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5 **HANCOCK SWEENEY
DISTRICT COURT**

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7 **FILED
BY T. DILLMAN
DEPUTY**

8 **MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

9
10 **RAISTLEN KATKA,**

11 **Plaintiff,**

12 **v.**

13 **STATE OF MONTANA and
14 MONTANA DEPARTMENT OF
CORRECTIONS,**

15 **Defendants.**

Cause No. BDV-2009-1163

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

16
17 This matter is before the Court on Plaintiff Raistlen Katka's motion
18 for a preliminary injunction.

19 **BACKGROUND**

20 This matter was heard over a four-day period from July 20 through
21 23, 2010. At issue at the July 2010 hearing were Plaintiff's request for a preliminary
22 injunction directing that he be held at the Montana State Hospital pending trial in this
23 matter; that he not be subject to any behavior modification plan (BMP) or restrictive
24 administrative segregation (RAS); and, if he be returned to the Montana State Prison
25 (MSP), that he not be subject to any BMP or RAS.

1 At the conclusion of the July 23, 2010 hearing, the Court directed that
2 the Plaintiff be housed at the Montana State Hospital, but that he could be removed
3 from the hospital if he engaged in threatening behavior that endangered himself or
4 others. On December 2, 2010, Plaintiff was returned to MSP for assaultive behavior.

5 Trial in this matter is currently set for February 13, 2012.

6 On March 31, 2011, the parties filed a stipulation wherein the Plaintiff
7 withdrew his objection to being housed at MSP. He did, however, reserve his right to
8 request additional relief based on the evidence presented at the July 2010 hearing.

9 Since the entry of the stipulation, Plaintiff now requests a preliminary injunction that
10 he not be placed in RAS or that he have a BMP imposed on him pending the trial in
11 February 2013.

12 Although the parties have stipulated that the Court should rely only on
13 the evidence heard at the July 2010 hearing, the Court, out of necessity to address
14 current issues, must also draw from the affidavits that both sides have submitted since
15 Plaintiff's return to MSP.

16 The interested reader might well ask why this decision has taken so long?
17 After the July 2010 hearing, the parties and the Court awaited the preparation of the
18 transcript. Then, when Plaintiff was taken back to MSP in December 2010, the matter
19 was scheduled for a show cause hearing in March 2011. After the March hearing was
20 cancelled, the parties submitted additional briefing that was not completed until
21 Plaintiff filed his reply brief in June 2011.

22 FINDINGS OF FACT

23 On September 20, 2007, Plaintiff pled guilty in the Sixteenth Judicial
24 District Court to two counts of felony assault on a peace officer. The plea was entered
25 as a result of an agreement by the Custer County Attorney to dismiss two additional

1 felony charges, all arising from Plaintiff's assaults against correctional officers at the
2 Pine Hills Youth Correctional Center.

3 Although he was fifteen years old at the time, Plaintiff, who was
4 represented by counsel, waived his right to a transfer hearing to youth court and agreed
5 to allow the matter to proceed in district court. He was sentenced to the custody of the
6 Montana Department of Corrections (DOC) on concurrent terms of five years on each
7 count, with the condition that he could petition the court to suspend the remainder of
8 his sentence if he successfully completed the boot camp program.

9 Following his 2007 felony sentencing hearing, Plaintiff was taken to the
10 Missoula Assessment and Sanction Center (MASC) on September 24, 2007 for boot
11 camp screening. MASC is a DOC program within the Missoula County Detention
12 Center and operated under a contract with Missoula County. Offenders are sent to
13 MASC for assessment to determine their needs, risks, and most appropriate placement
14 in the correctional system.

15 Plaintiff's eligibility for the boot camp was delayed by his inability to
16 maintain clear conduct at MASC. On February 20, 2008, Plaintiff met with the MASC
17 screening committee to discuss his options. He became uncooperative and vulgar;
18 threatened to "bash in" the head of the facility director; threw a chair into a window;
19 and kicked open the door. Plaintiff was restrained by Missoula County detention
20 officers. As a result of the altercation, Plaintiff was removed from MASC and taken to
21 MSP. At the time of his entry into MSP, Plaintiff was 16 years of age.

