IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

JEFFERY PRESLEY, et al.,
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Plaintiffs,

v. ***No. 4:05-CV-00148***

CHRISTOPHER EPPS, et al.,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CIVIL CONTEMPT SANCTIONS AND FOR OTHER EQUITABLE RELIEF TO COMPEL DEFENDANTS' COMPLIANCE WITH CONSENT DECREE PROVISIONS ON MEDICAL AND MENTAL HEALTH CARE

EXPEDITED EVIDENTIARY HEARING REQUESTED

Introduction

Plaintiffs, representing a class of approximately one thousand prisoners confined in Unit 32 of Mississippi State Penitentiary at Parchman, seek an expedited evidentiary hearing in this matter. Gross deficiencies in the medical and mental health care provided to the prisoners, and glaring violations of the remedial order in this case, are subjecting the prisoners to imminently life-threatening risks and causing them needless suffering and irreparable medical and psychiatric injury.

Plaintiffs filed suit against Defendants, officials of the Mississippi Department of Corrections, on June 22, 2005, challenging dangerous and inhumane conditions of confinement and requesting injunctive relief. On February 20, 2006, the Parties signed a Consent Decree, which the Court approved and entered as an order on April 28, 2006 (Dkt. No. 24, attached here as Exhibit A) after a fairness hearing in compliance with Rule 23 (e), Federal Rules of Civil Procedure. The Parties stipulated that the remedies set forth in the Consent Decree were narrowly drawn, extended no further than necessary to correct the violations of Plaintiffs' federal rights, and were the least intrusive means necessary to correct those violations. The Court retained jurisdiction to enforce the provisions of this Consent Decree. Plaintiffs thereafter proceeded to monitor Defendants' compliance.

Among the most urgent of the many pressing issues addressed by the Consent Decree were those relating to medical and mental health care.[1] During pre-settlement discovery, Plaintiffs'

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[1] Paragraphs 6 of the Consent decree provides that Defendants "shall comply, and shall ensure that their medical services provider complies" with the mandatory ACA Standards for Adult Correctional Institutions (4th Ed.) and with the essential National Commission on Correctional Healthcare (NCCHC) Standards for Health Services in Prison (2003);" that Plaintiffs' expert will periodically audit the provision of care, and will furnish Defendants with a report identifying deficiencies; and that Defendants will submit a written plan to address any such deficiencies. In addition, Defendants are to ensure compliance with ACA Standard 4-4345 on medical co-payment fees; provide a chronic disease program that adequately identifies, monitors and treats patients with chronic diseases, consistent with NCCHC and ACA standards; ensure compliance with NCCHC and ACA and community standards on medical record-keeping; and provide off-site medical consultation, hospitalization, and specialty care for patients in need of those services, consistent with NCCHC and ACA Standards. Paragraph 7 of the Decree provides that "[e]ach prisoner confined to Unit 32 for at least a year shall be given a comprehensive mental health examination in private" annually; that "prisoners diagnosed with psychosis and severe mental health illnesses shall be housed separately and apart from all other prisoners and shall be housed appropriately in light of their individual treatment plans consistent with NCCHC Standard P-G-01 [Special Needs Treatment Plans]" that "medication levels of all prisoners receiving psychotropic medications shall be

medical expert Dr. John Robertson and their mental health expert Dr. Terry Kupers identified systemic deficiencies in medical and mental health care that were causing needless acute suffering, life-threatening injuries, imminent risks of injury, and poor medical outcomes, many of an irreversible nature. Consequently, one of Plaintiffs' highest priorities has been to collaborate with Defendants in attempting to resolve those deficiencies.

Defendants have shown an interest in exploring the possibilities of collaboration. Commissioner Epps and Deputy Commissioner Sparkman have authorized MDOC's capable and conscientious Medical Director, Dr. Kentrell Liddell, to communicate freely with Plaintiffs' experts. Mr. Epps and Mr. Sparkman recently agreed, as a demonstration of their good faith, to implement an important mental health remedial measure that had been urged by Dr. Kupers (namely, to allow prisoners to control the light switch in their own cells). Parchman Superintendent Kelly and Unit 32 Warden Presley and their staff have fully accommodated Plaintiffs' experts and counsel during audits. Defendants' counsel have made consistent efforts to facilitate collaboration between the parties.

Unfortunately, despite the good intentions to which those actions attest, little substantive progress has been achieved towards compliance with the medical and mental health provisions of the Consent Decree. Problems of the utmost urgency remain to be resolved and Defendants have not taken the necessary steps to address those problems. The history of the parties' efforts since the

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monitored and assessed in accordance with appropriate medical standards, and that "[a]ll prisoners receiving mental health counseling or evaluation shall meet with the mental health professionals in a private setting**."**

entry of the Consent Decree shows that the Court's intervention is required if the medical and mental health provisions are to be implemented and the Plaintiff class protected from further irreparable injury.

I. DEFENDANTS HAVE FAILED TO COMPLY WITH THE COURT'S APRIL 28, 2006 ORDER

History of the Parties' Efforts to Achieve Compliance With Consent Decree

On May 16, 2006, shortly after the entry of the Consent Decree, Dr. Robertson and Plaintiffs' counsel met with Dr. Liddell and Defendants' counsel. The goal of the meeting was to open a dialog on reform of the medical and mental health care systems. The parties agreed at this meeting upon a process whereby Plaintiffs' experts could communicate with Defendants' experts in a timely way about significant emerging medical and psychiatric issues in individual class members' cases. The parties also had a preliminary discussion on some of the most acute systemic problems identified by Plaintiffs' experts. One particularly urgent agenda item was to discuss the terms of MDOC's contract with its contract health care provider. MDOC's two-year contract with Correctional Medical Services, Inc. was due to expire on July 1, 2006, and MDOC was in active negotiations with bidders for the new contract. Dr. Robertson, who has a decade of experience as the medical director for two state correctional medical systems, offered to assist MDOC in reviewing the terms proposed by bidders to help ensure that the new contract would not disadvantage MDOC in providing adequate medical and mental health care to the *Presley* class.

For example, Dr. Robertson pointed out that Wexford, Inc., sought terms that would allow Wexford to provide far less staffing than required to meet the needs of the population at Parchman, a six-month grace period to reach this already reduced level of staffing, and an additional 90 days

before any monetary penalties would go into effect. Based on those terms, there would be a potential nine-month period of extreme under-staffing, which would inevitably result in severe negative medical outcomes.

MDOC thereafter entered into a service contact with correctional health care service provider Wexford, Inc, effective July 1, 2006. Unfortunately, the contract to which MDOC finally agreed contained virtually all the terms which Dr. Robertson had warned MDOC would significantly handicap its ability to comply with the Consent Decree and to provide constitutionally adequate care to the prisoners.

In mid-July 2006, Dr. Robertson spent four days at Parchman meeting with MDOC and Wexford medical staff and administrators, reviewing medical records, touring the on-site medical facilities, and interviewing prisoners. At the end of August 2006, Dr. Kupers joined Dr. Robertson at Parchman in an audit of medical and mental health care. They met with MDOC's on-site health care administrators as well as key medical staff for Wexford; they also reviewed medical and mental health records, toured Unit 32 and the Unit 42 medical unit, and interviewed prisoners. On August 31, 2006, Dr. Robertson and Dr. Kupers met at Department of Corrections headquarters in Jackson with Deputy Commissioner Sparkman, Dr. Liddell, and MDOC's counsel to brief them on the major deficiencies they had found during the audit, and to engage in a collaborative exploration of possible remedies.

On September 8, 2006, Dr. Robertson and Dr. Kupers followed up this discussion with written reports, in compliance with paragraph 6 of the Consent Decree.[2] *See* September 8, 2006 Robertson

[2] Paragraph 6 provides that "[w]ithin 30 working days of the completion of each audit, Plaintiffs will

Report (attached here as Exhibit B) and September 8, 2006 Kupers Report (attached here as Exhibit C). The Reports outlined key findings, reiterated the urgent problems communicated to MDOC a week earlier during the meeting in Jackson, and made recommendations to assist MDOC in achieving compliance with the Consent Decree.

Deficiencies in Medical Care Identified in August 2006 Audit

Dr. Robertson's report gave priority to two items which he identified as being "of particular importance and urgency," namely, the inappropriate imposition of prisoner co-pay fees for medical access and services, and the inadequacy of health care staffing.

Dr. Robertson found multiple documented instances of inappropriate co-pay billings for prisoners' sick-call requests for symptoms related to diagnosed conditions under active treatment, in violation of the Consent Decree. For example, Dr. Roberts found that MDOC charged the co-pay to known diabetics presenting with myriad symptoms of either dangerously high or low blood glucose levels; patients diagnosed Crohn's Disease (an inflammatory disease of the intestine) presenting with rectal bleeding; HIV infected patients on treatment presenting with symptoms of progressive HIV disease; and prisoners requesting medication refills for previously prescribed medications that had run out.

The problem was so pervasive that Dr. Robertson recommended that MDOC immediately suspend the co-pay system at Unit 32 pending a study to ensure that the co-pay system is functioning in compliance with NCCHC and ACA standards, that the written policy offers clear guidance to site

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furnish Defendants and their medical care provider with a report identifying deficiencies, if any. Within 45 working days after receipt of that report, Defendants will submit a written plan to address any such deficiencies."

medical staff, and that on-site medical staff have the training and understanding necessary to ensure the policy is appropriately administered.

Dr. Robertson found a two-fold problem with medical staffing: inadequate training and expertise of on-site medical staff, and an inadequate number of full time employees providing services. For example, Dr. Robertson found that under the new contract with Wexford, there has been a *47% reduction* in the nursing staff , without any parallel reduction in the overall number of patients or their medical acuity. Dr. Robertson characterized this shortfall as "a completely unsustainable situation of crisis proportion." He also stressed his great concern that, despite his warning, MDOC had entered into a contract with Wexford which essentially gives Wexford a six-month grace period to reach the staffing levels mandated by the contract, and an additional 90 days before any monetary penalties would go into effect. Dr. Robertson stated that "[t]he result of a potential nine-month period of extreme under-staffing puts the system at high risk to experience serious and medically significant shortfalls in health services delivery. .... For the prisoners, it inevitably means unnecessary suffering and exposure to the most severe negative medical outcomes. The urgency of the situation cannot be sufficiently stressed." Dr. Robertson recommended that MDOC immediately work with Wexford to set short-term, intermediate and strategic guidelines for staffing and that MDOC rigorously monitor staffing patterns.

In addition to these two issues, Dr. Robertson identified many other major deficiencies, including failure to provide off-site consultations with specialists; failure to provide chronic disease management; woefully substandard medical record keeping; and, of critical importance, Defendants' failure to provide MDOC's Medical Director and her office of medical compliance with the essential

central-office support and on-site resources to allow her to properly monitor the contract with Wexford and assure delivery of services.

Dr. Robertson supplemented his Report with a letter of the same date (Exhibit D), summarizing some of the individual cases who were at serious risk because of the severe staffing shortfall and who required close follow up (for example, a prisoner diagnosed with prostate cancer who was not receiving treatment). The requisite follow-up was not provided.

Deficiencies in Mental Health Care Identified in August 2006 Audit

Dr. Kupers' report detailed an almost total failure of compliance with the mental health provisions of the Consent Decree. Essentially no progress has been made in complying with the key requirement that prisoners "diagnosed with psychosis and severe mental health illnesses shall be housed separately and apart from all other prisoners and shall be housed appropriately in light of their individual treatment plans[.]" Severe under-staffing is crippling virtually every aspect of care. Only a very small fraction of prisoners have received the annual psychiatric examinations mandated by the Consent Decree; services for mentally ill prisoners continue to be grossly lacking; crisis treatment is "grossly substandard and unacceptable;" "there is absolutely no intermediate care available to prisoners in Unit 32," and there are insufficient professional staff to provide the necessary outpatient care.

Dr. Kupers found that the psychiatric wings of the Unit 42 medical facility provided even worse conditions than Unit 32 for mentally ill patents in crisis. It is commonplace for prisoners with serious mental illness to be issued disciplinary tickets for disturbed behaviors that are obviously driven by mental illness, and prisoners with mental illness are disproportionately subjected to use

of force, including immobilizing gas and cell extractions. Dr. Kupers found that "a vicious cycle" has been created, "wherein prisoners suffering from mental illness become more disturbed in isolated confinement at Unit 32, their illness leads them to break rules – either they act out in response to hallucinated voices or they try to harm themselves – then they are subjected to use of force (gassing, [cell] extractions) and forced to undergo even harsher conditions such as the special management isolation cells where their mental illness is further exacerbated and they breakdown or attempt to harm themselves anew." He found that the current policy and practice of housing prisoners in psychiatric crises in "special management isolation cells," where they are subjected to especially harsh restrictions and exaggerated isolation, "will predictably cause deterioration in the prisoners' psychiatric condition, likely accompanied by further misbehavior, ... further punishments and no effective treatment."

Dr. Kupers found that communication between staff and mentally ill prisoners remains a serious problem. There are no call buttons in the cells, and prisoners consistently report that the custody staff do not make frequent rounds. In many cases, prisoners who have flooded the range or set fires explain that they did so because they could not figure out a better way to summon help. Dr. Kupers also found that prisoners' lack of any control over the lights in their cell was exacerbating mental illness and intensifying the kind of despair that can lead to suicide attempts.

Dr. Kupers recommended, among other things, that MDOC resolve staffing shortages; provide more training for custody staff about mental illness and suicide; cease the use of special management isolation cells and additional deprivations to manage psychiatric crises; improve the crisis care at Unit 42 by (at the very least) assigning a qualified full-time mental health care provider

on Unit 42's psychiatric wing; and pursue any of the multiple available options for accomplishing the objective of separating prisoners with mental illness from the other prisoners on Unit 32.

Dr. Kupers supplemented his report with a separate letter by letter dated September 15, 2006 (Exhibit E) listing a number of acutely psychotic and suicidal prisoners needing urgent and ongoing psychiatric intervention and separation from the population at Unit 32. Dr. Kupers requested that Defendants keep him informed as to their follow-up with these patients. Although Defendants agreed to provide such follow-up information, they did not do so.

Defendants' Response to the Monitors' Reports and Recommendations

On October 10, 2006, Defendants responded to Dr. Robertson's and Dr. Kupers' reports by letter captioned "MDOC Written Plan to Correct Alleged Deficiencies at Unit-32" (Exhibit F). In vague and general terms, Defendants stated that MDOC had begun to review Sick Call requests prior to charging a co-pay fee; that it would suspend co-pay (at some unspecified future time) if it found that inmates are being charged unfairly ; that it had advised Wexford that no inmate should be charged for on-going, chronic or unresolved health care concerns; that Wexford "has presented a plan" to address the problem of staff vacancies and that MDOC will continue to monitor staffing patterns; that continuity of care with specialty consults has "significantly improved;" that chronic disease management "has improved significantly," that a "significant reorganization of the medical record keeping process is underway;" that Defendants do not feel call buttons or intercoms are warranted because "[w]e do standard 15 minute rounds everywhere and more frequently as required;"[3] and that

[3]Defendants' statement reflects official policy, but the practice, according to consistent reports from the plaintiff class, is quite different.

MDOC "is in the process of developing a step-down unit for the mentally ill consistent with the parties prior discussions."

Defendants' response to Dr. Kupers' recommendation that prisoners be permitted to control their own cell light deserves special mention. To show their good faith, Deputy Commissioner Sparkman recommended to Commissioner Epps, and Commissioner Epps authorized, individual light switches in each of the cells at Unit-32.[4] This is a significant and welcome decision.

Plaintiffs' Request to Defendants for a Genuine Corrective Action Plan

On October 19, 2006, Plaintiffs sent Defendants a response to MDOC's Written Plan. *See* Exhibit F. Plaintiffs' monitors expressed their dismay that "in its present form MDOC's response provide[ed] an inadequate basis for productive discussion, collaboration, and monitoring, and fails to meet the requirements of the consent decree in *Presley v. Epps,* which requires Defendants to submit a written plan to address any deficiencies identified in Plaintiffs' post-audit reports." Plaintiffs noted that there is a broad consensus among correctional health care professionals about the general approach and format for effective corrective action plans, and that MDOC's October 10 response did not qualify as a genuine plan to correct deficiencies, since it neither listed specific tasks, assigned responsibility for implementation, identified the resources required for implementation, nor spelled out a time frame for implementation. Plaintiffs explained that, at a minimum, a meaningful and effective corrective action plan must identify the problem requiring remedy; specify the necessary remedial steps, spell out the resources required to implement the plan, identify the key persons

[4]Defendants have stated that they will attempt to implement this reform by January 2007.

responsible for implementation, and lay out an unambiguous time line for beginning implementation, intermediate steps, and full compliance.

Dr. Robertson and Dr. Kupers offered to assist MDOC in developing an appropriate and responsive corrective action plan to address the identified needs of the system. Plaintiffs urged MDOC to accept this offer of assistance in the same spirit of cooperation in which it was offered, pointing out that Dr. Robertson and Dr. Kupers have many years of combined experience in helping to formulate and implement corrective action plans in correctional health care settings (in fact, Dr. Robertson's experience includes ten years as medical director of two prison systems under court oversight).

Defendants never responded to or otherwise acknowledged Plaintiffs' offer to assist MDOC in creating a corrective action plan to correct the deficiencies identified in the August 2006 audit. Meanwhile, class members continue to be seriously injured and their lives continue to be put at grave risk by the deficiencies that Plaintiffs' experts identified. The Court's intervention is required to assist the parties in implementing the Consent Decree and to protect the plaintiff class from further irreparable injury.

II. DEFENDANTS' CONDUCT WARRANTS SANCTIONS FOR CIVIL CONTEMPT

"Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced." *Frew v. Hawkins*, 504 U.S. 431, 440 (2004). A Court has the "inherent power to enforce compliance with [its] lawful orders through civil contempt." *Spallone v. United States*, 493 U.S. 265, 276 (1990) (quoting *Shillitani v. United States*, 384 U.S. 364, 370 (1966)). The rules generally applicable to civil contempt apply with equal force to consent

decrees. *See United States v. City of Jackson,* 359 F.3d at 732 (*citing Frew v. Hawkins*, 504 U.S. .at. 440).

"Sanctions for civil contempt are meant to be wholly remedial and serve to benefit the party who has suffered injury or loss at the hands of the contemnor." *Petroleos Mexicanos v. Crawford Enters.,* 826 F.2d 392, 399 (5th Cir.1987) (internal quotation marks omitted). The purpose of a civil contempt sanction is "to coerce the contemnor into compliance with a court order, or to compensate another party for the contemnor's violation." *Lamar Fin. Corp. v. Adams,* 918 F.2d 564, 566 (5th Cir.1990).

In a civil contempt proceeding, "the movant must establish by clear and convincing evidence that (1) a court order was in effect, (2) the order required specified conduct by the respondent, and (3) the respondent failed to comply with the court's order. *United States v. City of Jackson, Mississippi*, 359 F.3d 727, 731 (5th Cir. 2004) (citing *Am. Airlines, Inc. v. Allied Pilots Ass'n,* 228 F.3d 574, 581 (5th Cir.2000)). The issue is whether a party is in compliance with a court order, not whether the party acted in good faith. The Fifth Circuit has consistently held that good faith is not a defense to a finding of civil contempt. *See City of Jackson* at 735 (collecting cases); *see also McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) ("The absence of wilfulness does not relieve from civil contempt ... . Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act.").[5]

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[5] Of course, "[w]here compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action. It is settled, however, that in raising this defense, the defendant has a burden of production." *United States v. Rylander*, 460 U.S. 752, 757 (1983) (citing *McPhaul v. United States,* 364 U.S. 372, 379 (1960); *Maggio v. Zeitz*, 333 U.S. 56 , 75-76 (1948); *Oriel v. Russell*, 278 U.S. 358, 366 (1929)). A defendant does not meet his burden of

Defendants' conduct more than meets the legal standard for civil contempt. As set forth in the reports of Plaintiffs' monitors, and as the testimony and documentary evidence presented at hearing will prove, Defendants have failed to comply with the medical and mental health provisions of the April 28 Decree. The deficiencies in Defendants' system for delivering medical and mental health care and their treatment of mentally ill prisoners have produced a completely unsustainable situation of crisis proportion.

CONCLUSION

The Plaintiffs respectfully request that the Court set this motion for evidentiary hearing; enter findings following hearing that Defendants have failed to comply with the Consent Decree's provisions on medical and mental health care; hold Defendants in civil contempt of the Court's April 28 Decree; and direct that Defendants purge themselves of the contempt by promptly accomplishing the following:

Resolve medical staffing shortages;

Suspend prisoner co-pay charges;

Separate prisoners with mental illness from the other prisoners on Unit 32;

Assign a qualified full-time mental health care provider to Unit 42 (the MSP in-patient unit);

Cease the use of special management isolation cells to manage psychiatric crises; and

In collaboration with the Plaintiffs and their experts, formulate meaningful corrective action plans for each of the deficiencies identified in the experts' audit reports, setting forth specific tasks;

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offering evidence that compliance is impossible by offering evidence or denials which the court finds incredible in context. *Maggio, supra,* at 75-76.

assigning responsibility for implementation; identifying the key individual responsible for each aspect of implementation; identifying the resources that will be required for implementation; and laying out an unambiguous time-line for implementation.

Plaintiffs further request that the Court order Defendants to pay Plaintiffs' reasonable litigation costs, experts' fees and attorneys' fees; and that the Court order such further equitable relief as necessary to enforce compliance with the Consent Decree and to provide Plaintiffs constitutionally adequate medical and mental health care.

Respectfully submitted,

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