

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WISCONSIN

DENNIS JONES'EL, MICHA'EL  
JOHNSON, DE'ONDRE CONQUEST,  
LUIS NIEVES, SCOTT SEAL, ALEX  
FIGUEROA, ROBERT SALLIE, CHAD  
GOETSCH, EDWARD PISCITELLO,  
QUINTON L'MINGGIO, LORENZO  
BALLI, DONALD BROWN, CHRISTOPHER  
SCARVER, BENJAMIN BIESE, LASHAWN  
LOGAN, JASON PAGLIARINI, and  
ANDREW COLLETTE, on behalf of  
themselves and all others similarly  
situated,

Plaintiffs,

Case No. 00-C-421-C

v.

JON LITSCHER, in his official capacity;  
GERALD BERGE, in his official and  
individual capacities; and DOES 1-100,  
in their official and individual capacities,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION  
FOR PRELIMINARY INJUNCTION

INTRODUCTION

On July 26-28, 2001, plaintiffs' psychiatric expert, Terry Kupers, M.D., M.S.P., toured the Supermax Correctional Institution (SMCI) in Boscobel, Wisconsin. During his tour, Dr. Kupers conducted in-depth interviews with twenty prisoners and reviewed their clinical and other files.'

'Dr. Kupers' qualifications are set forth in his declaration; filed herewith, and in his curriculum vitae, attached to that declaration as Exhibit A. Dr. Kupers is a board-certified psychiatrist; he is a Professor in the Graduate School of Psychology of the Wright Institute in Berkeley, California, and maintains a private clinical

Based upon this review, Dr. Kupers concludes as follows:

I have formed the opinion that many of the prisoners confined in SMCI currently suffer from serious mental illnesses and are not receiving the mental health treatment their psychiatric condition requires. I have further concluded that confinement at SMCI of prisoners suffering from serious mental illnesses, or who are prone to serious mental illness or to suicide, is an extreme hazard to their mental health and well-being. It causes irreparable emotional damage and psychiatric disability as well as extreme mental anguish and suffering, and in some cases presents a risk of death by suicide. I have identified seven prisoners who should be transferred out of SMCI on an urgent basis and undergo thorough psychiatric examination in a less stressful mental health treatment setting. In addition, all prisoners in SMCI should undergo rigorous psychiatric examination and psychological assessment within the next one to two months, and those exhibiting significant signs and symptoms of serious mental illness and/or suicide risk should be transferred immediately to a correctional or secure psychiatric setting where their psychiatric condition can be adequately evaluated and they can receive competent psychiatric treatment.

Kupers Decl., 18.

Moreover, based upon the "shocking degree of psychopathology" he found in interviewing only twenty prisoners, Dr. Kupers concludes that it is certain that "there are many more prisoners at SMCI who suffer from serious mental illness." However, SMCI has no means of identifying these prisoners and transferring them to appropriate mental health facilities. Id., In 47,48.

For these reasons, plaintiffs seek a preliminary injunction ordering defendants to immediately transfer six identified seriously mentally ill prisoners from SMCI to an inpatient psychiatric facility,<sup>2</sup> screen all other SMCI prisoners for serious mental illness, and transfer those found to be seriously mentally ill to an inpatient psychiatric facility or other appropriate facility. <sup>3</sup>

**practice in Oakland. He has testified in over twenty cases involving prison and jail conditions, and has acted as a consultant on prison mental health issues to the Civil Rights Division of the United States Department of Justice.**

**<sup>2</sup>Because the seventh prisoner identified by Dr. Kupers, Prisoner 6, may present unique security issues, plaintiffs do not seek his immediate transfer at this time. However, as Dr. Kupers makes clear in his declaration,**

## CONDITIONS AT SMCI

Prisoners at SMCI are subjected to levels of social isolation, enforced idleness, and sensory deprivation that are without parallel in modern corrections. <sup>4</sup> Upon arrival at SMCI, a prisoner is assigned to Alpha Unit.<sup>5</sup> In this unit, he is housed alone in a cell that is separated from the corridor by a solid steel door, a vestibule, and then a second solid steel door. All cells feature "boxcar doors," which are constructed of solid metal and create forced isolation. Kupers Decl. 18. There are no windows; indeed, a prisoner never even sees the outdoors during his incarceration at SMCI. The cell is illuminated both day and night, making sleep *difficult* or impossible. Id. IM 18, 23.