22 During his incarceration at MSP, Plaintiff has received approximately 50
23 infractions for over 35 separate incidents of misconduct, including fights with other
24 inmates, breaking sprinkler heads in his cell, flooding his cell, breaking through fences
25 in the recreational yard, threatening to assault staff, and numerous incidents of

1 encouraging and participating in gang activity. He was classified to RAS in
2 March 2009, after breaking through two of three fences in the yard of the Close III
3 Housing Unit on the high security side of the prison with two other inmates before they
4 were stopped by correctional officers. Plaintiff remained in RAS until his transfer to
5 the Montana State Hospital in June 2010.

6 The RAS program requires that an inmate be housed in a solitary cell,
7 locked down 23 hours a day, five days a week, with one hour of solitary recreation in
8 an outdoor facility each of those five days. For the remaining two days a week, the
9 inmate is locked down for 24 hours a day. The RAS program lasts for two years.
10 During the first year, the inmate cannot receive any visitors or phone calls and, if he
11 gets a write-up during this period, the clock starts running again. The inmate must
12 then have another year of clear conduct before being allowed visitors or phone calls.
13 The only program allowed in RAS is solitary cell study, and RAS inmates are not
14 eligible for work assignments, hobby activities, or other programs.

15 Plaintiff was also approved for placement on a BMP, which is used to
16 control an inmate's violent behavior. BMP imposes a strategy of taking away an
17 inmate's privileges and returning them in intervals when the inmate demonstrates he
18 can conform his conduct to prison policy and be free of dangerous and assaultive
19 behaviors.

20 Since going to MSP approximately two and one-half years ago, Plaintiff
21 has been cleared for placement on a BMP on three separate occasions. Each clearance
22 is approved upon review by mental health staff and is effective for six months. Mental
23 health professionals are required to assess an inmate to determine whether the
24 dangerous behavior is a direct result of an Axis I serious mental disorder; whether the
25 inmate is knowingly, willingly, and purposely engaging in dangerous behavior;

1 whether a higher level of mental health care or observation is indicated; and whether
2 the inmate's mental status is presently deteriorated or deteriorating. All mental health
3 teams members are required to review and approve any request to approve an inmate
4 for BMP clearance. The team members did so in this case. Once an inmate is cleared
5 for BMP, if his behavior warrants, a correctional officer can activate the BMP which
6 results in certain sanctions being placed on the inmate. It would appear to the Court
7 that a BMP can be activated for an inmate with a an Axis I mental illness if the
8 behavior triggering the BMP is not a result of that mental illness.

9 While cleared for behavior management plans, Plaintiff has been
10 "activated" on a BMP five times during his two and a half years at MSP. An activated
11 BMP consists of three steps:

12 Step one (48 hours): All items are removed from the inmate's cell. The
13 inmate receives a security mattress, a security blanket, and a safety gown. Meals
14 consist of food loaf delivered on a paper towel. Water supply to the cell is controlled
15 by the unit staff if the inmate's behavior involves flooding.

16 Step two (24 hours): The inmate receives a pillow and regular state-issue
17 clothing.

18 Step three (24 hours): The inmate receives regular meals and regular
19 state-issue clothing.

20 If the inmate complies with each of the three steps of the plan, it is
21 deactivated within four days and all privileges previously available to the inmate are
22 restored. If the inmate engages in additional disruptive conduct, the BMP can be
23 restarted.

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1 The evidence submitted at the hearing (primarily through Defendant's
2 Exhibit E and the testimony of unit manager Chris Conell) shows that Plaintiff was
3 placed on fully activated BMPs on the following dates:

4 March 5 through 13, 2009, for flooding his cell;

5 March 19 through 22, 2009, for flooding his cell;

6 June 7 through 12, 2009, for flooding his cell, being in possession of a
7 weapon, and disobeying a direct order;

8 June 18 through 24, 2009, for flooding his cell; and

9 July 20 through 24, 2009, for threatening staff with physical harm and
10 then threatening to break out his cell window.

11 Thus, over the course of his nearly 30 months at MSP, Plaintiff has been
12 on an active BMP for approximately 25 days, only 4 days of which were in what is
13 known as the "isolation cell" — a cell designed to prevent all means of self-harming or
14 destructive behavior.

