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United States District Court, E.D. Pennsylvania.

Martin HARRIS, Jesse Kithcart, Dennis Carter, Evelyn Lingham, Esdras Fowler and Michael Graves
v.
THE CITY OF PHILADELPHIA, Rev. Albert F. Campbell, Rosita Saez–Archilla, M. Mark Mendel, Hon. Paul M. Chalfin and Mamie Faines, each in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System, Frank Hall, in his official capacity as Commissioner of the Philadelphia Prisons, Wilhelmina Speach, in her official capacity as Warden of the Detention Center Thomas A. Shields, in his official capacity as Warden of the House of Corrections, Joseph Certaine, in his official capacity as Managing Director of the City of Philadelphia, hon. Edward G. Rendell, in his official capacity as Mayor of the City of Philadelphia

No. CIV. A. 82–1847. | Aug. 17, 1995.

Opinion

MEMORANDUM AND ORDER

NORMA L. SHAPIRO, J.

***1** In this class action alleging unconstitutional conditions in the Philadelphia Prison System, the court entered an order in 1986 approving the parties' Settlement Agreement and an order in 1991 approving the parties' Stipulation and Agreement (hereinafter "the consent decrees"). In January, 1992, Defendants (hereinafter "City") filed a Motion to Modify the consent decrees that requests this court to vacate the nonadmission and release provisions of the decrees. The motion was dismissed as a contempt sanction when the City repeatedly failed to comply with requirements of the consent decrees. The Court of Appeals affirmed the finding of contempt but reversed the court's dismissal of the Motion to Modify as a sanction for contempt and for failure to comply with discovery. *See Harris v. City of Philadelphia,* 47 F.3d 1311, 1329, 1331 (3d Cir.1995). While the dismissal of the Motion to Modify was on appeal, defendants filed a Motion to Vacate the consent decrees in their entirety. The court now addresses the Motion to Modify and the Motion to Vacate in light of the Court of Appeals' remand to further consider the Motion to Modify on the merits.[1]

I. ***Motion to Modify***

The history of this litigation and a detailed description of the consent decrees are found in prior opinions. *See, e.g., id.* at 1315–1317. The City agreed to settle plaintiffs' Eighth and Fourteenth Amendment claims by entering into consent decrees in 1986 and 1991 that establish a maximum allowable population (MAP) for the Philadelphia Prison System (PPS), and, when the MAP is exceeded, require the nonadmission and authorize the release of prisoners not charged with enumerated violent crimes until alternatives to incarceration, prison construction, and a Prison Planning Process have been implemented.

The Motion to Modify argues this court must vacate the provisional nonadmission and release procedures (paragraphs 2 f-g, 3–5 of the 1986 decree and paragraphs 17–19 and 30 of the 1991 decree). The City contends this modification is required under Fed.R.Civ.P. 60(b) because: (1) its action in entering into these decrees was *ultra vires;* (2) there has been a change in the law on which the decrees were based; and (3) there has been an intervening change in the facts on which the decrees were based.

A. ***Ultra Vires***

The District Attorney previously objected to the entry of the 1991 consent decree on the basis that "[n]one of the parties to this litigation possesses the power to nullify these state court orders." Objections of Ronald D. Castille to Proposed Consent Decree at 15. The court rejected the District Attorney's objections and entered an order approving the Stipulation and Agreement. *See Harris v. Reeves,* 761 F.Supp. 382 (E.D.Pa.1991). The defendants did not appeal but the District Attorney attempted to appeal that order; the Court of Appeals dismissed the appeal because he (now she) was not a party. *See Harris v. Reeves,* 946 F.2d 214, 218 (3d Cir.1991). The Court of Appeals also affirmed the court's denial of the District Attorney's motion to intervene. *See Harris* v. Reeves, No. 82–1847, 1990 WL 238417 (Dec. 28, 1990), *aff'd,* 946 F.2d 214 (3d Cir.1994), *cert. denied,* 503 U.S. 952 (1992). All possible appeals have been exhausted or the time periods for appeals have long since run; it is too late for the City simply to change its mind regarding its decision to enter the consent decrees.

