UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

Charles E. Austin et al.,	:	CASE NO. 4:01-CV-071
Plaintiffs,	:	
vs.	:	ORDER [Resolving Doc. Nos. 538, 559, 560]
Reginald Wilkinson et al.,	:	
Defendants.	:	

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On March 4, 2005, Plaintiffs filed a motion seeking to prevent the transfer of death row inmates from the Mansfield Correctional Institute ("ManCI") to the Ohio State Penitentiary in Youngstown, Ohio ("OSP") [Doc. 538]. Plaintiffs subsequently filed a Motion for a Temporary Restraining Order and Preliminary and Permanent Injunction on May 31, 2005. [Doc. Nos. 559, 560]. In this motion, Plaintiffs argue that a wholesale transfer of death row inmates to OSP without an individualized hearing would deprive the death row inmates of liberty without due process of law.

To support the argument that the proposed confinement would be atypical and a significant hardship, the plaintiffs principally rely upon this Court's earlier findings. *See Austin v. Wilkinson*, 189 F. Supp.2d 719, 742 (N.D. Ohio 2002), *aff'd in part, rev'd in part*, 372 F.3d 346 (6th Cir. 2004), *aff'd in part, rev'd in part*, 125 S.Ct. 2384 (2005). In those findings, this Court determined that the conditions facing inmates under the rules then existing at OSP were atypical and a significant hardship. In response,

the defendants say that the conditions they will apply to the death row inmates at OSP will differ significantly from the conditions facing inmates at OSP at the time of this Court's earlier decision.

As described below, the Court finds insufficient evidence that confinement of death row inmates under the conditions promised by Defendants would be atypical and a significant hardship. For this reason, the Court denies the motion to further enjoin the defendants.

BACKGROUND

I. The State of Ohio's Plan to Transfer Death Row Inmates to OSP

Ohio has incarcerated death row inmates at ManCI since 1995. Recently, the Department announced a plan to transfer all death row inmates from ManCI to the OSP. The Department justifies the move on financial, not correctional grounds.

Opened in 1998, the OSP is an ill-conceived legislative remedy to a problem that did not exist. Reacting to the horrendous April 1993 riot at the Southern Ohio Correctional Facility at Lucasville, the General Assembly poured huge amounts of state funds into OSP, Ohio's first supermax prison. The fault of this plan lies in the fact that the Lucasville riot was caused by overcrowding in the maximum security area, not by any lack of space in the high maximum security. Despite a need for maximum security cells, the Ohio General Assembly built OSP to provide high-maximum security cells, cells for which there was little need.

The State of Ohio classifies all prisoners upon their entry into the prison system based on the security risk they pose. Currently, Ohio employs a five-level security classification scale, with level 1 representing the lowest security risk prisoners and level 5 representing the highest. As a high-maximum

security prison, OSP was tailored specifically for level 5 prisoners. Designed to hold 504 male inmates, OSP housed approximately 478 inmates in February 2000. OSP achieved this population only by over-classifying many of the inmates. Indeed, when OSP first opened, Ohio had no clear policy for determining which prisoners posed a sufficient risk as to warrant placement in OSP. As a result, at unnecessary cost to both the mis-classified prisoners and the Ohio taxpayers, Ohio assigned many inmates to OSP who did not require that level of security.

In 2002, Ohio promulgated a revised policy with regard to classifying inmates for assignment at OSP.[1] This new policy provides inmates greater procedural protection against erroneous assignments to OSP. As Ohio implemented this policy, the OSP population fell to 229 inmates by August 2005. Of the inmates housed at OSP, the broad majority volunteered for placement at OSP, most to be housed nearer their families.[2] More than 80 percent of the inmates at OSP are at level 4 conditions of confinement, not at level 5, the confinement that OSP was designed to accomplish. Having been built at stiff state expense, the OSP has always been a facility in search of a mission.