15 In addition to the five full-step BMPs, Plaintiff has twice been placed on
16 what is known as a "Section G" BMP. A Section G BMP may be used when the
17 inmate is engaging in assaultive or dangerous conduct and is not currently cleared for
18 placement on a BMP. Placement on a Section G plan also requires assessment by
19 mental health staff. Consistent with the prison's policy, the Section G plans were in
20 place 24 hours or less on each of the two occasions concerning Plaintiff.

21 Plaintiff was approved for BMPs in March 2008, September 2008,
22 March 2009, December 2009, and May 2010.

23 Plaintiff has attempted suicide while in MSP. The first attempt was in
24 March 2009 while he was on a BMP. At that time, Plaintiff bit through a vein in his
25 arm. A similar suicide attempt occurred in June 2009 while Plaintiff was also on a

1 BMP. In May 2010, Plaintiff cut an artery and needed to be hospitalized for his
2 recovery. When Plaintiff was returned to the prison from the Deer Lodge hospital, he
3 was put on a Section G BMP.

4 Plaintiff's last suicide attempt occurred on June 20, 2010. On
5 June 18, 2010, Plaintiff informed a correctional officer that he felt suicidal. Despite
6 his history and his stated suicidality, he was given a razor to shave himself on
7 June 20, 2010. He easily and quickly disassembled the razor and severely cut himself.

8 At the hearing, the Court heard from a variety of psychologists and
9 psychiatrists. Plaintiff called Dr. Terry Kupers, a psychiatrist from California.
10 Dr. Kupers diagnosed Plaintiff as having two Axis I disorders — major depression and
11 PTSD. According to Dr. Kupers, Plaintiff's mental illness is triggered by the isolation
12 imposed on him in the prison's RAS and BMP programs. While placed in RAS,
13 Plaintiff suffers an increase in despair and an exacerbation of his mental illness.

14 The Court also heard from Dr. Brenda Roche, a psychologist. Dr. Roche
15 tested Plaintiff on December 2009. She also diagnosed Plaintiff with major depression
16 and PTSD. She further noted that Plaintiff has an antisocial personality disorder. Dr.
17 Roche indicated that the RAS and BMP programs at the prison exacerbate Plaintiff's
18 mental illness.

19 Dr. Sally Johnson, a well-known psychiatrist specializing in correctional
20 psychiatry, also testified at the hearing. Dr. Johnson diagnosed Plaintiff with a
21 depressive disorder, not otherwise specified. Dr. Johnson felt that Plaintiff's primary
22 diagnosis was antisocial and borderline personality disorder. Dr. Johnson does not
23 believe that PTSD or any other serious mental illness is driving Plaintiff's persistent
24 behavioral problems.

25 ////

1 The Court heard from Dr. Virginia Hill from the Montana State Hospital.
2 The Court also received Dr. Hill's affidavit on December 20, 2010, following
3 Plaintiff's discharge from the Montana State Hospital. Dr. Hill does not believe that
4 Plaintiff has a major mental illness. She finds that he does have a depressive disorder,
5 but that mental illness does not drive his behavior. Dr. Hill testified that Plaintiff's
6 mental condition does not prevent him from being placed on a BMP or RAS.

7 According to Dr. Hill's December 2010 affidavit, Plaintiff began
8 engaging in antisocial behaviors at the Montana State Hospital in the fall of 2010.
9 (Hill Aff., ¶¶ 10 -12, 14.) Because she was concerned that Montana State Hospital
10 staff would not be able to protect other patients, Dr. Hill requested that Plaintiff be
11 transferred from the hospital to MSP on December 2, 2010. (Id., ¶¶ 17, 18.) Dr. Hill
12 diagnosed Plaintiff as having an antisocial personality disorder (Axis II) and a possible
13 depressive disorder, not otherwise specified. (Id., ¶¶ 22, 25.) According to Dr. Hill,
14 Plaintiff is not seriously mentally ill. (Id., ¶ 23.) Dr. Hill notes that despite everyone's
15 best intentions, Plaintiff may eventually choose to end his life, regardless of the level
16 of care or observation he is on. (Id., ¶ 26.)

