UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 97-2806-CIV-HUCK
MAGISTRATE JUDGE TURNOFF

MARK OSTERBACK, et al.,

Plaintiffs,

v.

MICHAEL W. MOORE, et al.,

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO TERMINATE REVISED OFFER OF JUDGMENT

AND

PLAINTIFFS' MOTION TO REOPEN DISCOVERY, AND RESTORE CASE TO TRIAL CALENDAR

AND

PLAINTIFFS' MOTION FOR A STATUS CONFERENCE

Plaintiffs' respond to Defendants' Motion to Terminate Revised Offer of Judgment, and move to reopen discovery and restore this matter to the trial calendar, and move for a status conference, and state:

I. The Reasons for the Osterback v. Moore Litigation

For decades the courts have agreed that conditions of confinement which can only be characterized as foul, inhuman or in violation of basic concepts of decency violate the Cruel and Unusual Punishments clause of the Eighth Amendment. See Laaman v.

Helgemoe, 437 F. Supp. 269, 310 (D.N.H. 1977). Now, despite the two years of time afforded the Florida Department of Corrections to eliminate such conditions, the only fair characterization of the Close Management units operated by the Florida Department of Corrections is that they continue to be foul, inhuman and operated in violation of basic concepts of human decency.

The core of this action is Plaintiffs' claim "that the defendants house inmates assigned to Close Management under conditions so harsh, atypical and punitive as to amount to Cruel and Unusual Punishment in violation of the Eighth Amendment to the United States Constitution." Second Amended Complaint, § 1. Plaintiffs further alleged that the "conditions under which Close Management inmates are housed result in serious mental and physical deterioration." Second Amended Complaint, § 2. Moreover, the conditions "pose a danger to the public since a large, although unknown number of inmates complete their sentence while on Close Management and are released directly from Close Management to the street." Second Amended Complaint, § 3.

In sum:

> The effects of Close Management on the plaintiffs, and the Class they represent, are profound. Placement of prisoners with serious mental disorders on Close Management exacerbates their underlying mental disorders, induces psychosis, and increases the risk of suicide or other self-inflicted harm. Even mentally healthy prisoners are likely to develop mental illness after placement on Close Management.

Second Amended Complaint, § 204.

In addition, for all Close Management inmates, the harsh conditions "constitute a grossly exaggerated response to the problems created by inmates whose behavior justifies heightened security and bear no rational relationship to any legitimate penological interest." Second Amended Complaint, § 205.

In reports filed with this Court more than two years ago, Plaintiffs' experts opined that the conditions imposed on Close Management inmates clearly ran afoul of the Eighth Amendment.

A. Craig Haney

Professor Craig Haney, with very extensive experience in evaluating the psychological impact of isolation of prisoners, summarized his opinions:

> 14. Prisoners who are confined in the Close Management Units that I toured and inspected are being subjected to extremely harsh treatment and deprived conditions of confinement. Long-term exposure to this kind of treatment and these particular conditions is not only psychologically painful—and the prisoners in these units are certainly in pain—but it is damaging and dangerous. Because of extreme nature of the treatment and deprivations inflicted in these units, the overall conditions and practices that prevail lack penological justification.
>
> 15. There appear to be an unusually high number of mentally ill and otherwise psychologically vulnerable prisoners in the Close Management Units I toured and inspected and from which my representative sample of interviewees was selected. Whatever the psychological screening and monitoring practices that are in operation in these facilities, if any, they have not been effective in diverting mentally ill and psychologically vulnerable prisoners from these units (for which they are uniquely unsuited). Nor have they properly identified those prisoners whose mental health or psychological stability

may have further deteriorated once confined to Close Management.

16. These unjustifiably harsh conditions of confinement appear to have existed in the Florida Department of Corrections for some time. There is evidence that Department of Corrections officials knew or should have known about the adverse psychological consequences of such confinement, yet did nothing to ameliorate these damaging conditions. Indeed, the unnecessarily punitive policies that prevail—ones that include not only extraordinary levels of deprivation but management control techniques that are dangerous and wildly out of proportion to the offense that provokes them—can only have existed with the full knowledge and support of many correctional officials in the state.