Faced with a major funding shortage and having recently spent large amounts of money to build OSP, the Ohio Department of Rehabilitation and Correction ("Department) now seeks to use OSP to house Ohio's 196 male death row inmates general population. For the unacquainted, the Department's proposal seems to make sense. Having been convicted of murder, one could expect death row inmates to make up the Department's most difficult prisoners to handle. Counterintuitively, the broad majority of

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[1] Department of Rehabilitation and Correction Policy 111-07.

[2] Of the 229 prisoners at OSP, 172 had volunteered to transfer to the OSP.

death-row inmates do not present special housing threats. As described by Department Assistant Director Terry Collins: "most inmates on Death Row have not created problems" and "have been a relatively peaceful group." The Department seeks the transfer of death row inmates to OSP for financial, not security reasons.

In seeking to place death row inmates at OSP, the Department attempts to rationalize the use of OSP. As described above, OSP was built and staffed to house 502 inmates and was designed to house level 5 inmates, the highest security classification. Although the population of OSP had fallen precipitously, the Department laid no employees off. Explaining the overstaffing, Assistant Director Collins explained that he had been "weak" in failing to properly decrease the staff at OSP to reflect the reduction of half of its inmates.[3] Currently, the Department classifies only forty-four OSP inmates at level 5, the level the OSP was designed to deal with. In sum, OSP costs the Department far more than any other correction institution, mostly because of overstaffing.[4] At the OSP approximately 245 correctional officers watch 230 prisoners, while on Death Row at ManCI 104 correctional officers guard approximately 190 prisoners. By transferring death row inmates to OSP, the Department hopes to reduce this disparity.

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[3] Collins testified:

Q. And about the same number of staff continued to be employed at OSP, despite the fact that the number of prisoners has decreased by more than half.

A. That's correct. When we closed the cell block at the Ohio State Penitentiary, I did not remove the staff from that particular prison. I admitted in my deposition and I have admitted to several other people that I was weak. I should have; I didn't. If I had to do it over again, I would have, but the fact remains that I didn't do it.

Tr. 91.

[4] Recently, the daily cost of housing an inmate at OSP was $167.23. In contrast, the Department incurs average daily costs per inmate ManCI of $58.14.

The plaintiffs suggest instead that housing death row inmates at OSP will cost Ohio more money, not less. The plaintiffs cite Ohio public records showing the cost of housing death row inmates at ManCI is only 35 percent of the cost of housing level 5 inmates at OSP. Moreover, Plaintiffs contend that at ManCI, death row inmates generally reside under conditions less restrictive than many Ohio correctional institutions and significantly less restrictive than level 5 inmates enjoy at OSP. For example, death row inmates housed in DR-6, an honors wing at ManCI, enjoy considerable privileges.[5] To list a few, DR-6 has a large recreation yard with a basketball court, a handball court, and a running track. Still, only a small percentage of death row inmates are housed in DR-6, and most death row inmates have tighter restrictions.

Plaintiffs maintain, however, that at OSP, Ohio limits inmate privileges more than even the most restrictive living area at Death Row at ManCI. Among other restrictions at OSP, inmates take meals alone in their cells, visitations seldom occur, and communication with other inmates is extremely limited. At level 5 OSP incarceration, inmates remain in their cells twenty three hours per day and "are deprived of almost any environmental or sensory stimuli and of almost all human contact." *Wilkinson v. Austin*, 125 S.Ct. 2384, 2386 (2005).

In contrast, the Department alleges that the death row inmates would live under different conditions than those enjoyed by current level 5 inmates. Regarding isolation, the Department's proposal calls for death row inmates to be out of their cells in congregate space for five hours per day, together with one hour a day of outdoor recreation time five days a week. The Department contrasts this with the one to two hours each day of out of cell time that inmates at ManCI currently receive. At OSP, the Department says

[5] At ManCI, Ohio classifies the death row inmates into six categories, from DR-1 (the most restrictive) through DR-6 (the least restrictive, "extended privilege" block).

inmates will be allowed to take meals with others, while the inmates currently take meals alone at ManCI. In addition, the Department promises that it will assign death row inmates to service positions that will also get inmates out of their cells. In total, the Department claims that death row inmates will be out of their cells up to thirty-five hours each week at OSP.