The prisoner is entombed in this cell virtually 24 hours a day. He is allowed out only four hours a week, for exercise in a dark, windowless, concrete "exercise module." The "exercise module" is just a larger, empty cell; it has no recreation equipment, and the temperature is the same as the outside air. To go to the "exercise module," a prisoner must be placed in full restraints and be searched when going to and from the module. Level One Handbook (Garvey

Prisoner 6 is suffering from a serious mental illness and needs to be transferred on an urgent basis to a mental health treatment setting. Kupers Decl. If 40-41.

Plaintiffs ask that this screening be done by psychiatrists and psychologists not employed by the Wisconsin Department of Corrections (WDOC) or by Prison Health Services (PHS), the contract medical provider at SMCI. As Dr. Kupers' declaration makes clear, WDOC and PHS mental health staff have thus far failed to prevent seriously mentally ill prisoners from being housed at SMCI. In addition, a May 2001 report by the Wisconsin Legislative Audit Bureau found that PHS has overcharged for services at SMCI, has failed to provide complete staffing records, and has failed to provide the staffing required by the contract. Wisconsin Legislative Audit Bureau, An Evaluation, Prison Health Care, Department of Corrections, 01-9 (May 2001) (hereinafter Prison Health Care) (Garvey Decl., Ex. 2), at 78-79.

<sup>4</sup>Below is an overview of the factual circumstances at SMCI. Plaintiffs respectfully request the Court to carefully review the detailed facts as set forth in the Declaration of Dr. Terry A. Kupers filed herewith.

SMCI operates on a "level system." - Level One is the lowest level, with the most restrictive conditions of confinement. Level One prisoners are housed on Alpha Unit, which has the most isolating physical conditions. See Kupers Decl., 118-

Decl., Ex. 1), at 8, 13. Because of these oppressive conditions, most prisoners do not use the "exercise module." Kupers Decl., IM 16, 17. The detrimental effects of spending months alone in a cell with no physical activity are especially harmful to prisoners with serious mental illness. Id.

Prisoners on Level One may not participate in any programming. Garvey Decl., Ex. 1, at 5. They are not allowed to have a television or radio. Id. They are allowed no reading material, except one Bible or equivalent religious book, and one pocket [dictionary](#). Id. at 1415. They are not allowed to possess photographs of family members or other loved ones. Id. They are allowed only one six minute telephone call per month, some are allowed no telephone calls at [all](#). Id. at 13.

Prisoners at SMCI are not allowed face-to-face visits with loved ones. Rather, SMCI provides only "video visitation," in which the prisoner remains locked in a cell hundreds of feet away from his visitor. The prisoner and his visitor see each other only on small video [screens](#). Id. at 16. Some mentally ill prisoners refuse these "video visits" because, since they cannot actually see their family members or other visitors, they cannot be certain it is really their visitor and not an altered image. Kupers Decl., 1 20.

As explained in Dr. Kupers' declaration, these "uniquely damaging" features of SMCI inflict needless pain and pose a grave risk of harm to those prisoners who are seriously mentally ill. Kupers Decl., 118, 15, 46.

## ARGUMENT

### I. STANDARD FOR GRANTING PRELIMINARY INJUNCTION.

"[T]he granting of a preliminary injunction is not a decision on the merits of the plaintiffs suit. It is merely a decision that the suit has enough merit--which need not be great merit--to justify an order that will freeze the situation; in the plaintiffs favor, for such time as it may take to

determine whether the suit is, or is not, meritorious." Ayres v. City of Chicago, 125 F.3d 1010, 1013 (7th Cir. 1997).

In Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6, 11-12 (7th Cir. 1992), Chief Judge Flaum reviewed Seventh Circuit precedent on the standards to be applied by the district court when passing upon a motion for a preliminary injunction. The court explained that a condition for the issuance of a preliminary injunction is a showing by the movant of (1) some likelihood of prevailing on the merits; and (2) the movant has no adequate remedy at law and will suffer irreparable harm if preliminary relief is denied. If the movant sustains the burden of proving these factors, the Court must then consider (3) any irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the consequences of granting or denying the injunction to non-parties and the general public interest.