Professor Haney's conclusion was that:

48. The Florida Close Management Units I evaluated subject prisoners to extremely deprived, restrictive, and oppressive living conditions. Prisoners in these units lack meaningful opportunities for programming of any kind. They are isolated in the most total and complete way possible in modern correctional practice— punished for talking, prohibited from congregating with one another, visit under such limited conditions that most of them discourage visitors of any kind (many of whom would be required to travel long distances for non-contact visits). They are significantly more deprived and oppressive than those in many other institutions with which I am familiar, and certainly worse than conditions in one notorious facility that the federal judge who examined it concluded "may press against the outer bounds of what most humans can psychologically tolerate."

49. Not surprisingly, there was an extremely high level of psychological trauma and symptoms of psychopathological reactions to isolated confinement manifested by the prisoners whom I interviewed. In addition to this isolation-related trauma, these units also appear to be housing an unusually high percentage of mentally-ill and psychologically-vulnerable prisoners who are uniquely unsuited for such harsh confinement. There were also widespread complaints voiced by prisoners about rampant overuse of force, primarily in the form of excessive pepper spraying for relatively trivial infractions. Prisoners in these units appear to feel desperate

> and hopeless in part because they believe there is no possible or realistic way out of their current level of harsh confinement; indeed, many of them have spent many years living under such deprived conditions. Finally, virtually nothing is done to prepare Close Management prisoners for the extraordinarily difficult transition from such degraded and unusual living conditions into the freeworld.
>
> 50. There is no penological justification possible for these extreme practices. Continued operation of Close Management, as presently constituted in the Florida Department of Corrections, appears to reflect deliberate indifference to the psychological health of the prisoners confined therein.

Report of Professor Craig Haney, filed September 21, 2001 (Docket Entry 233, Exhibit F.) (Paragraph Numbers from Report, footnotes omitted).

B. Chase Riveland

Mr. Chase Riveland, a corrections professional with vast experience, first explained that the Close Management regime of the Florida Department of Corrections is unique in several ways, including:

> 11. c. The conditions under which the CM inmates are kept, particularly the CM I and CM II inmates, are as austere, or more austere, than any 'supermax' or administrative segregation program in the country.
>
> 11. d. The only clear behavioral standard that inmates can identify that would contribute to their ability to move out of CM is that they must be free of disciplinary reports for at least six months. All other criteria appear to be the subjective decisions of the local and central office classification staff.
>
> 11. e. The number of inmates found in CM status with documented past or present mental health problems are startlingly high. Over one-half of the inmates interviewed had documentation in their files of past or

> present mental health problems, and a high percentage of those are taking prescribed medication for those problems. Most jurisdictions prohibit such persons from their extended control settings, particularly those on psychotropic medications.

Mr. Riveland then opined that:

> 25. It is my opinion that the impact of these sterile environments, particularly on inmates who have not been placed there based on actual misbehavior while in prison (such as inmates placed on Close Management based on pre-prison actions) and those that are mentally ill or intellectually limited, is very destructive. The absence of social interaction, the withdrawal of most humane privileges, the absence of reasonable stimulus, the isolation, and the stigma of being housed in an environment thought to hold but the worst-of-the-worst all blend into a setting that probably will cause a deterioration of most human beings.

Mr. Riveland further opined that the Department of Corrections could improve its operation of the Close Management program in the following ways:

> 32. a. Develop Rules that are more specific regarding which inmates may be placed in Close Management and for what specific behaviors, limiting those reasons to major rule violators and dangerous individuals.
>
> 32. b. Chronic or acute mentally ill inmates should be excluded from this group.
>
> 32. c. 'Nuisance' inmates, those with multiple minor violations should be excluded from this group.
>
> 32. d. The Rules should be specific as to the CM level the inmate will be in based on the potential threat the inmate's behavior poses to the safety and security of the institution.
>
> 32. e. Other than a brief orientation/observation period, inmates should be allowed privileges similar to general population, other than separation from other inmates if that is necessary for the protection of inmates or staff.