II. Procedural Background and Plaintiffs' Motion for a Preliminary Injunction

Litigation surrounding the placement of prisoners at OSP began on January 1, 2001, when OSP inmates filed a class-action suit against Reginald Wilkinson et al., Ohio Department of Rehabilitation and Correction officials ("ODRC Officials"), alleging Eighth Amendment violations as well as procedural due process claims relating to their placement at the OSP facility. The parties settled Plaintiffs' Eight Amendment claims.

In January of 2002, this Court conducted a hearing on the plaintiffs' procedural due process claims for declaratory and injunctive relief. Relying on *Sandin v. Conner*, 515 U.S. 472 (1995), Plaintiffs argued that conditions at OSP give rise to a liberty interest because they impose an atypical and significant hardship on the prisoners in relation to the ordinary incidents of prison life. They further maintained that due to the existence of this liberty interest, the procedures the defendants used in transferring Plaintiffs to OSP and retaining them at the institution denied them due process. This Court found for the plaintiffs and the suit ultimately worked its way up to the United States Supreme Court. *See Austin*, 189 F. Supp.2d at 724.

Reversing this Court's decision, the Supreme Court held that the 2002 revised placement policy afforded inmates sufficient procedural protection against unwarranted assignments to OSP. *Wilkinson*, 125 S.Ct. at 2398. The Supreme Court based its decision on the fact that under the new policy, an inmate is

entitled to receive notice of the factual basis for his assignment to OSP and an opportunity to respond. In addition to having the opportunity to be heard at this early stage of classification, the inmate may also submit objections prior to the final stage of the review. Thus, the new policy provides for an individualized review and an opportunity to be heard for each inmate Ohio classifies for OSP placement.

Despite the fact that the Supreme Court determined the procedures mandated by Ohio's new placement policy to be sound, the Supreme Court agreed with both this Court and the Sixth Circuit Court of Appeals that the conditions that then existed at OSP were atypical and a significant hardship, giving rise to a liberty interest protected by the Fourteenth Amendment Due Process Clause. Writing for the Court, Justice Kennedy explained its finding that OSP presented such conditions:

> [W]e are satisfied that assignment to OSP imposes an atypical and significant hardship under any plausible baseline. For an inmate placed in OSP, almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in Sandin, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration. While any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context. It follows that respondents have a liberty interest in avoiding assignment to OSP.

Wilkinson, 125 S.Ct. at 2394-95 (citations omitted). *See also Austin v. Wilkinson*, 372 F.3d 346, 353 (6th Cir. 2004) (finding "the extreme isolation visited upon the inmates at OSP, the lack of any outdoor recreation, the limitations upon personal property rights and access to telephones and counsel, and, finally, the ineligibility of OSP inmates for parole, all combined to create a significant and atypical hardship.").

The matters addressed in that line of cases now rear their head again in connection with the State of Ohio's most recent plan to transfer the ManCI death row inmates to OSP. After learning of that plan, the Plaintiffs filed the instant Motion for a Temporary Restraining Order and Preliminary and Permanent Injunction on May 31, 2005. Objecting to the wholesale transfer of death row inmates to OSP, the plaintiffs argue, citing the earlier findings, that the conditions at OSP are atypical and present a significant hardship. Contending that the conditions differ so significantly from the conditions otherwise applied to death row inmates, the plaintiffs argue that the ManCI death row inmates are entitled to individualized hearings before transfer.

The Ohio Department of Rehabilitation and Correction responds that the conditions proposed for housing death row inmates at OSP differ significantly from those considered by the Sixth Circuit and the Supreme Court in the previous line of *Austin* cases. Given the changed conditions of confinement, the Department contends that the earlier findings no longer control. Thus, the Department maintains that while individualized hearings were required for other inmates transferred to or held at OSP such hearings are not required for death row inmates.