The court then weighs all of these factors and exercises its discretion in deciding whether to grant the injunction, "seeking at all times to minimize the costs of being mistaken." Id. at 12 (internal quotation marks, citation omitted). The balancing involves a "sliding scale" analysis: the greater the movant's-chance of success on the merits, the less strong a showing must it make that the balance of harms is in its favor. Storck USA, L.P. v. Farley Candy Co., 14 F.3d 311, 314 (7th Cir. 1994). The process is "subjective and intuitive" and permits the court to "weigh the competing considerations and mold appropriate relief." Abbott Labs., 971 F.2d at 12, citing Lawson Prods., Inc. v. Avnet, Inc. 782 F.2d 1429, 1436 (7th Cir. 1986). The Abbott Labs case remains the leading case on the standards for the issuance of a preliminary injunction. See TL

Inc. v. Jones Group, Inc., 237 F.3d 891, 895 (7th Cir. 2001); Eli Lilly & Co. v. Natural Answers, Inc., 233 F.3d 456, 461 (7th Cir. 2000).<sup>6</sup>

## II. PLAINTIFFS ARE OVERWHELMINGLY LIKELY TO PREVAIL ON THE MERITS OF THEIR EIGHTH AMENDMENT CLAIM.

As an initial matter, plaintiffs must show some likelihood of success on the merits of their claims. The threshold for this showing is low. See Roland Machinery Co. v. Dresser Industries, Inc. 749 F.2d 380, 387 (7th Cir. 1984). Plaintiffs need only demonstrate a "better than negligible chance of succeeding." Boucher v. School Bd. of Greenfield, 134 F.3d 821, 824 (7th Cir. 1998) (citations omitted); see also Cooper v. Salazar, 196 F.3d 809, 813 (7th Cir. 1999).

Plaintiffs claim that conditions of confinement at SMCI constitute cruel and unusual punishment in violation of the Eighth Amendment with respect to seriously mentally ill prisoners. Plaintiffs are overwhelmingly likely to prevail on the merits of this claim.

To establish a violation of the Eighth Amendment, plaintiffs must satisfy two tests, one objective and one subjective. Plaintiffs must first show that the conditions to which they are subjected are "objectively, sufficiently serious." Farmer v. Brennan, 511 U.S. 825, 834 (1994) (internal quotation marks, citation omitted). Next, they must show that defendants are "deliberately indifferent" to this harm. *Id.*

<sup>6</sup>Under the Prison Litigation Reform Act (PLRA), a preliminary injunction "must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm." 18 U.S.C. § 3626(a)(2). This does not differ from pre-PLRA standards for entry of injunctive relief. See Smith v. Arkansas Dept. of Correction, 103 F.3d 637, 647 (8<sup>th</sup> Cir. 1996) (§ 3626(a) "does not change the standards for determining whether to grant an injunction"); Williams v. Edwards, 87 F.3d 126, 133 n. 21 (5<sup>th</sup> Cir. 1996) (same).

<sup>7</sup>In this litigation, plaintiffs contend that conditions at SMCI constitute cruel and unusual punishment with respect to all prisoners housed there. See First Amended Complaint, 186. However, this preliminary injunction motion deals only with seriously mentally ill prisoners housed at SMCI.

- A. Conditions at SMCI subject seriously mentally ill prisoners to gratuitous pain and suffering, and pose a grave risk of serious injury and death.

Conditions of confinement that deprive prisoners of "the minimal civilized measure of life's necessities" satisfy the objective component of the Eighth Amendment. Farmer, 511 U.S. at 834 (internal quotation marks, citation omitted). It is well settled that the Eighth Amendment protects not only against harm that is presently occurring, but also against conditions that pose a "substantial risk of serious harm" if allowed to continue unabated. Farmer, 511 U.S. at 828. "We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year." Helling v. McKinney, 509 U.S. 25, 33 (1993).

It is also well settled that the Eighth Amendment protects the mental health of prisoners no less than their physical health. See, e.g., Meriwether v. Faulkner, 821 F.2d 408, 413 (7<sup>th</sup> Cir. 1987); Wellman v. Faulkner, 715 F.2d 269, 272 (7<sup>th</sup> Cir. 1983) ("[t]reatment of the mental disorders of mentally disturbed inmates is a serious medical need") (internal quotation marks omitted). See also Hudson v. McMillian, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) ("It is not hard to imagine infliction of psychological harm - without corresponding physical harm - that might prove to be cruel and unusual punishment").

"[A]lthough courts have often focused on the minimum needed to physically sustain life, such as shelter, food, and medical care, courts have also recognized that conditions that inflict serious mental pain or injury also implicate the Eighth Amendment." Madrid v. Gomez, 889 F. Supp. 1146, 1260 (N.D. Cal. 1995). "[I]f the particular conditions of [confinement] being challenged are such that they inflict a serious mental illness, greatly exacerbate mental illness, or

deprive inmates of their sanity, then defendants have deprived inmates of a basic necessity of human existence - indeed, they have crossed into the realm of psychological torture." Madrid, 889 [E.Supp.at](#) 1264.