> 32. f. Specific timeframes — much more frequently than present -- should be adopted for review for placement at a lower CM level, or return to general population. The presumption being that CM is not a punitive status and that the inmate should be moved to a lower level—to include general population--as soon as they no longer present a threat to the institution.
>
> 32. g. The CM I level should be reserved for only the inmates who have displayed violent, assaultive, escape, or inciting a disturbance behavior.
>
> 32. h. CM II and III should be patterned after the program operation at Bay Correctional Institution-but with specific timeframes for review for movement to a lower level or to general population.

Report of Mr. Chase Riveland, filed September 21, 2001 (Docket Entry 233, Exhibit D) (Paragraph Numbers from Report).

C. <u>Seymour Halleck</u>

Dr. Seymour Halleck, a psychiatrist with extensive experience evaluating and treating prisoners, reported that:

> . . . it should not be surprising that the majority of the people I saw were mentally ill. The illness these individuals demonstrated, however, were so severe and so painful to them that I was not prepared for the degree of suffering I saw. All but a handful of the seventy-seven inmates I saw were in deep distress. These are not individuals who just happened to have a mental disease and happened to be in prison. Rather they are individuals whose illnesses were created or exacerbated by the conditions of close management. Some inmates became ill for the first time while in CM. Others who had been quite ill on the outside managed to control their illness and make fair adjustments prior to coming to CM. When exposed to the stresses of close management their illnesses became more florid.

Report of Dr. Seymour Halleck, filed September 21, 2001(Docket No. 233, Exhibit E, page 15). Dr. Halleck went on to report that:

> The purpose of any highly controlled unit like CM is to restrain or incapacitate offenders who are likely to hurt

> themselves or others. It is basically a safety measure. Although the intentions of those that restrain or incapacitate may be to do no harm, inmates will experience lost freedoms as psychologically painful. Restraint will have a punitive quality whether intended or not. Clearly the best security units operate by using just enough restraint to guarantee safety. Use of additional punishment to accompany restraint serves absolutely no correctional purpose. The problem with the Florida Department of Corrections' Close Management system is that it uses severe punishment of inmates such as gassing, teasing, writing people up for little reason, and sensory deprivation, not for reasons of control or safety but as a form of mindless retribution. The degree of excessive restraints or punishments put upon individuals in the CM unit is unnecessarily creating serious mental problems for inmates.

Halleck Report, page 20.

Dr. Halleck's Report concluded with a series of recommendations, including:

> 1. There should be a constant moving towards an attitude that discomforts imposed upon inmates for purposes of restraint or incapacitation are sufficient. It should be the philosophy of staff that additional punishment which does not serve safety purposes should not be perpetrated upon inmates unless they have seriously violated rules.
>
> 2. Mentally ill patients must be provided the quality of treatment that is provided to mentally ill persons in other settings. This means timely and effective treatment with possible release to population or long term treatment units rather than punishment units.
>
> 3. The Department of Corrections needs to spell out in detail why an inmate will be sent to close management, what criteria will be used for this assignment, and what criteria will be used for determining how the individual will get out of CM. The rules need to be made clear, they need to be communicated to the inmates, and they need to be followed.

Halleck Report, page 23.

Finally, Dr. Halleck noted that:

> Of all of the deficiencies in the program which I have enumerated above, the one which I found most distressing and most dangerous to the community, is the practice of releasing inmates directly from CM to the free community. Nearly every inmate should be living in a relatively non-restrictive prison unit during the last few months of his sentence. Here he should receive counselling, vocational guidance, and other planning to help him adjust on the outside. The practice of releasing seriously mentally ill patients on medication from CM to the community needs to be modified either by transferring these individuals to a less restrictive hospital unit before they go home or by providing a program of effective counselling within the CM unit. The former solution is of course the better one.

Halleck Report, page 24, Docket No. 233.

