. Wilson v.

Memorandum of Law in Support of Motion for TRO

Seiter, 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). And inmates do not need to wait until they suffer actual injury before they may raise a claim of cruel and unusual punishment under the Eighth Amendment. Heller v. McKinney, 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) (prisoner's eighth Amendment claim could be based on possible future harm to health as well as present harm); Hutto v. Finney, 427 U.S. 678, 682, 98 S.Ct. 2565, 2569, 57 L.Ed.2d 522 (1978) (an injunction cannot be denied to inmates who plainly prove an unsafe, life-threatening condition on the ground that nothing has yet happened to them).

Given a history of complaints by A.D.T.C. inmates of verbal and physical assaults by State prisoners during court and medical trips dating back over fifteen years to 1989, and given the recent incidents involving Mr. Becka, as reported in the verified complaint and Mr. Cornwell, the State cannot claim it was not noticed as to the risks posed by transporting and holding A.D.T.C. inmates with State Prisoners. As noted in Heller,

"The [Eighth] Amendment, as we have said, requires that inmates be furnished with basic human needs, one of which is 'reasonable safety.' [cite omitted] It is 'cruel and unusual punishment to hold convicted criminals in unsafe conditions.' Youngberg v. Romeo, 457 U.S. 307, 315-316, 102 S.Ct. 2452, 2457-2458, 73 L.Ed.2d 28 (1982). It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." Heller, supra, 509 U.S. at 33.

Clearly, then, the Plaintiffs enjoy a substantial likelihood of success on the merits of this claim.

D. THE RELIEF SOUGHT WILL SERVE THE PUBLIC INTEREST

The public interest is certainly served by protecting prisoners from needless and senseless violence. Society has a strong interest in rehabilitation, an interest which is shortchanged when prisoners suffer injury or death at the hands of other prisoners. That interest is even stronger in the case of those sentenced to the A.D.T.C. The public, through its elected legislators, has determined that its interests are particularly served by providing comprehensive psychological treatment to those convicted of sexual offenses. Allowing those in treatment to be subjected to physical and psychological harm, runs counter to the purpose of treatment.

The public also has an interest in safe and secure prisons. As illustrated by Mr. Cornwell's case, allowing unsafe conditions to persist and result in injury to prisoners, increases the cost of operating the State's prisons. Mr. Cornwell's injuries incurred as a result of the assault by the State Prisoner required additional medical treatment and medical trips which were paid for by the taxpayer.

But perhaps the most critical public interest, especially in the wake of allegations of prisoner abuse at Abu Ghraib prison in Iraq and at Guantánamo base in Cuba, is in preserving the human

Memorandum of Law in Support of Motion for TRO

rights and dignities of those it confines, as a measure of our standing in the world community. Conversely there is no public interest served by turning a blind eye toward (or as has happened too frequently in the past, actually encouraging or instigating) attacks by one type of prisoner against another.

POINT II

PLAINTIFFS SHOULD NOT BE REQUIRED TO POST SECURITY

Usually a litigant who obtains interim injunctive relief is asked to post security. Fed. R. Civ. P. 65(c). However, the plaintiffs are unable to post security. The court has discretion to excuse an impoverished litigant from posting security. Orantes-Hernandez v. Smith, 541 F.Supp. 351, 384, n. 30 (C.D.Cal. 1982); J.L. v. Parham, 412 F.Supp. 112, 140 (D.Ga. 1976), rev'd on other grounds, 442 U.S. 584, 99 S.Ct. 2493 (1979).

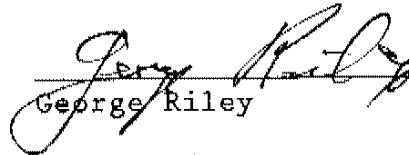
Although Plaintiffs did not file for indigency status because between them that had sufficient funds to afford the \$150 filing fee (which came to about \$22 each), they cannot afford counsel or the cost of posting security. In addition, as this is a class action suit, Plaintiff should not be asked to bear the burden of posting security for the entire class.

In view of the immediate and irreparable harm facing Plaintiffs, the Plaintiffs pray the Court grant the relief requested without requiring the post of security.

CONCLUSION

For the reasons enumerated herein, and on the facts attested to in the accompanying declarations, the Plaintiffs pray this court grant the relief requested.

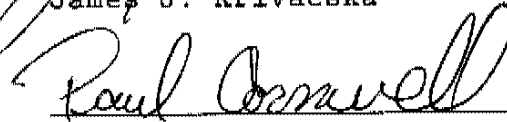
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George Riley

Date: January 10, 2006


James J. Krivacska

Date: January 10, 2006


Paul Cornwell

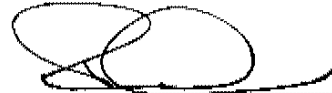
Date: January 10, 2006


Vincent Macrina

Date: January 10, 2006


William Vansciver

Date: January 10, 2006


Richard Gibbs

Date: January 10, 2006


Peter Braun