LEGAL STANDARD

In deciding whether to grant a preliminary injunction this Court must consider: (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the

652, 656 (6th Cir. 1993). If the Court finds such a liberty interest entitled to protection, it must determine whether the state afforded procedures that were constitutionally adequate. *See Thompson*, 490 U.S. at 460; *Pusey*, 11 F.3d at 656; *Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir. 1999) (citing *Victory v. Walton*, 721 F.2d 1062, 1066 (6th Cir. 1983)).

Courts provide due process protection to a state-created liberty interest involving prison confinement only when the state action either: (1) creates an "atypical and significant hardship" by subjecting the prisoner to conditions different from those ordinarily experienced by similarly situated inmates or (2) inevitably affects the duration of the prisoner's sentence. *Sandin*, 515 U.S. at 486.

Regarding the determination whether conditions are atypical and impose a significant hardship, courts have given prison authorities fairly broad discretion. *See id.* (prisoner's disciplinary segregation falls within expected parameters of sentence); *Jones v. Baker*, 155 F.3d 810, 812 (6th Cir. 1998) (the confinement of a prisoner in administrative segregation for two and a half years did not impose an atypical and significant hardship); *Dominique v. Weld*, 73 F.3d 1156, 1160 (1st Cir. 1996) (the transfer of a prisoner to a higher security prison did not subject him to different conditions than those ordinarily experienced); *Fraise v. Terhune*, 283 F.3d 506, 522 (3d Cir. 2002) (the placement of a prisoner in a higher security confinement did not impose an atypical and significant hardship); *Penrod v. Zavaras*, 94 F.3d 1399, 1406 (10th Cir. 1996) (the transfer of a prisoner to more restrictive quarters and administrative segregation was not atypical and a significant hardship where it did not affect the length of the sentence.).

In finding an atypical and significant hardship, most courts have emphasized conditions that depart significantly from minimal prison conditions. *See Bazzetta v. McGinnis*, 286 F.3d 311, 323 (6th Cir.

probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction. *Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir. 1994); *Keweenaw Bay Indian Community*, 11 F.3d 1341, 1348 (6th Cir. 1993). In considering these, "the four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met. Accordingly, the degree of likelihood of success required to support a grant of a preliminary injunction may depend on the strength of the other factors considered." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). Finally, the plaintiff bears the burden of persuading the court that the factors weigh in favor of granting a preliminary injunction. *Chrysler Corp. v. Franklin Mint Corp.*, 32 F.3d 569, 1994 WL 378144, **2 (6th Cir. 1994) (unpublished decision) (citing *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 441 (1974)). "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002).

DISCUSSION

The Fourteenth Amendment to the United States Constitution prohibits governments from depriving individuals of "life, liberty, or property" without "due process of law." Under 42 U.S.C. §1983, individuals may seek redress in federal court for an alleged violations of this right to liberty. Where, as here, a party seeks relief from an alleged deprivation of a liberty interest without due process, the Court analyzes the claim using two steps. First, the Court determines if the right at issue is a protected liberty interest. *See Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989); *Pusey v. City of Youngstown*, 11 F.3d

652, 656 (6th Cir. 1993). If the Court finds such a liberty interest entitled to protection, it must determine whether the state afforded procedures that were constitutionally adequate. *See Thompson*, 490 U.S. at 460; *Pusey*, 11 F.3d at 656; *Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir. 1999) (citing *Victory v. Walton*, 721 F.2d 1062, 1066 (6th Cir. 1983)).

Courts provide due process protection to a state-created liberty interest involving prison confinement only when the state action either: (1) creates an "atypical and significant hardship" by subjecting the prisoner to conditions different from those ordinarily experienced by similarly situated inmates or (2) inevitably affects the duration of the prisoner's sentence. *Sandin*, 515 U.S. at 486.