II. Defendants' Response to the Litigation

Defendants' response to the litigation was to propose a judgment which, *inter alia*, provided the Department of Corrections with two years in which to remedy the obvious problems evident in the close management units. The Department's plan included consolidation of the then existing Close Management units, affording close management inmates a limited set of the rights and privileges afforded other inmates, more extensive mental health screening and services, and more centralized and consistent review of close management status decisions.

The Department has failed to live up to each and every promise made to resolve this litigation. Consolidation has not taken place as set forth in the Revised Offer of Judgment. While rights and privileges exist on paper, many inmates are deprived of those rights and privileges by ad hoc rule-making, arbitrary decisions,

and the failure of staff to implement the Revised Offer of Judgment in good faith. Likewise, while there has been some improvement in mental health screening and services, the existing services fall far, far short of meaningfully addressing the needs of close management inmates. The idea of centralized and consistent review of close management status decisions has clearly fallen by the wayside as the number of close management inmates has grown by nearly 50% in the last year.

In addition to the general failure to implement the Revised Offer of Judgment in a way that would meaningfully resolve the problems which led to this litigation, the level of abuse, intimidation, and retaliation has clearly increased over the last two years.

Nor has the Department shown any interest in working with the Plaintiffs to seek ways to resolve problems. During the course of the two year implementation period, the Department has never seen fit to discuss any proposed deviations from the Revised Offer of Judgment with the Plaintiffs. Instead, during the two year implementation period, Plaintiffs' complaints about the operation of the close management units were met with one of two responses: (1) "[a]s you know, the department has until October 1, 2003, to fully implement the Revised Offer of Judgment. . . Thus, your complaint appears premature" or (2) "your request does not rise to

the level of a constitutional violation and is outside the scope of the Revised Offer of Judgment."[1]

III. There Are Current, Ongoing Violations of the Eighth Amendment for Which Prospective Injunctive Relief Is Necessary — the Revised Offer of Judgment Should Be Set Aside and the Matter Restored to the Trial Calendar

Plaintiffs agree that consistent with the Prison Litigation Reform Act, injunctive relief can only be continued upon a showing of current violations of federal constitutional rights for which prospective injunctive relief is necessary.[2] The Plaintiffs, after a suitable time for discovery,[3] are prepared to prove the existence

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1. Defendants' claim that plaintiffs have only complained about Close Management conditions on isolated occasions is simply not true. Over the course of the two year implementation period, Plaintiffs' counsel have written to Defendants' counsel approximately 85 times. Defense counsel has responded about 50 times, and of those responses, at least 20 have been made more than six months later. It is also fair to say that with very few exceptions, none of the responses made by Defendants have been positive. In addition, the Court is aware of, and can take judicial notice of, the numerous *pro se* filing alleging a wide-range of violations of the Revised Offer of Judgment

2. Defendants' argument that the Revised Offer of Judgment should be terminated for failure to make the findings required by 18 U.S.C. § 3626(a)(1), is the epitome of bad faith. Defendants drafted the Revised Offer of Judgment. Now, they tell the Court that the Court erred in entering the very judgment they proposed. The proposition that a party who deliberately leads a court into error is not entitled to relief needs no citation of authority.

3. Discovery is necessary because the Defendants have limited the ability of the Plaintiffs to monitor and evaluate their progress to the bare minimum offered in the Revised Offer of Judgment and have made no effort ask for input by the Plaintiffs or to otherwise cooperate in an effort to improve the Close Management system, other than to allow the Plaintiffs to submit written comments with reference to possible changes in the Close Management Rules.

of present, ongoing violations of constitutional rights. The preliminary reports of Dr. Seymour Halleck, Dr. Craig Haney, and Mr. Chase Riveland, filed with this Response and Motion, and summarized below, all attest to the fact that most of the problems that prompted this litigation, and which the Defendants promised to remedy during their two year implementation period, still exist. The manner in which the Close Management units of the Florida Department of Corrections still operate continues to cause mental illness where there was no mental illness before or to aggravate pre-existing mental illness. Conditions are still foul, inhuman and in violation of basic concepts of human decency.