17 Dr. Hill also noted that the Montana State Hospital forensic program
18 treatment team and the MSP mental health treatment team developed a specialized
19 treatment plan to manage Plaintiff's self-destructive behavior in the prison setting.
20 (Hill Aff., Ex. D, see also Mahoney Aff. (Dec. 10, 2010), Ex. 2.) According to
21 Warden Mike Mahoney's affidavit, the treatment plan provided for Plaintiff's
22 discharge from the prison infirmary to the Mental Health Treatment Unit in Close II on
23 December 15, 2010. (Mahoney Aff., ¶ 16.) In that unit, Plaintiff earned his GED.

24 The Court has also received an affidavit from Warden Mahoney
25 filed on May 20, 2011. (Def.'s Resp. Pl.'s Mot. Ruling Prelim. Inj., Ex. A.) In that

1 affidavit the Court is informed that in March 2011, Plaintiff was transferred to Housing
2 Unit B (Mental Health Treatment Unit) on the low side of the prison. Plaintiff
3 received a write-up for threatening staff and received a 15-day detention. Following
4 his detention, Plaintiff was returned to the low side of the Mental Health Treatment
5 Unit, where he is continuing his programing. (Mahoney Aff. (May 20, 2011), ¶ 15.)

6 The Court is presented with clearly differing psychiatric and
7 psychological evidence. Clearly, Plaintiff is a difficult person to manage in an
8 institutional setting. While Plaintiff has done well since his return to MSP in
9 December 2010, that improvement may be, as his attorney suggests, his response to the
10 better treatment and not being placed in the RAS and BMP programs. Further,
11 although his suicidal behavior may be the result of a serious mental illness, it may be a
12 result of his antisocial personality disorder and an attempt to manipulate others. The
13 Court is presented with what appears to be a real danger of suicide on behalf of
14 Plaintiff.

15 From the foregoing Findings of Fact, the Court enters the following:

16 CONCLUSIONS OF LAW

17 An injunction is an order of the court requiring a party to refrain from a
18 particular act. Section 27-19-101, MCA. A preliminary injunction restrains a party
19 pending trial on the merits and is issued after notice and a hearing. BLACK'S LAW
20 DICTIONARY 800 (8th ed. 1999). The district court is vested with the discretion to
21 determine whether a preliminary injunction should issue and this decision will not be
22 overturned except in instances of manifest abuse. *Sweet Grass Farms, Ltd. v. Bd. of*
23 *County Comm'rs*, 2000 MT 147, ¶ 20, 300 Mont. 66, 2 P.3d 825; *Porter v. K & S*
24 *P'ship*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981).

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1 The Montana Code provides for the issuance of a preliminary injunction
2 in the following cases:

3 (1) when it appears that the applicant is entitled to the relief
4 demanded and the relief or any part of the relief consists in restraining
5 the commission or continuance of the act complained of, either for a
6 limited period or perpetually;

7 (2) when it appears that the commission or continuance of some
8 act during the litigation would produce a great or irreparable injury to the
9 applicant;

10 (3) when it appears during the litigation that the adverse party is
11 doing or threatens or is about to do or is procuring or suffering to be
12 done some act in violation of the applicant's rights, respecting the subject
13 of the action, and tending to render the judgment ineffectual;

14 (4) when it appears that the adverse party, during the pendency of
15 the action, threatens or is about to remove or to dispose of the adverse
16 party's property with intent to defraud the applicant, an injunction order
17 may be granted to restrain the removal or disposition;

18 (5) when it appears that the applicant has applied for an order
19 under the provisions of 40-4-121 or an order of protection under Title 40,
20 chapter 15.

21 Section 27-19-201, MCA.

22 The Montana Supreme Court determined that the "subsections of this
23 statute are disjunctive, 'meaning that findings that satisfy one subsection are
24 sufficient.' Consequently, only one subsection need be met for an injunction to issue."
25 *Sweet Grass Farms*, ¶ 27 (citations omitted) (quoting *Stark v. Borner*, 226 Mont. 356,
359-60, 735 P.2d 314, 317 (1987)). "An applicant for a preliminary injunction must
establish a prima facie case or show that it is at least doubtful whether or not he will
suffer irreparable injury before his rights can be fully litigated." *Id.*, ¶ 28 (quoting
Porter, at 181, 627 P.2d at 839. "In deciding whether an applicant has established a
prima facie case, a court should determine whether a sufficient case has been made out
to warrant the preservation of the property or rights in status quo until trial, without
expressing a final opinion as to such rights." *Id.* "Status quo' has been defined as

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1 'the last actual, peaceable, noncontested condition which preceded the pending
2 controversy.'" *Id.* (quoting *Porter*, at 181, 627 P.2d at 839).