Regarding the determination whether conditions are atypical and impose a significant hardship, courts have given prison authorities fairly broad discretion. *See id.* (prisoner's disciplinary segregation falls within expected parameters of sentence); *Jones v. Baker*, 155 F.3d 810, 812 (6th Cir. 1998) (the confinement of a prisoner in administrative segregation for two and a half years did not impose an atypical and significant hardship); *Dominique v. Weld*, 73 F.3d 1156, 1160 (1st Cir. 1996) (the transfer of a prisoner to a higher security prison did not subject him to different conditions than those ordinarily experienced); *Fraise v. Terhune*, 283 F.3d 506, 522 (3d Cir. 2002) (the placement of a prisoner in a higher security confinement did not impose an atypical and significant hardship); *Penrod v. Zavaras*, 94 F.3d 1399, 1406 (10th Cir. 1996) (the transfer of a prisoner to more restrictive quarters and administrative segregation was not atypical and a significant hardship where it did not affect the length of the sentence.).

In finding an atypical and significant hardship, most courts have emphasized conditions that depart significantly from minimal prison conditions. *See Bazzetta v. McGinnis*, 286 F.3d 311, 323 (6th Cir.

2002) (the denial of all visitors for a period stretching indefinitely into the future creates an atypical and significant hardship); *Shoats v. Horn*, 213 F.3d 140, 144 (3d Cir. 2000) (the imposition of 8 years in administrative custody with no prospect of release is atypical and significant hardship); *Williams v. Benjamin*, 77 F.3d 756, 769 (4th Cir. 1996) (the confinement of a prisoner in four-point restraints can be an atypical and significant hardship).

Inmates enjoy no absolute right to avoid transfer to an undesired correctional facility. *See Meachum v. Fano*, 427 U.S. 215, 225 (1976) (inmates have no liberty interest in remaining in a particular facility); *Meriwether v. Coughlin*, 879 F.2d 1037, 1047 (2d Cir. 1989) (permitting transfer because prisoner did not possess liberty interest in remaining at a particular facility); *Montez v. McKinna*, 208 F.3d 862, 865-66 (10th Cir. 2000) (permitting transfer because neither Constitution nor federal law prohibits transfer of an inmate).

As discussed above, the Supreme Court, the Sixth Circuit, and this Court earlier found that prisoners at OSP had a liberty interest when the State transferred the inmates to level 5 confinement at OSP. *See Austin*, 189 F. Supp.2d at 719; *Austin*, 372 F.3d at 346; *Wilkinson*, 125 S.Ct. at 2384. In this context, liberty interests "will be generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. *Sandin* emphasized that a court should focus not on the language of the applicable law or regulation causing the restriction, but rather on the nature and severity of the restrictions upon the prisoner. *Id.* at 480 (quoting *Hewitt v. Helms*, 459 U.S. 460 471-72 (1983)).

With this standard in mind, the Court now evaluates the plaintiffs claim that their pending transfer

from ManCI to OSP deprives them of their constitutionally protected liberty interest without due process. In earlier phases of this litigation, this Court found that the conditions of confinement at OSP were sufficiently restrictive so that a prisoner's transfer to level 5 confinement at OSP implicated atypical and substantial hardship. That holding was subsequently upheld by the Sixth Circuit and Supreme Court. *See Austin*, 372 F.3d at 346; *Wilkinson*, 125 S. Ct. at 2384. In so holding, these reviewing courts emphasized the "extreme isolation visited upon the inmates at OSP, the lack of any outdoor recreation, the limitations upon personal property rights and access to telephones and counsel, and finally, the ineligibility of OSP inmates for parole" in the finding of a protected liberty interest in avoiding assignment to OSP. *Austin*, 372 F.3d at 353.

The Court's directive to compare the degree of hardship in question to "the ordinary incidents of prison life" when deciding whether that hardship is "atypical and significant," begs the question of which "ordinary incidents of prison life" should be employed as the comparator. Large variations exist in the conditions of confinement throughout prison systems. In its earlier consideration of placement of inmates at level 5 confinement at OSP, this Court used the segregated units of other maximum security prisons at other Ohio prisons as the baseline comparator. Neither the court of appeals nor the Supreme Court criticized this comparison.