A. Craig Haney

Professor Haney, while acknowledging certain improvements (Second Report of Professor Craig Haney, ¶¶ 12-14), found that many very serious problems remain which still inflict gratuitous pain and suffering, and place prisoners at grave risk of long-term psychological damage. Report, ¶ 15. Among the problems Professor Haney identified were (1) large numbers of prisoners who report being on CM status for many years, years far in excess of what can be penologically justified, years long past the point in time when psychological deterioration would be expected to occur (Second Report, ¶ 16), (2) a policy of maximizing the deprivation and punitive control inflicted on prisoners coupled with a lack of meaningful activity for prisoners on CM I and very limited

activities for prisoners on CM 2(Second Report, ¶ 17) and (3) extreme levels of deprivation and idleness (Second Report, ¶22).

According to Professor Haney, "the indices of psychological trauma and psychopathological symptoms of extreme isolation that I saw manifested in the prisoners I interviewed continued to be extremely high and, for some, dangerously severe." Second Report, ¶ 24. In addition to the continuation of problems Professor Haney observed in 2001, it appeared that problems relating to excessive use of chemical agents and excessive writing of disciplinary reports had increased in the last two years. Second Report, ¶¶ 28-31. Moreover, the use of Florida State Prison (and Union Correctional Institution) to house those Close Management inmates most at risk can best be described as an abject failure. Second Report, ¶¶ 33-38. The same lack of concern for the mental health needs of inmates was evident in the housing of female Close Management inmates at Lowell Correctional Institution. Second Report, ¶ 39. Professor Haney's conclusion, that "too little of significance has changed, too much of the inhumane regime remains intact, and several important problems appear to have gotten worse" (Second Report, ¶ 40) cries out for further relief in this matter.

B. Chase Riveland

Mr. Riveland's Report, after identifying many of the changes resulting from the Revised Offer of Judgment, notes that "the life of an inmate on CM I has changed very little from the visits made

in 2001." Expert Report of Chase Riveland, ¶ 14. In 2001, Mr. Riveland stated that "the amount of spray and gas used throughout the system is excessive." By 2003, the use, and threats to use gas, had grown worse. Expert Report of Chase Riveland, ¶¶ 15 & 16.

Mr. Riveland's earlier opinion that inmates were assigned, or retained on, Close Management in an inappropriate manner, was only reinforced by his 2003 prison visits. He opined that:

> . . . little has changed with the FDOC use of Close Management. Many inmates interviewed have either been placed or retained on Close Management for rules violations having nothing to do with violence, serious contraband possession, possession of weapons, gang leadership, or, attempted or actual escape. 'Catchall' phrases governing placement in Close Management such as: "A history of disciplinary action or institutional adjustment reflecting an inability to live in general inmate population without disrupting the operation of the institution; . . ." allow nearly any inmate receiving a disciplinary report to be placed in CM. Many of the inmates found in CM in FDOC are dealt with in other jurisdictions through disciplinary hearings and finite and determinate periods of time (for example, 30 or 60 days) in disciplinary segregation, then returned to general population. Using Wisconsin and Ohio (both of whom have been the recipients of intervention by Federal courts): both exclude mentally ill inmates and both contain only those inmates who have been violent, serious escape risks, and those that have been leaders in serious institutional disturbances.

Expert Report of Chase Riveland, ¶ 20.

Conditions under which CM I and CM II inmates are kept continue to be "are as austere, or more austere, than any 'supermax' or administrative segregation program in the country." Expert Report of Chase Riveland, ¶ 21. The sterile environment, particularly for "those that are mentally ill or intellectually

limited, is very destructive. The absence of social interaction, the withdrawal of most humane privileges, the absence of reasonable stimulus, the isolation, and the stigma of being housed in an environment thought to hold but the worst-of-the-worst all blend into a setting that probably will cause a deterioration of most human beings." Expert Report of Chase Riveland, ¶ 25. Mr. Riveland concluded (Expert Report of Chase Riveland, ¶ 26) by stating that:

> My opinion of the FDOC Close Management program has not changed since my 2001 visits. Generally accepted correctional practices are not being adhered to. No correctional objective is being served. No legitimate penalogolical objective can be established for the extremely austere conditions for extended periods of time and for such large numbers of inmates. The conditions at there best are inhumane.