3 The Court is aware that courts generally afford prison officials wide-
4 ranging deference to adopt and execute policies to maintain order and discipline in the
5 prison. *Hawkins v. Mont. State Prison*, 2004 MT 289, ¶ 18, 323 Mont. 326,
6 102 P.3d 2. The Montana Supreme Court has addressed the issue of BMPs in another
7 context. *Walker v. State*, 2003 MT 134, 316 Mont. 103, 68 P.3d 872. This Court
8 recognizes that prison's mental health system has undergone changes since the *Walker*
9 decision. However, *Walker* held that BMPs and other living conditions in the prison
10 could constitute cruel and unusual punishment when it exacerbates an inmate's mental
11 health condition. *Walker*, ¶ 84.

12 The Court will issue a preliminary injunction prohibiting Plaintiff from
13 being placed in an RAS-type confinement or having a BMP imposed on him until the
14 trial of this matter. The Court does this for a couple of reasons. First, it is clear that
15 Plaintiff is doing well under the current specialized treatment plan mentioned in the
16 latest Mahoney and Hill affidavits. The time between now and the trial is not a
17 particularly long time, and while the Court does not wish to interfere with the prison's
18 legitimate operations, the Court finds that Plaintiff's current treatment plan is working
19 very well and should continue. In this case, Plaintiff has shown that it is at least
20 doubtful whether he will suffer irreparable injury before his rights can be fully
21 litigated. The State is correct that the one psychiatrist who has the most hands-on
22 experience with Plaintiff (Dr. Hill) states that he does not have a major mental illness.
23 However, at this stage of the proceedings, the Court has a very real concern that it is at
24 least doubtful whether the Plaintiff will suffer an irreparable injury (death by suicide)
25 if he is placed in a BMP or RAS program. While Plaintiff may not ultimately prevail

1 in his case, the Court wants to ensure, to the best of its ability, that Plaintiff be kept as
2 safe as possible in the few short months between the issuance of this Order and the
3 date of the trial.

4 Based on the above Findings of Fact and Conclusions of Law, the Court
5 enters the following:

6 **ORDER**

7 **IT IS HEREBY ORDERED:**

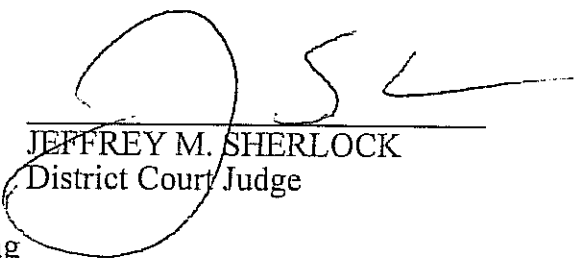
8 1. The Montana Department of Corrections is ENJOINED from
9 placing Plaintiff in the restrictive administrative segregation program (RAS) pending
10 further Order of this Court.

11 2. The Montana Department of Corrections is ENJOINED from
12 using solitary confinement and isolation, such as that described in the behavior
13 modification plan policy (BMP) against Plaintiff pending further Order of this Court.

14 3. The Court finds and ORDERS that Plaintiff is appropriately
15 currently housed in the Montana State Prison.

16 4. If, prior to the trial of this matter, Plaintiff presents a management
17 problem that is not able to be addressed by the current specialized treatment plan, the
18 Montana Department of Corrections shall be free to contact this Court for modification
19 of this Order.

20 DATED this 18 day of August 2011.

21
22 
23 **JEFFREY M. SHERLOCK**
District Court Judge

24 pcs: Andrée M. Larose
Jennifer A. Giuttari/Elizabeth L. Griffing
25 Ronald F. Waterman
Maxon R. Davis
Pamela Snyer-Varnes

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