In that analysis, the comparator group was comprised of those most similarly situated to plaintiffs. Here, the plaintiffs challenge the conditions to be applied to death row inmates. Using similar reasoning, other death row inmates, and the conditions they face, provide the proper objects of comparison.

In determining whether an atypical and significant hardship exists, the Court need consider the

conditions planned for the Death Row environment at OSP. The defendants have delayed transfer of any death row inmates pending this Court's ruling upon the plaintiffs' request for an injunction. No actual conditions are available for comparison, only predicted conditions. The plaintiffs argue that defendants previously failed to carry through on earlier commitments within the time promised. The plaintiffs contend this failure should temper this Court's reliance upon the defendants' assurances.

In the past, the Department failed to complete certain promised changes in the conditions at OSP within the time promised. For example, the construction of outdoor recreation yards was not completed within the time promised. The Department also failed to complete certain promises made to death row inmates at the time the inmates were transferred to ManCI. While the defendants' earlier failures inspire caution in accepting future promises, they do not preclude consideration of the Department's proposals. Given that nothing can be predicted with absolute certainty, the Court considers the Department's proposals, albeit with an appropriate degree of skepticism. The analysis will proceed under the assumption that the Department's plans will generally transpire as described in their pleadings before the Court and at the hearing in this case.

Five characteristics of the proposed conditions of confinement at OSP will be discussed: out of cell time, recreation time, length of confinement, opportunity for parole, and access to counsel. The Court will then compare each of these factors against the conditions now faced by death row inmates to decide whether the OSP conditions impose atypical conditions and a significant hardship upon the death row inmates.

The Court first considers the the time that the inmates are permitted to be out of their cells.

Second, the Court looks at the time afforded inmates for recreation, especially outdoor recreation. Other than DR-6 death row inmates, the ManCI death row inmates receive five to ten hours of out-of-cell time each week. At ManCI, general death row inmates receive five to seven hours per week of access to outdoor recreation. Some level A death row inmates, the most privileged, received more. At OSP, the Department says death row inmates will receive 35 hours of out-of-cell time and 5 hours of outdoor recreation. At OSP, Death row inmates will eat together, something they do not do at ManCI. Describing this, the Department says "the idea of being isolated from human contact, as it is for Level 5s, and appropriately for Level 5s, is not being contemplated for Death Row." While the Court has concern that the practice at OSP will not comport with the Department's representations, the opportunity for contact with others under the conditions represented by the Department is not atypical or a significant hardship when compared with the conditions that currently control death row inmates.

The third consideration is the length of confinement. The length of confinement at OSP for the death row inmates is the entire length of their confinement in prison. Apart from death row inmates with mental problems, all death row inmates will be placed at OSP and will remain at OSP. Given the nature of the plaintiffs' sentences, this period could vary significantly, but could potentially last for a decade or longer. Therefore, if the other conditions of confinement pose significant hardships, this factor would compound that hardship.

The fourth consideration is the opportunity for parole. This Court, the Court of Appeals, and the Supreme Court each emphasized this factor as important to the finding that level 5 conditions at OSP were atypical and a significant hardship. See *Austin*, 189 F. Supp.2d at 728 ("Placement and retention at the

OSP has immense consequences for some inmates. . . . In addition, initial placement at the OSP denies some inmates the chance to be considered for parole because of a Department policy. The Department has a policy, approved by Director Wilkinson, that prevents inmates in maximum security facilities from being paroled."); *Austin*, 372 F.3d at 354; *Wilkinson*, 125 S.Ct. at 2394-95.