C. Dr. Seymour Halleck

Dr. Halleck Preliminary Report notes that "notwithstanding the reality that some changes have been made, the C. M. environment at all of the institutions I visited remains one which consistently raises serious threats to the C. M. inmates' mental health and sometimes to their physical health." Report, ¶ 5. While the level of sensory deprivation has diminished, "fear of the correctional officers has grown more prominent in the past two years. Report ¶ 6. In sum, his "overall assessment" of the mental health of the inmates he saw in 2003 "was that they were no better but slightly worse than the inmates" he saw in 2001. Report, ¶ 12

IV. Specific Facts Entitling Plaintiffs to Relief

In addition to the finding of Professor Haney, Dr. Halleck, and Mr. Riveland, Plaintiffs believe that at a trial, the evidence would show that:

1. Although the Revised Offer of Judgment purported to limit prisons with Close Management units to Florida State Prison, Santa Rosa Correctional Institution, Charlotte Correctional Institution, and Dade Correctional Institution, the Defendant has ignored that part of the agreement. As a result, Close Management units now exist at Florida State Prison, Union Correctional Institution, Santa Rosa Correctional Institution, Charlotte Correctional Institution, and Lowell Correctional Institution. There is, apparently, a plan to add an additional Close Management unit at yet another prison.

2. The Revised Offer of Judgment called for extensive mental health screening and services. Screening, and especially services, are minimal and inconsistent at best. While large numbers of Close Management inmates can only be described as seriously mentally ill, the methods by which the Close Management units operate continues to cause and/or contribute to the mental illness of the inmates confined in the Close Management units.

3. Security staff members do not treat the mentally ill inmates with the special consideration they need. The large majority of CM inmates at Florida State Prison, Union Correctional Institution and Lowell Correctional Institution have severe

psychological and psychiatric disorders and intensive treatment needs. Because of the severity of their disabilities, these inmates should not be housed in the harsh CM environment at all.

4. Security staff who supervise Close Management inmates are either not appropriately trained to recognize inmates who are mentally ill and the symptoms of their illnesses or, if they are trained, ignore their training.

5. Although Close Management units continue to operate as facilities for the mentally ill, staff do not respond to the needs of these inmates in a humane manner consistent with the special needs of the inmates housed there. Security staff routinely respond to manifestations of inmates' psychological disorders with the use of chemical agents, with other physical abuse, with disciplinary reports, with verbal harassment, or with indifference. The environment at all of the prisons with Close Management units is not appropriate for mentally ill inmates.

6. A range of self-betterment and stimulation programming was identified in the Revised Offer of Judgment. While the activities setout in the Revised Offer of Judgment have, in general, been implemented, many Close Management are denied the right to participate in the activities called for by the Revised Offer of Judgment. Security staff accomplish this in two ways. First, many Close Management inmates are placed on disciplinary status for extended periods of time, sometimes stretching over

years. While on that status, they are deprived of all self-betterment and stimulation programming. Second, Defendants have implemented (totally outside the terms of the Revised Offer of Judgment) what is called "suspension of privileges," a process with no procedural safeguards which allows low level Correctional Officers to deny any or all of the rights and privileges set out in the Revised Offer of Judgment.[4] As a result of these two factors, many Close Management inmates are housed for years without access to books, a radio, educational programming, family visitation, phone calls, T.V. or dayroom time, thus continuing the isolation and lack of simulation which is such a great contributor to the mental health problems of the inmates.

7. Inmates report that they are so desperate to leave Florida State Prison that they refuse prescription psychiatric medications in order to reduce their psych or "S" grade, a tactic they believe will enable them to obtain a transfer to another prison. Many of these prisoners are severely depressed or psychotic. By refusing anti-depressants they are risking their mental health and, possibly, their safety.