"More recently, in light of the maturation of our society's understanding of the very real psychological needs of human beings, courts have recognized the inhumanity of institutionally-imposed psychological pain and suffering" Ruiz v. Johnson, 37 F.Supp.2d 855, 914 (S.D. Tex. 1999), rev'd on other grounds, 243 F.3d 941 (5' Cir. 2001), adhered to on remand, 2001 WL 737338 (S.D. Tex., June 18, 2001), at \*4-5. "[T]he same standards that protect against physical torture prohibit mental torture as well - including the mental torture of excessive deprivation."

In Madrid, the court considered conditions in the Security Housing Unit (SHU) at California's Pelican Bay State Prison. Conditions in the SHU were, in important respects, far less oppressive than those at SMCI. There was apparently no 24 hour illumination; prisoners were allowed far more time out of their cells (10.5 hours per week, compared to four hours per week at SMCI); prisoners were allowed face-to-face visits with their loved ones, rather than "video visits;" and all prisoners who could afford a television and/or radio were permitted to have one. 889 [E.Supp.at](#) 1228-30.

Nevertheless, the Madrid court held that, with respect to prisoners who are already mentally ill and those at increased risk for mental illness, conditions in the Pelican Bay SHU constituted cruel and unusual punishment in violation of the Eighth Amendment:

Such inmates consist of the already mentally ill, as well as persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression. For these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe. The risk is high enough, and the consequences serious enough, that we have

no hesitancy in finding that the risk is plainly unreasonable. Such inmates are not required to endure the horrific suffering of a serious mental disorder or major exacerbation of an existing mental illness before obtaining relief.

We are acutely aware that defendants are entitled to substantial deference with respect to their management of the SHU. However, subjecting individuals to conditions that are very likely to render them psychotic or otherwise inflict a serious mental illness or seriously exacerbate an existing mental illness can not be squared with evolving standards of humanity or decency, especially when certain aspects of those conditions appear to bear little relation to security concerns. A risk this grave - this shocking and indecent - simply has no place in civilized society.

889 [E.Supp.at](#) 1265-66 (citations, internal quotation marks, footnotes omitted).

In [Ruiz](#), the court considered conditions in Texas' administrative segregation units. These units were similar in many respects to SMCI, utilizing a "level" system, and creating an environment in which "inmates' lives are virtually void of property, personal contact, and mental stimulus." 37 F.Supp.2d at 908 (footnote omitted). Prisoners were screened before placement in administrative segregation, ostensibly to ensure that their condition would not worsen as a result of such [placement](#). [Id.](#) at 913. Nevertheless, the court made the following findings and conclusions:

[P]laintiffs submitted credible evidence of a pattern in TDCJ of housing mentally ill inmates in administrative segregation -- inmates who, to be treated, would have to be removed to inpatient care. These inmates, obviously in need of medical help, are instead inappropriately managed merely as miscreants. It is determined that TDCJ officials are well aware of both these conditions and these inmates' ensuing pain and suffering. Whether because of a lack of resources, a misconception of the reality of psychological pain, the inherent callousness of the bureaucracy, or officials' blind faith in their own policies, TDCJ has knowingly turned its back on this most needy segment of its population.

[A]dministrative segregation is being utilized unconstitutionally to house mentally ill inmates - inmates whose illness can only be exacerbated by the depravity of their confinement. Conditions in TDCJ-ID's administrative segregation units clearly violate constitutional standards when imposed on the subgroup of the plaintiffs' class made up of mentally-ill prisoners. In light of the obvious severity of these inmates' needs, it is determined that defendants have been deliberately indifferent to the serious risks posed by

subjecting such inmates to confinement in administrative segregation for extended periods of time.

As to mentally ill inmates in TDCJ-ID, the severe and psychologically harmful deprivations of its administrative segregation units are, by our evolving and maturing society's standards of humanity and decency, found to be cruel and unusual punishment.