In placing emphasis upon this denial ofparole eligibility, this Court, the Court of Appeals, and the Supreme Court followed a longstanding protection against correctional actions that extend a prisoner's custody. *See Sandin*, 515 U.S. at 487 (no liberty interest was impacted in 30 day administrative segregation confinement because confinement will not affect duration of sentence); *Dominique*, 73 F.3d at 1160 (prisoner's return to confinement from work release program by state did not inevitably affect duration of sentence); *Jones*, 155 F.3d at 812 (administrative segregation did not affect overall duration of inmate's sentence); *Wright v. Coughlin*, 132 F.3d 133, 136 (2d Cir. 1998) (the effect of disciplinary action on the length of imprisonment is factor used to decide whether such action imposes atypical and significant hardship); *Hallmark v. Johnson*, 118 F.3d 1073, 1079-80 (5th Cir. 1997); *Thomas v. Ramos*, 130 F.3d 754, 760 (7th Cir. 1997) (inmate's continued confinement in disciplinary segregation after committee determined inmate needed no further segregation did not extend inmate's sentence so as to give rise to due process protections).However, as death row inmates are not eligible for parole, the effect of placement at OSP upon parole eligibility is irrelevant to the present analysis.

The fifth and final consideration is the inmates' access to legal counsel. Prisoners enjoy a constitutional right to meaningful access to the courts. *Bounds v. Smith*, 430 U.S. 817, 824, 828 (1977) (prisoners have a constitutional right to access to courts to challenge violations of constitutional rights);

Johnson v. Avery, 393 U.S. 483, 485 (1969) (prisoners' right of access to courts may not be denied or obstructed). Complementing this right is the fundamental right to access to counsel. *John L. v. Adams*, 969 F.2d 228, 233-37 (6th Cir. 1992) ("We affirm the portion of the district court's remedial order that requires the State to provide the plaintiffs with access to an attorney."). In carrying out the right to access counsel there is an obvious need for facilities that allow confidential communication. *See* ABA Standards for Criminal Justice: Defense Function (3d ed. 1993), Standard 4-3.1(b) ("To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, courthouses, and other places where accused persons must confer with counsel."). *See also Johnson-El v. Schoemehl*, 878 F.2d 1043, 1052 (8th Cir. 1989) ("Detainees' right to counsel and due process can also be compromised by a lack of privacy in consultations with counsel. Forcing prisoners to conduct their meetings with their attorneys in the open or to yell over the phone obviously compromises the consultation.").

Under the proposed plan for OSP, this final factor of confinement is the most troublesome. The evidence presented shows that the current facilities available to OSP inmates for obtaining access to counsel are inadequate in many respects. When death row inmates were housed at Southern Ohio Correctional Facility ("SOCF"), they met their attorneys in attorney rooms that were open, with glass fronts and a table and chairs on both sides. The doors could be closed. At ManCI, each death row inmate housing pod has at least one conference room with a table and chairs and a door that closes for contact visits between clients and attorneys. The ManCI conference rooms also have a phone plug to allow inmates to use the rooms for private calls with their attorneys. Counsel use these conference rooms for calls

to their clients.

The SOCF and ManCI facilities greatly assist to developing the attorney client relationship needed with death row inmates. Mitigation specialist Dorian Hall explained:

> Q. In terms of collecting this information, how important is it to you in order to adequately do your job to have a confidential visit with your client, extremely important?
>
> A. Extremely important. I'm talking to a person, I'm just a new person coming in, they don't know me from Adam, so I need to develop some trust, so I need to be able to speak to them on a regular basis and they need to be able to trust me, to trust the situation, that anything they tell me will not go any further than the defense team. I also talk about pretty personal information. I need to talk about their sexual history, their being abused, personal medical history that people don't normally talk about on a day-to-day basis with just anybody. And in order for people to feel comfortable to give me that information, we need to be in a quiet, comfortable space so that they are comfortable giving me that information.

Tr.294.