8. Security staff members constantly abuse inmates with verbal threats and taunts, use racial epithets, and chemical agents, such as pepper spray. This institutionally accepted and encouraged practice compromises the physical and psychological

4. See Exhibit D.

safety of Close Management inmates. Also, this unchecked use of force severely compromises the effectiveness of the available mental health services.

9. At Florida State Prison, inmates have been told that their psychological or "S" grade will not be lowered if they receive a disciplinary report or are the subject of chemical agents.[5] Rather than exploring why mentally ill CM inmates are routinely disciplined and gassed, the prison administration has chosen to encourage these practices in a way that negatively impacts on mental health care. It is this type of refusal to acknowledge the mental health needs of CM inmates that demonstrates that Florida State Prison is not a suitable therapeutic environment. When Florida State Prison staff respond to what they perceive as an infraction, they make no inquiry as to whether an inmate's behavior is a manifestation of mental illness and they routinely respond with force to behavior that inmates cannot control because of their mental illness.

10. Inmates who complain about CM conditions run a real and substantial risk of retaliation. Inmates report that writing a grievance may result in the use of chemical agents, refusal of food or placement on the management meal, and the writing of false disciplinary reports. Even if this is not true, the perception that it is true is so widespread as to adversely impact on the

5. See Exhibit E.

entire CM operation. The denial of food, for purposes of punishment and retaliation, is an issue that has arisen subsequent to the entry of the Revised Offer of Judgment. According to inmates, correctional officers, while engaging in this type of conduct, will make derogatory statements about the reforms supposedly adopted as a result of Osterback.

11. Inmates report that correctional officers often enforce local rules prohibiting inmates from talking to each other, even during dayroom activities, looking out their cell window to the outside, or standing at their door and looking out the cell door window, and will use chemical agents or loss of rights and privileges very quickly as a punishment.

12. None of the prisons housing Close Management inmates are air-conditioned. Nevertheless, at some prisons staff enforce local rules requiring all inmates to be fully dressed while in their cells even on stifling summer days.[6]

13. The adequacy of the in-cell heating systems at some prisons is doubtful. Nevertheless, Close Management inmates are not permitted to purchase winter clothing, such as sweatshirts, to combat the cold, or obtain extra blankets to keep warm. Nor are

6. See Exhibit F.

they permitted to purchase sneakers, gym shorts, or T-shirts to use during recreation periods.[7]

14. Inmates report that correctional officers will often deny Close Management inmates the right to recreation, use of the dayroom, and even meals.

15. Inmates who have been accused of an obscene or profane act (masturbating) are denied recreation because they are placed in the rec cages with their hands cuffed behind their backs. Likewise, inmate who have gotten into fights are kept in restraints during recreation.[8]

16. Many inmates have been assigned to Close Management for years and years. For many, particularly those at Florida State and Union Correctional Institution, it is the result of the environment where unsatisfactory behavior, corrective consultations, use of force, and disciplinary reports are a foregone conclusion.

17. Inmates (many of whom are mentally ill) continue to leave prison for the free-world from Close Management without any type of transition programming or assistance, thus putting all of us at risk.

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7. Prior to the Revised Offer of Judgment, close management inmates could purchase these types of items from the canteen. There omission from the Revised Offer of Judgment was clearly an oversight by all parties. Nevertheless, utilizing its typical mean-spirited approach to Close Management, the Defendants have refused remedy the problem.

8. See Exhibit G.

18. Inmates report that some Correctional Officers do their best to provoke inmates and, when inmates, who are locked in their cells, respond by talking back, they are subjected to unjustified punishment and retaliation.