37 F.Supp.2d at 913-15.

Other courts have similarly found Eighth Amendment violations when seriously mentally ill prisoners are placed in isolated confinement. In Casey v. Lewis, 834 F. Supp. 1477 (D. Ariz. 1993), the court found that placement of such prisoners in "lockdown" units "clearly rises to **the level of deliberate indifference to the serious mental health needs of the inmates and violates their constitutional rights to be free from cruel and unusual punishment.**" [Id. at](#) 1549. The court noted that even defendants' experts agreed that "it is inappropriate to house acutely psychotic inmates in segregation facilities for more than three days," and that "lockdown **damages, rather than helps, mentally ill inmates.**" [Id. at](#) 1548. See also [id. at](#) 1529-34 (describing housing of mentally ill prisoners in lockdown units).

In Arnold v. Lewis, 803 F. Supp. 246 (D. Ariz. 1992), the court considered the case of a prisoner with schizophrenia who was frequently housed in lockdown.<sup>8</sup> The court found that "[o]n numerous occasions, plaintiff **should have been transferred to [the Arizona State Hospital] as necessary to ensure adequate treatment, but was not.**" [Id. at](#) 251. The court further found that "[l]ock down generally worsens symptoms of mental illness and can be a traumatic experience for the mentally ill inmate," and that "prolonged lock down is inexcusable in the management of schizophrenia." [Id. at](#) 254 (internal quotation marks omitted). The court described the prison system's treatment of this prisoner as "barbaric," and enjoined defendants from placing her in

<sup>8</sup>Conditions in the lockdown units at issue in Casey and Arnold were similar to the conditions under which plaintiffs live at SMCI. See 803 [E. Supp. at](#) 254.

lockdown unless her behavior "presents an immediate danger to self or others." [Id. at](#) 258-59. See also [Coleman v. Wilson](#), 912 F. Supp. 1282, 1320-21 (E.D. Cal. 1995) (placement of mentally ill prisoners in segregation units violated Eighth Amendment because, *inter alia*, "such placement will cause further decompensation" ); [Langley v. Couhg Jin](#), 715 F. Supp. 522, 540 (S.D.N.Y. 1989) (psychiatric testimony that defendants fail to exclude from segregated housing "those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there" raises triable Eighth Amendment issue).

Given this clearly established law, and the findings made by Dr. Kupers (see p. 2, [supra](#)), there can be no doubt that seriously mentally ill prisoners at SMCI are subjected to a "substantial risk of serious harm" in violation of the Eighth Amendment. See [Farmer](#), 511 U.S. at 828.

B. Defendants are deliberately indifferent to the risk of harm to seriously mentally ill prisoners at SMCI.

A prison official exhibits deliberate indifference when he or she "knows of and disregards an excessive risk to inmate health or safety." [Farmer](#), 511 U.S. at 837. Defendants are well aware that conditions at SMCI pose a grave risk of harm to seriously mentally ill prisoners, but continue to house such prisoners at the facility.

A May, 2001 report by the Wisconsin Legislative Audit Bureau found that more than 15% of the prisoners at SMCI are suffering from mental illness. [Prison Health Care](#) ( Garvey Decl., Ex. 2) at App. 2, p. 2-14. The report also stated:

Concerns have also been raised about the transfer of mentally ill inmates to the Supermax Correctional Institution. When Supermax was planned, the Department [of Corrections] adopted a policy that no mentally ill inmates would be transferred to Supermax. However, the Department indicated that policy was changed in 2000.

[Id. at](#) 59. Defendant Litscher has specifically acknowledged receiving and reviewing this report.

Id., App. 6.9

Moreover, defendants have in their possession a copy of Dr. Stuart Grassian's pioneering article, Psychopathological Effects of Solitary Confinement, 140 *Am. J. Psychiatry* 1450 (1983). Garvey Decl., Ex. 3. This article documents the devastating mental health effects of isolated confinement. Similarly, the Legislative Fiscal Bureau, Joint Committee on Finance, Paper #332, Prison Staffing -- Supermax (DOC -- Adult Correctional Facilities), May 27, 1999, also in defendants' possession, contains the following warning:

Insofar as possible, mentally ill inmates should be excluded from extended control facilities. Each inmate being considered for such a facility should have a mental health evaluation. Although some mentally ill offenders are assaultive and require control measures, much of the regime common to extended control facilities may be unnecessary, and even counterproductive, for this population.

[Id. at](#) 4 (Garvey Decl., Ex. 4).

In a December 1, 2000 letter to Dr. Gary Maier, defendant Berge frankly acknowledged the inadequacy of mental health services at SMCI:

I am concerned about available psychiatric hours here. When we designed the staffing of this facility, we clearly concluded that we needed a full-time equivalent psychiatric consultant as part of the medical contract. As you know we ended up with an 8-hour per week arrangement. This result was driven exclusively by budget factors.

