- Modification Consent Decrees -

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. G84-63-CA
STATE OF MICHIGAN, et al., Defendants.	)	Hon. Richard A. Enslen

RESPONSE TO DEFENDANTS' REQUEST FOR MODIFICATION OF THE STATE PLAN

I. INTRODUCTION

A. Summary of Argument

Amici believe that defendants misconceive the legal issue before the Court. Granting the defendants' motion requires modification of the consent decree as well as the State Plan. Accordingly, the real issue is whether defendants have satisfied the legal standard to grant the extraordinary relief of modification of the consent decree itself. On the current record, defendants have not come close to establishing their entitlement to a modification. Even if the defendants were requesting no more than a modification of the State Plan, the requested modifications implicate the constitutional rights of inmates, and therefore should be disallowed.

B. Factual Background

On July 22, 1986, following a hearing, this Court found that the defendants had violated, inter alia, the fire safety

provisions of the consent decree. In addition, among the enforcement orders entered by the Court on that date was an order requiring the defendants to report by October 1, 1986, on their efforts to implement the fire safety requirements for which compliance was due in July, 1986. Indeed, one of the areas in which the defendants already have the poorest records of compliance is fire safety; a year before, the parties' stipulation had allowed them extra time to come into compliance on fire safety, but compliance never materialized.

Instead, the defendants, on September 26, 1986, filed what they designated a motion to modify the State Plan. The defendants' motion states that out of twenty-nine fire safety items with July 1, 1986 deadlines, they have implemented two. See Defendants' Memorandum at p.5 and schedule accompanying memorandum. They claim to have started three other projects.[1] One project is scheduled to begin November 1, 1986. The other twenty projects are not even scheduled to begin until various dates in 1987.[2] Accordingly, the defendants' rate of success in meeting the July 1, 1986, requirements, after an additional three months, is slightly under seven percent.

Indeed, the defendants' expected dates of completion of the fire safety projects have in many cases slipped since July of this year. On July 14, 1986, George Walter, Special Projects

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1 From the memorandum at p.5, the beginning date for E-11 (Remote Release) at MR should read September 15, 1986, rather than September 15, 1987.

2 The sprinkler project at SPSM (E-9) has only a completion date of December 1987, but no starting date, listed.

Manager, sent a memorandum to Luella Burke regarding most of the deadlines at issue here. That memorandum was submitted to the Court on July 17, 1986. Amici list below some projected dates for compliance that were moved back by defendants in the slightly more than two months between the two submissions:[3]

		Walters' Memorandum Projected Date, 7/14/86	Defendants' Schedule, 9/26/86
E-2	Exit Modifications		
	MPB	9/87	11/87
	SPSM	11/87	12/15/87
E-4	Enclosed Stairs		
	SPSM	7/87	9/15/87
E-7	Fire-Separate Cellblocks		
	SPSM	7/86	9/15/87
	MR	9/86	6/1/87
E-8	Magnetic Hold-Open Devices		
	MBP	11/86	3/87
	MR	11/86	3/87
E-10	Exit Signs		
	MBP	4/87	6/87
	SPSM	6/87	9/87
	MR	4/87	6/87

In short, despite the patience of the Court and the plaintiff with the defendants, they have been unable so far to perform with any degree of reliability in the area of fire safety. Based on these repeated failures, there is as little reason to expect compliance on the new dates they now request as there was to expect compliance on the dates they reported in July of this year.

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3 There may be additional project delays represented, but the two summaries could not always be reconciled because of differences in descriptions of the projects.

II. THE PROPOSED FIRE SAFETY DELAYS IMPLICATE THE CONSTITUTIONAL RIGHTS OF INMATES

Modification of the State Plan, by itself, is in this case irrelevant. The fire safety provisions of the consent decree are among the few provisions in which deadlines are set forth in the consent decree itself. See the final paragraph of Section B of the consent decree.[4]

Moreover, even if the defendants were requesting no more than a modification of the State Plan for Compliance, as they claim, they do not meet the standard that the proposed changes do not implicate the constitutional rights of inmates. As amici recently argued in their memorandum regarding the solid doors at MIPC, a provision implicates constitutional rights if the elimination or modification of the provision poses a significant risk of a constitutional violation.

In this case, the delays in needed fire safety improvements clearly expose inmates to a continuing significant risk of a constitutional violation.

Although the defendents cite Hoptowit v. Ray, 618 F.2d 1237 (9th Cir. 1982), they fail to cite the later opinion in the same case regarding fire safety. See Hoptowit v. Spellman, 753 F.2d 779 at 783-784 (9th Cir. 1985):

> The district court concluded that the substandard fire prevention at the penitentiary endangered the prisoners' lives and therefore violated the Eighth Amendment. Prisoners have the right not to be subjected to the unreasonable threat of injury or

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[4] Nothing in the July 21, 1985, Stipulation affects the fire safety deadlines that are the subject of the defendants' motion.

> death by fire and need not wait until actual casualties occur in order to obtain relief from such conditions. Leeds v. Watson, 9th Cir. 1980, 630 F.2d 674, 675-676.

See also Williams v. Edwards, 547 F.2d 1206, 1214 (5th Cir. 1977); Cody v. Hillard, 599 F.Supp. 1025, 1049 (D.S.D. 1984); Toussaint v. McCarthy, 597 F.Supp. 1388, 1410 (N.D.Cal. 1984); Fischer v. Winter, 564 F.Supp. 281, 300 (N.D. Cal. 1983); Ramos v. Lamm, 520 F.Supp. 1059, 1064 (D. Colo. 1981); Hutchings v. Corum, 501 F.Supp. 1276, 1282-1283, 1293 (W.D.Mo. 1980); Battle v. Anderson, 447 F.Supp. 516, 525 (E.D.Okla. 1977), aff'd 564 F.2d 388 (10th Cir. 1977); Laaman v. Helgemoe, 437 F.Supp. 269, 281-282, 309 (D.N.H. 1972); Gates v. Collier, 423 F.Supp. 732 (N.D.Miss. 1976), aff'd and remanded 548 F.2d 1241 (5th Cir. 1977); and Campbell v. McGruder, 416 F.Supp. 100, 105 (D.D.C. 1975), aff'd in relevant part 580 F.2d 521 (D.C.Cir. 1978).

Defendants are asking for a delay in not just one fire safety requirement, but twenty-eight separate requirements, thus multiplying the risk to the inmate class. For example, one requirement for which the defendants request a delay is the deadline in implementing the requirements that certain doors swing in the right direction at the three major institutions. One its face, this appears to be a requirement of less than critical importance. In fact, however, exit doors that swung in the wrong direction were a major cause of the loss of life in the fire at the Federal Correctional Institution at Danbury, Connecticut.

Major fires with loss of life are not a common occurrence, of course, at any prison or jail. The fact that no loss has yet

occurred provides absolutely no guarantee for the future; the potential consequences of a failure to implement fire safety requirements are literally catastropic. Since the Eighth Amendment protects against an unreasonable threat of injury or death by fire, the delays requested by defendants in curing the unreasonable risks themselves pose a substantial risk of violating the Constitution, and are not justified under the consent decree provisions for appropriate modifications of the State Plan. As the Court noted at p.4 of its opinion of July 22, 1986, "[g]iven the serious danger that fire poses in the prison setting, [defendants should] make these requirements one of their top priorities." Unfortunately, the defendants' new motion, asking for yet further delay, does not indicate that the defendants fully appreciate the seriousness of the problem.

III. THE DEFENDANTS HAVE FAILED TO SHOW AN ENTITLEMENT TO A MODIFICATION OF THE CONSENT DECREE

Since the defendants cannot obtain the relief they seek without a modification of the consent decree itself, the Court must look to the standards for modification of consent decrees for guidance. The discussion below focuses on the relevant principles applicable to motions for modification.

A. The Provisions of the Consent Decree Need Not Be Constitutionally Required to Be Enforced

In Local 93, International Association of Firefighters v. City of Cleveland, __U.S.__, 106 S. Ct. 3063 (1986), the Supreme Court held that a consent decree could be entered by a court, and enforced as any other order, even though the decree "provides

broader relief than the court could have awarded after a trial." Id. at 3077. The Court held as follows: "It is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations enbodied in a Consent Decree." Id. at 3076.

Accordingly, a consent decree "obviate[s] any need to determine" the constitutional violations and "no issue of constitutional violation" is before the district court in post-judgment proceedings. Badgely v. Varelas, 729 F.2d 894 at 899 (2nd Cir. 1984).

The principle that the party seeking enforcement of a consent decree need not reestablish a constitutional right to relief at every stage in the litigation is but a specific example of the general principle that the parties' interest in finality of judgments requires that Courts refuse to relieve parties of their calculated and deliberate choices, despite one party's later regret of its decision to allow a judgment to become final. See Ackermann v. United States, 340 U.S. 193 at 198 (1950). See also System Federation No. 91, Railway Emp. Dept. v. Wright, 364 U.S. 642 at 647 (1961):

> Firmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided.

B. The Defendants' Submission Fails to Show a Grievous Wrong Evoked by New and Unforeseen Conditions

Traditionally, modification of judgments has been granted only on "a clear showing of grievous wrong evoked by new and

unforeseen conditions." United States v. Swift, 286 U.S. 106 at 119 (1932):

> Life is never static and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victim of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

The defendants cannot make a showing that it will work a grievous wrong to deny modification of the consent decree. Although the defendants have in their memorandum asserted some general grounds for delay (See Defendants' Memorandum at p.2), the defendants do not tie these alleged general sources of delays to specifics requests for extensions of deadlines. For example, why must construction of the automatic transmission for the fire alarms (Defendants' memorandum at 5) wait to begin until January 15, 1987? Why must construction of the enclosed stairs at SPSM (Defendants' Memorandum at 5-6) wait to begin until June 15, 1987?

Delay has already occurred here, and the defendants are to be faulted for not keeping the Court more fully informed at an earlier date. As a practical matter, there may well be little that the Court can do to speed completion of projects that have already started or are about to commence. Twenty-three of the twenty-nine projects, however, have requested starting dates in 1987. The Court should not acquiesce in any of these major

delays without a full factual hearing.[5] Certainly the defendants have failed to make the necessary showing so far. Cf. Fortin v. Commissioner of Massachusetts Department of Public Welfare, 692 F.2d 790 at 800 (1st Cir. 1982):

> No circumstance appears different in 1982 than 1975 except perhaps the degree to which the Department regrets its consent. Regret intensified upon reflection is not however cause for modification.

The Court should not take defendants' pleas of difficulties at face value. It is apparent that whether or not accomplishment of a particular task is possible often depends on the pressure for performance. Cf. Badgely v. Varelas, 729 F.2d 894 at 902, supra:

> If the NCCC were closed today because of a natural disaster such as fire or disease, we have little doubt that the responsible officials of New York State and Nassau County would figure out some way to confine tomorrow those arrested by the police and sentenced by the courts. The persistent violation of the population limit of the consent judgment--a violation now entering a fourth year--is an equivalent disaster.

This Circuit holds that modification of a judgment is extraordinary relief that requires the showing of special circumstances. United States v. Work Wear Corp., 602 F.2d 110, 114 (6th Cir. 1979). On the defendants' current submission, they have completely failed to make the requisite showing.

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[5] Even if the Court ultimately determines that the defendants should not be held in contempt for their failure to comply, the Court can of course issue supplemental orders to assure future compliance. See, e.g., Brewster v. Dukakis, 675 F.2d 1 (1st Cir. 1982).

IV. SUMMARY AND PROPOSED REMEDY

The record of the defendants with regard to fire safety is a dismal one. A year after they signed the consent decree, the plaintiff allowed them extensions of time for certain fire safety improvements. This time expired, and the defendants have been found to have violated a number of provisions of the State Plan. Now defendants tell the Court that they have so far complied with less than 7% of the fire safety deadlines for July 1 of this year.[6] This is an absolutely miserable record, and the Court should not acquiesce in it. At least as to all projects that have not yet been started, the Court should require the defendants to establish specific and completely unavoidable reasons for any additional delay. In addition, the Court should hold defendants in contempt for their admitted failure to comply with the consent decree. As the Court has done in the mental health area, the Court should impose fines on the defendants, to be executed if the defendants fail to purge themselves of their contempt by the deadline that the Court ultimately sets for compliance.

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6 Cf. Fortin v. Commissioner of Massachusetts Department of Public Welfare, 692 F.2d 490, supra. In that case, the defendants' overall rate of compliance with a consent decree was 94% but the First Circuit upheld a finding of contempt.

Respectfully submitted,

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