V. Constitutional Violations Identified

In Davenport v. DeRobertis, 844 F.2d 1310, 1313 (7th Cir. 1988), cert. denied, 488 U.S. 908 (1989), the Court said: "the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total." See Grassian, Psychological Effects of Solitary Confinement, 140 Am.J. Psychiatry 1450 (1983). "[M]any, if not most, inmates [in a CM-like unit] experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation." Madrid v. Gomez, 889 F. Supp. 1146, 1235 (N.D.Cal. 1995). Because of that, inmates at high risk for suffering very serious or severe injury to their mental health should not be placed in a Close Management setting. "Such inmates are not required to endure the horrific suffering of a serious mental illness or major exacerbation of an existing mental illness before obtaining relief." Madrid v. Gomez, supra, 889 F. Supp. at 1265 (citation omitted).

Placement of a seriously mentally ill inmate in Close Management unit "is an Eighth Amendment violation in and of itself." Jones'El v. Berge, 164 F. Supp. 2d 1096. 1116 (W.D. Wis. 2001). See also, Ruiz v. Johnson, 37 F. Supp. 2d 855, 914 (S.D. Tex. 1999), rev'd on other grounds, 243 F.3d 941 (5th Cir. 2001), adhered to on remand, 154 F. Supp. 2d 975 (S.D. Tex. 2001).

Florida continues to house many inmates with pre-existing psychiatric illness, and many inmates vulnerable to psychiatric illness if confined in isolation, in its Close Management units. At least a third of the inmates currently confined in Close Management should not be maintained in Close Management, in accordance with Madrid and Jones'El. Yet, rather than meet the needs of its mentally ill inmates, evidence at trial would show that the Department of Corrections is expanding the use of Close Management.

For those inmates whose mental health status is not a disqualification, the wide range of abusive practices and restrictions, such as use of chemical agents, arbitrary deprivation of rights and privileges, lack of opportunity to engage in verbal communication with other inmates, all coupled with a regime of fear, intimidation and retaliation, serves no purpose other than to punish those assigned to Close Management. These gratuitous punitive practices, all of which have survived the changes mandated by the Revised Offer of Judgment, serve no legitimate penological purpose and have no place in a prison facility allegedly intended to house prisoners who must be separated from the general prison population for reasons of security.

Two years ago, the Plaintiffs argued that the Close Management Consolidation Plan, which consolidates the male Close Management units at three prisons, Santa Rosa Correctional

Institution, Charlotte Correctional Institution, and Florida State Prison, would be clearly detrimental to Close Management prisoners, pointing out that (1) two of the prisons, Santa Rosa Correctional Institution and Florida State Prison, have reputations for brutality which are borne out by the excessive use of chemical agents, as compared with other prisons housing Close Management inmates,[9] (2) it makes both visiting and telephone contact that much more difficult because of the distances involved, and (3) it continues to allow defendants to house known mentally ill inmates under conditions which exacerbate their mental illness or to make those without any manisfistation of mental illness, mentally ill. Plaintiffs' Partial Response to Defendants' Motion for Summary Judgment, Docket Entry No. 232. As evident from the recent reports of Drs. Haney and Halleck, and Mr. Riveland, the same problems continue to exist.

The arbitrary and ad hoc suspension of privileges, without any type of notice or opportunity for review, violates the due process requirements of Wolff v. McDonnell, 418 U.S. 539, 567-69, 94 S.Ct. 2963 (1974).

VI. Request for Status Conference, Discovery and Trial

9. Rather than reduce the use of gas at Florida State Prison and Santa Rosa Correctional Institution, the Defendants increased the use of gas elsewhere.

Plaintiffs' request a status conference for the purpose of setting discovery parameters and scheduling a trial date. See Cason v. Seckinger, 231 F.3d 777 (11th Cir. 2002).

WHEREFORE, for the foregoing reasons Plaintiffs respectfully request that Defendants' Motion be denied, and that, after a status conference, and the opportunity for discovery, the matter be scheduled for trial.

Respectfully submitted,

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Florida Bar No. 227862

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correction copy of the foregoing document was furnished to Jason Vail, Assistant Attorney General, Department of Legal Affairs, PL-01 The Capitol, Tallahassee, Fla. 32399-1050, by First Class U.S. Mail on January 8, 2004.

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Peter M. Siegel, Esquire