Garvey Decl., Ex. 6.

Defendants' deliberate indifference is further demonstrated by their own Mental Illness Screening Tool for SMCI (DOC-2056, 4/00) (Garvey Decl., Ex. 5). This form lists three categories: "General Clearance for SMCI," "Conditional Transfer to SMCI," and "Restricted

**'This report also found that psychiatric services at SMCI fall far below American Psychiatric Association guidelines, which recommend a minimum of 1 full-time psychiatrist for every 150 patients on psychotropic medications. [Id. at](#) 56-57.**

Movement to SMCI" Under "Restricted Movement to SMCI" are listed the following mental health conditions: "Major Depressive Disorders," "Bipolar Disorder," "Borderline Personality Disorders," "Dissociative Di[s]orders," "Schizophrenic/Psychotic Disorders," "Mental Disorders due to a medical condition," and "History of severe self-abusive behaviors." However, as Dr. Kupers' declaration makes clear, prisoners with these serious mental illnesses are in fact housed at SMCI. Kupers Decl., ¶ 47.

Finally, of course, the filing of the First Amended Complaint in this lawsuit, specifically alleging that conditions at SMCI "cause serious and sometimes catastrophic deterioration" in the mental health of mentally ill prisoners (First Amended Complaint, 134), placed defendants on notice of these conditions. See Arnold v. Le 803 F. Supp. 246, 257 (D. Ariz. 1992) (filing of class action challenge to prison mental health care placed defendant corrections director on notice of deficiencies in that system).<sup>o</sup>

III. PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW AND WILL SUFFER IRREPARABLE HARM IF A PRELIMINARY INJUNCTION IS NOT GRANTED.

"Although irreparable harm is ... one of the prerequisites to obtaining a preliminary injunction, all it means is that the plaintiff is unlikely to be made whole by an award of damages or other relief at the end of the trial." Vogel v. American Society of Appraisers, 744 F.2d 598, 599 (7th Cir. 1984), <sup>q</sup>uoting Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970) (Friendly, J.). Irreparable harm is harm "that compensation in money cannot atone for." Graham v. Medical Mut. of Ohio, 130 F.3d 293, 296 (7th Cir. 1997) (quoting Gause v. Perkins, 56 N.C. (3 Jones Eq.) 177 (1857)). See also Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d at

<sup>o</sup>Three of the seven prisoners Dr. Kupers found to be seriously mentally ill and inappropriately housed at SMCI are named plaintiffs in this action.

386 (Irreparable harm is "harm that cannot be prevented or fully rectified by the final judgment after trial").

Thus, if plaintiffs show that they will suffer irreparable harm if injunctive relief is not granted, they have also shown that any remedy at law would be inadequate. Moreover, by "inadequate," the Seventh Circuit has said, "we do not mean wholly ineffectual; we mean seriously deficient as a remedy for the harm suffered." Roland Mach., 749 F.2d at 386.

It is well established that the violation of constitutional rights, even if temporary, constitutes irreparable harm. See National People's Action v. Village of Wilmette, 914 F.2d 1008, 1013 (7th Cir.1990); Elrod v. Burns, 427 U.S. 347, 373 (1976) ("[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury").

Plaintiffs allege that seriously mentally ill prisoners at SMCI are suffering pain, aggravation of their mental illness, and in some cases a risk of death, in violation of the Eighth Amendment. According to Dr. Kupers, housing seriously mentally ill prisoners at SMCI "causes irreparable emotional damage and psychiatric disability as well as extreme mental anguish and suffering, and *in some* cases presents a risk of death by suicide." Kupers Decl., 18. See also id., 146 ("leaving psychotic or seriously depressed prisoners alone in a cell to suffer for long periods of time from the kinds of symptoms I discovered in prisoners in SMCI is likely to cause significant deterioration in their mental condition over time").

"[T]he denial of a fundamental constitutional right, such as the Eighth Amendment right to be free of cruel and unusual punishment, has been held to be irreparable harm." Lee v. McManus, 543 F. Supp. 386, 392 (D. Kan. 1982). Indeed, even the threat of an Eighth Amendment violation will support preliminary injunctive relief. Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984) (granting preliminary injunction barring closing of prison).