In contrast, at OSP, meetings between attorneys take place in an open booth, a booth that is adjacent to booths used for family visits. The booths are not enclosed and the booths allow the sound of the conversations to be overheard by others nearby. A glass partition separates the attorney and the inmate and make communication between the attorney and inmate difficult at normal speaking tones. Mitigation specialist Hall described this:

> A. I had to speak louder because I was -- they couldn't hear and I couldn't hear them, so they had to talk louder and we had to get up really close. Also, there was another visitor in the other family area and they were really loud, and I couldn't hear my client because of the noise from that other individual. Also, there was more than one person in the attorney booth with me. They were totally unable to hear anything that I said with the client. I had to keep relating whatever the client said back to the other person and that person made a comment, I would have to relay that back to the client and it was just really cumbersome, trying to

communicate at all.

Tr. 407. Speaking to the same issue, OSP Warden Houk testified: "I did was personally went to the attorney booth as well as the family visitation booths and had staff get in the booths on either side of me, and you can definitely hear noise from the other booths." Tr. 376. The meaningful access to counsel is an important right for death row inmates. Typically, habeas council have no past relation with the death row inmate, requiring some period before inmates become comfortable with counsel. Given the evidence adduced at trial concerning the current OSP conditions and those intended for the death row inmates, there is reason to believe that the transferred inmates might not be able to (1) communicate readily and confidentially on the phone with their attorneys, (2) meet with their attorneys in a confidential environment, and (3) meet with consultants, including psychiatrists and consultants.

At the hearing Warden Houck testified that he had only recently become aware of concern regarding the ability of counsel to effectively communicate to OSP inmates. In response to becoming aware of this concern, Warden Houck could only suggest sound proofing or white-noise. Neither alternative seems to be adequate to satisfy the constitutional right.

Therefore, the Court finds significant concern whether the conditions for attorney-client meetings, together with meetings with related consultants, are atypical and a substantial hardship. As described above, the conditions predicted for meetings at OSP are certainly atypical when compared to the conditions for attorney-client meetings at either ManCI or SOCF. Given the importance of the ability of counsel to consult with their inmate clients, the lack of meeting space could be a substantial hardship. An acceptable plan would provide the inmates adequate access to counsel through both telephone and personal

conference space. It would assure that attorney-client communications are confidential and, of equal importance, that the inmates could have confidence in their confidentiality.

Unfortunately, the backdrop of this case makes predictions near impossible. The Department has not yet moved any inmate to the OSP. Noone comes forward with certain evidence regarding what conditions will exist for death row inmates at OSP. Instead, both Plaintiffs and Defendants offer mere forecasts and speculation as to what the condition will be upon transfer.

Although the Court finds insufficient current evidence to support the issuance of a preliminary injunction to stop the defendants from transferring death row inmates to OSP, the Court finds good reason *not* to consolidate this determination of plaintiffs' application for a preliminary injunction with a determination of plaintiffs' application for a permanent injunction. Instead, the Court denies the plaintiffs' application for a preliminary injunction but declines to rule at this time on plaintiffs' application for a permanent injunction.

When the Court returns to the determination of plaintiffs' application for a permanent injunction, the Court will be better able to review whether the Department has met its representations regarding out-of-cell time, its representations regarding conditions of confinement, and its representations regarding making recreation facilities available. The Court will also be better able to consider whether defendants have ameliorated the obvious problem associated with allowing meaningful attorney-client consultation in a room conducive to confidential communications.

CONCLUSION

For the foregoing reasons, the Court finds that Plaintiffs failed to demonstrate that Ohio's proposed

transfer of death row inmates to OSP would create an atypical or significant hardship. However, the Court also notes that if Defendants fail to implement the conditions they have proposed to the Court for death row inmates transferred to OSP, Plaintiffs may at that later time be able to prove the existence of a liberty interest requiring due process protections. Plaintiffs' motion for a preliminary injunction is therefore DENIED, but Plaintiffs' motion for a permanent injunction is DEFERRED until such time as the Court may better evaluate the actual restrictions placed on and privileges afforded death row inmates at OSP.

IT IS SO ORDERED.

Dated: September 30, 2005

s/ *James S. Gwin*
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE