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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE VIRGIN ISLANDS

LAWRENCE CARTY, et. al., Plaintiffs,	)	
vs.	)	Civil Action No. 94/78
ALEXANDER A. FARRELLY, et. al., Defendants	)	

DEFENDANTS' MOTION FOR MODIFICATION
OF CONSENT DECREE AND SUPPORTING
MEMORANDUM OF LAW

The Virgin Islands, Bureau of Corrections, moves this Honorable Court to grant its Motion for Modification and for reasons therefor states the following:

1. The Consent Decree was entered into in December 1994, two years ago. Since that time, the Defendant Bureau of Corrections undertook several affirmative steps in a good faith effort to comply with all aspects of the decree, and indeed, did comply with many of the non-fiscal requirements of the decree.

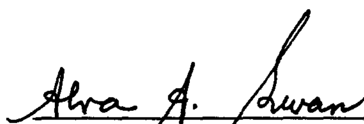
2. Since the date of the Consent Decree, the Virgin Islands has experienced five major storms which have caused unforeseen and unbudgeted financial setbacks for the entire populace, and have resulted in an unprecedented public debt.

3. Despite the Bureau of Corrections's compliance with the non-fiscal requirements of the decree, there remain two areas where the Bureau cannot achieve compliance, namely, the overpopulation of the Criminal Justice complex and the forensic psychiatric evaluation, care, and treatment.

4. The compliance mandates of the Consent Decree in these twin areas will require fiscal obligations that are beyond the budgetary Ken of the Bureau, and legal authority that the Bureau lacks and cannot acquire without enabling legislation. It is outside the financial, legal, and political power of the Bureau to effectuate compliance with these dual mandates, and therefore, modification is appropriate pursuant to Federal Rules and Civil Procedure 60(b)(1).

WHEREFORE, the premises considered, and in conjunction with the Memorandum of Law in support thereof, the Bureau of Corrections respectfully requests that this Court modify the Consent Decree with respect to it in the areas stated above.

Respectfully Submitted,



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MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR MODIFICATION

The unique nature and demands of institutional reform litigation necessitate a more flexible approach to modification than may be appropriate with respect to consent decrees between private parties. The uniqueness of such litigation lies in the fact that it is necessarily aimed at achieving "broad public policy objectives in a complex, ongoing fact situation, with the consequence that consent decrees settling such litigation must be viewed as embodying not so much peremptory commands to be obeyed but as...future-oriented plans designed to achieve those objectives". Small v. Hunt, 1996 WL591893, 6 (4th. Cir. (N.C.)).

This flexibility component is bound within the parameters as first articulated by the Supreme Court in Rufo v. Suffolk, Co., 502 U.S. 367 (1992) extrapolated by Plylor v. Evatt, 924 F.2d 1321 (4th Cir. 1991) and now buttressed by Small v. Hunt, Supra. These cases represent the constant evolution and interpretation of Federal Rule of Evidence 60(b). From the rigid constraints of exceptional circumstances to the now proffered more flexible standard, parties who have already entered consent decrees, may avail themselves to modification by giving due regards to the public interest which may have been the impetus for a particular change, or whose interest was not considered. Ordinarily modification should not be granted where a party relies upon events that actually were anticipated at the time it entered the decree. Conversely, modification of an institutional consent decree should not be had if it is merely no longer convenient for the defendant to abide by the terms. When a defendant asserts that modification is being sought due to changed factual conditions he must "additionally show that the change in conditions make compliance with the consent decree "more onerous," "unworkable," or "detrimental to the public interest." Id. at 6. The test for what is an actual change in factual circumstances or conditions versus mere inconvenience encompasses good faith of the defendant.

In order for a modification to be granted after having alleged a change in circumstance, the Court must determine whether the proposed modification is suitably tailored to

the changed circumstances. Small at 6. As a court makes this determination, "three matters should be clear." Id. at 7. "First modification of a consent decree 'must not create or perpetuate a constitutional violation.' Second, a modification should not strive to rewrite a consent so that it conforms to the constitutional floor. Rather, a court should do no more than necessary to resolve the problem created by the changed circumstance. Third, within the constraints just mentioned, principles of federalism require a District Court to defer to local government administrators to resolve the intricacies of implementing a decree modification... This means that while "financial constraints may not be used to justify the creation or perpetuation of constitutional violations, they are a legitimate concern of government defendants in institutional reform litigation and therefore appropriately considered in tailoring a consent decree modification." Id. at 6.

The Bureau of Corrections predicates its request for modification on the recommendations of the experts, which were made a part of the Special Master Report No. 3. The experts, James Austin, Ph. D., a specialist in population, and Sonia Oquendo, M.D., M.P.H., a specialist in mental health, made recommendations for the corrections of the violations of overcrowding and mental health services which are, quite simply, beyond any ability of the Bureau to effectuate. At the time the Decree was entered into, it is now beyond peradventure that the bureau possessed the good faith belief that it could bring about the changes mandated by the decree. However, after several major Acts of God, an

unexpected explosion in the public debt, and a bankrupt public treasury, the recommendations of the experts which have a fiscal component to compliance, have become impossible for the Bureau to meet. For instance, it is recommended, among other things, that the Bureau (1) rehabilitate the Halfway House, (2) complete construction of the east wing of the Halfway House, (3) identify funding source to pay for the transfer of 75 inmates to BOP State Facilities, (4) identify funding source to build a 100 bed facility, all in an effort to reduce the overcrowding at CJC. While the achievement of these goals would be laudable, legal, and worthwhile, to achieve them will require a huge outlay of funds numbering in the hundreds of thousands of dollars. Funds which the Bureau does not have. Even those areas which do not require a huge fiscal outlay - increase pre-trial release and expedite parole releases - require the involvement and cooperation of agencies over which the Bureau does not have control, such as the Territorial Court and the Parole Board.

Dr. Austin made this observation: "The pretrial periods appear to be excessive (and) most courts strive to have all felony dispositions completed within 180 days.... If the Virgin Islands courts were to be able to meet that standard, the number of inmates in pretrial status might be reduced..." We agree, and we will cooperate in any manner to achieve a reduction in the inmate population, however, the principal player is the Territorial Court, over which the Bureau has no control and minimal influence at best.

These changed factual conditions and circumstances from the inception of the Consent Decree, precipitated by unanticipated Acts of God, have made it impossible for the Bureau to comply with the mandates of the decree relating to overcrowding. Although the Bureau has complied with many of the mandates which do not require fiscal outlays.

With regards to the mental health aspects of the decree, Dr. Oquendo made these telling observations: "Cluster three is severely overcrowded. Although the Defendants tend to comply with the segregation of the mentally ill, the lack of adequate mental health services greatly hampers the value of services provided at CJC", and "mental health beds for the sole use of inmates in need of hospitalization are unavailable at the local hospital. As a residual effect of Hurricane Marilyn... half of the beds available are occupied by inmates who have been committed by the court for hospitalization ", and "no beds for the sole use of inmates in need of hospitalization are available at the local hospital." Dr. Oquendo recognized the good faith attempts by the Bureau to comply with this portion of the mandates, but the critical components of compliance are within the province of the hospital, the mental health department, and any long-term facility the government has, not within the Bureau of Corrections. The same holds true for her recommendations which include (1) the creation of a 6 -12 bed forensic psychiatric unit at the hospital, and (2) move 12 mental health inmates to the hospital. It should be clear to all that the Bureau cannot "create" a unit at the

hospital, nor can it move inmates into the hospital without the consent and cooperation of the hospital. And Dr. Oquendo recognized that there is no room at the hospital for either. Furthermore, any possibility of minimal success in implementing these mandates will require the involvement of the Executive, the Legislature, the Commissioner of Health, and other personnel or agencies over which the Bureau has no control.

When the principles of Small are applied to the decree, the Court should conclude that the request for modification is proper and warranted. The first prong in Small's three-tier analysis is satisfied because the modification that is being sought is narrowly tailored to correct a constitutional violation, that is, to bring before the Court those agencies that can effectuate compliance with the decree and not heap upon the Bureau duties and responsibilities that are beyond its legal ability to perform.

The second-tier of the analysis is also easily satisfied. The Bureau wants the decree to remain-intact. It merely wants it to be qualified as to duties and responsibilities.

The third-tier is likewise easily satisfied because the proposed modification does not require the Court to micro-manage the intricacies of the decree, but rather it provides the Court with a wide scope of accountability for carrying out its mandates.

Small is applicable to the facts of the present case, in that, it provides in part the matrix of a solution to the problem of population in particular, and the Decree in general. In Small, the decree was modified because the prison population growth exceeded that which was anticipated at the time the decree was entered. All indications were that the State of South Carolina would only experience low-single digit population increase of the next few years, when in reality the prison population increased by double digits yearly. Given this unforeseen eventually, the Court of Appeals for the Fourth Circuit held "that explosive increase in prison admissions, and related unanticipated expenses justified modification of the consent decree "Small at 8. The Court granted permanent relief.

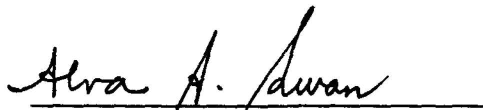
The way in which the State of South Carolina attacked its problem is what makes Small dispositive to the case at bar. If the Virgin Islands would apply the matrix of Small, then the problems that exist within the Criminal Justice Complex can be resolved. "South Carolina moved on four interrelated fronts to tackle the problem of prison overcrowding and to comply with the consent decree. First, the state (legislative branch) enacted a prison population cap that limited prison population to 18,000. Second the state (legislative and executive branches) had appropriated $500 million for new prison construction. Third, the state (judiciary branch) implemented and expanded programs providing alternatives to incarceration, thereby diverting

thousands of offenders form prison. Finally, the state (legislative, executive and judiciary branches) enacted the Structured Sentencing Act and accelerated its implementation. The structured sentencing legislation reduces the length of incarceration for less serious offenders and reserves the longest sentence for the most dangerous of offenders." Id. at 4. South Carolina acted in concert to abate its prison problems and comply with its consent decree.

CONCLUSION

The reasoning of Small suggests that the two areas where the Bureau cannot achieve compliance will require intensive involvement by all three branches of government. This is a fact that the Bureau cannot guarantee and which is obviously beyond its ability to effectuate.

Respectfully submitted,



Alva A. Swan
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<u>**CERTIFICATE OF SERVICE**</u>

I hereby certify that on the 26th day of November, 1996, I mailed a copy of DEFENDANTS' MOTION TO MODIFY by facsimile and first class mail, postage prepaid, to:

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