More specifically, it is well established in prison cases that pain, suffering, and the risk of death constitute "irreparable injury" sufficient to support a preliminary injunction. See Von Colln v. County of Ventura, 189 F.R.D. 583, 598 (C.D. Cal. 1999) ("defendants do not argue that pain and suffering is not irreparable harm, nor could they"); Arnold v. Lewis, 803 F. Supp. 246, 255 (D. Ariz. 1992) (finding "great likelihood of irreparable harm to her mental health" if schizophrenic prisoner were transferred from mental health facility to prison); Duran v. Anaya, 642 F. Supp. 510, 526-27 (D.N.M. 1986) ("Death, extreme pain, self-mutilation and the other consequences of medical and mental health staffing reductions in evidence before the Court constitute irreparable injury in the most extreme sense of that term"); Lee, 543 E. Supp. at 392 ("unnecessary discomfort and anxiety as well as possible pain and complications potentially of a life-threatening nature").

It is equally well established that the possibility of a future damages award is not an adequate remedy for the ongoing infliction of pain in violation of the Eighth Amendment. See Lee, 543 E. Supp. at 392 ("While plaintiff may eventually receive compensatory damages as a result of physical injury, the injury and any accompanying pain are not repaired by such an award"); Howard v. U.S., 864 F. Supp. 1019, 1029 (D. Colo. 1994) (prisoner whose First Amendment rights are being violated "cannot be made whole through the imposition of money damages"); cf. Ingraham v. Wright, 430 U.S. 651, 695 (1977) (White, J., dissenting) ("[t]he infliction of physical pain is final and irreparable; it cannot be undone in a subsequent proceeding").

In any event, the seriously mentally ill plaintiffs in this case have virtually no prospects of a damages award. A provision of the PLRA bars recovery of damages for "mental or emotional injury" without "a prior showing of physical injury." 42 U.S.C. § 1997e(e); Zehner v. Tr1QQ, 133

F.3d 459, 461 (7<sup>th</sup> Cir. 1997). Thus, no matter how excruciating plaintiffs' psychological suffering as a result of conditions at SMCI, they will have no remedy in damages unless they suffer physical injury as well. In light of § 1997e(e), plaintiffs' only remedy is an injunction."

IV. THE IRREPARABLE HARM TO PLAINTIFFS IF INJUNCTIVE RELIEF IS DENIED OUTWEIGHS ANY INCONVENIENCE TO DEFENDANTS IF INJUNCTIVE RELIEF IS GRANTED.

Defendants will suffer, at most, minor administrative inconvenience if preliminary relief is granted; certainly they will suffer no irreparable harm. Screening prisoners for deterioration of their mental health is hardly an extraordinary burden; indeed, it is routine in many supermax facilities. Kupers Decl.,148. Nor is transferring individual mentally ill prisoners from SMCI to an inpatient psychiatric facility unduly burdensome. See Prison Health Care (Garvey Decl., Ex. 2), at 58-59 (describing transfer of mentally ill prisoners to Wisconsin Resource Center); Mental Illness Screening Tool for SMCI (Garvey Decl., Ex. 5), at 2 (describing "treatment options" including "inpatient treatment at WRC").

Any minor inconvenience to defendants is decisively outweighed by the ongoing violation of plaintiffs' Eighth Amendment rights. In Mitchell v. Cuomo, 748 F.2d 804 (2d Cir. 1984), prisoners sought a preliminary injunction against the closure of a prison, arguing that the resulting crowding to which they would be subjected at other facilities would result in violation of their Eighth Amendment rights. Corrections officials argued that the preliminary injunction would cause "fiscal chaos as well as additional strain on the ... security force." Id. at 807. Nevertheless, the Second Circuit held that the balance of hardships tipped "decidedly" in the plaintiffs' favor,

**'Indeed, the Seventh Circuit has strongly suggested that only the continuing availability of injunctive relief saves § 1997e(e) from unconstitutionality. Zehner, 133 F.3d at 462-63.**

given the likelihood of Eighth Amendment violations were the injunction not [granted](#). [Id.](#) at 807-08.

Similarly, in [Duran v. Anaya](#), 642 F. Supp. 510, 527 (D.N.M. 1986), the court concluded that "the preservation of human life and the protection of prisoners from violent assault and the agonies of acute physical or mental illness outweigh any monetary damage that defendants may suffer" as a result of a preliminary injunction prohibiting staff reductions. See also [Von Colln](#), 189 F.R.D. at 598 (balance of hardships favors plaintiffs where, "[u]mless the injunction is granted, they will suffer pain and suffering in violation of their constitutional rights"); [Sisneros v. Nix](#) 884 F. Supp. 1313, 1348 (S.D. Iowa 1995) (balance of harms weighs in favor of prisoner whose First Amendment rights had been violated, despite defendants' argument that injunction requiring interstate transfer of prisoner would be unduly disruptive); Lee, 543 [E. Supp. at](#) 392 ("Certainly, the threat of irreparable physical harm to plaintiff is not outweighed by the risk of financial burden or administrative inconvenience to defendants"); [Beerheide v. Zavaras](#), 997 F. Supp. 1405, 1411 (D. Colo. 1998) (balance of hardships tips in favor of prisoners who had been denied Kosher meals, despite defendants' argument that injunctive relief would have negative budgetary and security effects).

#### IV. THE PUBLIC INTEREST WILL BE SERVED BY GRANTING THE PRELIMINARY INJUNCTION.

"The protection of constitutional rights is always in the public interest." [Int'l Soc. For Krishna Consciousness v. Kearnes](#). 454 F. Supp. 116, 125 (E.D. Cal. 1978). More specifically, "[r]espect for law, particularly by officials responsible for the administration of the State's correctional system, is in itself a matter of the highest public interest. The public at large is not

served by ... the willful or wanton infliction of pain and suffering on prisoners." Duran v. Anaya, 642 F. Supp. 510, 527 (D.N.M. 1986).<sup>12</sup>

Similarly in this case, the public interest is not served by a situation in which seriously mentally ill prisoners at SMCI suffer "an extreme hazard to their mental health and well-being, ... irreparable emotional damage and psychiatric disability as well as extreme mental anguish and suffering, and in some cases ... a risk of death by suicide." See Kupers Decl., 18. As one court has said, in terms equally applicable to this case:

I believe the public interest will be served by safeguarding Eighth Amendment rights in the prisons in Michigan. ... [T]his Court is bound by law to keep a balance between efficient prison management and keeping prisons a humane place: in this case, there is a glaring need for the latter goal.

Phillips v Michigan Dept. of Corrections, 731 F. Supp. 792, 801 (W.D. Mich. 1990).

#### VI. NO SECURITY SHOULD BE REQUIRED.

Although Fed. R. Civ. P. 65(c) requires that an applicant for a preliminary injunction give security, this requirement may be waived when the applicant is indigent. Wane Chemical, Inc. v. Columbus Agcy. Serv. Corp., 567 F.2d 692, 701 (7<sup>th</sup> Cir. 1977). This action is brought by indigent prisoners, represented by court-appointed counsel acting pro bono. Therefore, the preliminary injunction should be granted without requiring security.

<sup>12</sup> See also Sisneros v. 884 F. Supp. 1313, 1349 (S.D. Iowa 1995) ("the public interest is best served by vindication of constitutional rights;" granting injunction requiring interstate transfer of prisoner); Beerheide v. Zavaras, 997 F. Supp. 1405, 1411 (D. Colo. 1998) (protecting prisoners' First Amendment rights is in the public interest); Howard v. U.S., 864 F. Supp. 1019, 1029 (D. Colo. 1994) (finding that preliminary injunction vindicating prisoner's First Amendment rights "will greatly serve the public interest"); Cohen v. Coahoma County Miss., 805 F. Supp. 398, 408 (N.D. Miss. 1992) (noting "the public's interest in the vindication of constitutional rights and the proper and lawful administration of the jail"); Green v. Johnson, 513 F. Supp. 965, 977 (D. Mass. 1981) ("The public interest is served by the due and faithful fulfillment by public officials of the duties imposed upon them by law") (granting preliminary injunction in prison case).

## CONCLUSION

For good reason, WDOC adopted a policy that it would be inappropriate to house mentally ill prisoners at SMCI. There can be no doubt that the policy has been abandoned by the defendants. The report of Dr. Kupers dramatically demonstrates that seriously mentally ill prisoners have knowingly been transferred to SMCI in what can only be described as callous disregard by WDOC of the damaging and life-threatening effect on the prisoners described by Dr. Kupers. The six prisoners identified by Dr. Kupers must be removed immediately to an institution that can provide appropriate mental health services to avoid dangerous consequences including suicide. A screening by competent and objective mental health personnel must be implemented as soon as possible. SMCI is inappropriate for any person, but must be immediately declared off limits for the seriously mentally ill. For all these reasons, plaintiffs' motion for preliminary injunction should be granted.

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