***2** Even if it were not too late, the City's argument is without merit. The court may relieve a party from a final judgment or order only if "the judgment is void." Fed.R.Civ.P. 60(b)(4). Rule 60(b) applies to consent

decrees. *See Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 378 (1992). The City argues that state law prohibits the release of pretrial detainees under judicial commitment orders, so it lacked authority to enter into decrees that require the release or nonadmission of detainees and therefore the challenged provisions of the decrees are void.

Under its Home Rule Charter, the City's Department of Public Welfare has broad authority over PPS:

> The Department shall have general supervision over all City penal, reformatory and correctional institutions, homes for the indigent and other welfare institutions now or hereafter owned or operated by the City. It shall determine the capacity of City institutions and determine and designate the type of persons and proportion of each type to be received therein.

351 Pa.Code § 5.5–700(c) (1995). The Charter authorizes the Board of Trustees of PPS to manage the prisons. *See id.* at § 5.5–701. The City correctly points out that it may not exercise its powers under the Home Rule Charter in violation of state law. *See* Pa. Stat. Ann. tit. 53, § 13133 (1957); *Harris v. Pernsley,* 820 F.2d 592, 598 (3d Cir.1987) ("The Home Rule Charter, however, cannot provide the City with powers contrary to those granted by state statutes.").

The City claims Pa. Stat. Ann. tit. 61, § 785 (1964) establishes its legal duty to hold detainees under judicial commitment orders. Section 785, part of the chapter authorizing the establishment of houses of detention, states:

> It is hereby declared to be the true purpose and intent of this act that, in the county wherein said house or houses of correction are situate all persons held to await trial on any criminal charge, or as witnesses, shall be committed to such house or houses of detention instead of the county prison, as now provided by law; and it shall be the duty of all judges, magistrates, or other officers having power of commitment, and they are hereby authorized and directed, in making commitments for trial on criminal charges and in holding witnesses in judicial proceedings, to commit to said house or houses of detention, instead of to the county prison, as now provided by law. The practice and procedure now established by law for the commitment and detention of prisoners for trial, and witnesses, shall remain as heretofore, except that the place of commitment and detention shall be to the house or houses of detention herein established.[2]

This statute does not require the City to hold those charged with crimes in custody. This statute only requires that, in a county in which there is a detention house, those whom the state holds in custody to await trial must be committed to a house of detention not a county prison.

***3** The City claims that *County of Allegheny v. Pennsylvania,* 490 A.2d 402 (Pa.1985), requires it to incarcerate pretrial detainees. *County of Allegheny* held a county was entitled to a preliminary injunction requiring the state to accept state prisoners temporarily housed in county jails to alleviate an overcrowding crisis in the county jail. The opinion refers to Pennsylvania political subdivisions' "statutorily delegated duty to provide detention facilities." *Id.* at 411. But the duty to provide detention facilities is not the same as a duty to hold detainees.

The City has failed to identify any state law requiring it to hold detainees under judicial commitment orders, so the cases it cites for the proposition that a consent decree is invalid when based upon the *ultra vires* consent of a public official are inapposite. *See, e.g., United States v. Beebe,* 180 U.S. 343 (1901) (vacating consent judgment entered with *ultra vires* consent of United States District Attorney who failed to follow federal treasury regulations for compromise of federal government's claim); *Cobb v. Aytch,* 539 F.2d 297 (3d Cir.1976) (reversing entry of a consent decree, in constitutional prison litigation, in which a defendant agreed to undertake actions beyond his duties under state law), *cert. denied,* 429 U.S. 1103 (1977); *National Revenue Corp. v. Violet,* 807 F.2d 285 (1st Cir.1986) (holding void a consent judgment that state statute was unconstitutional because attorney general lacked authority to concede the unconstitutionality of a statute).

The City contends that the Supremacy Clause of the United States Constitution does not require that state commitment orders yield to the federal consent decrees because there never has been a trial in this action. This is incorrect. "[A federal] consent decree is a final judgment," *Rufo,* 502 U.S. at 391, requiring compliance unless and until reversed on appeal. In *Badgely v. Santacroce,* 800 F.2d 33 (2d Cir.1986), *cert. denied,* 479 U.S. 1067 (1987), county and state prison officials objected to federal court enforcement of a consent decree capping the number of inmates in a prison ("NCCC") and

argued that the Supremacy Clause does not apply to a federal consent decree. The court stated

> The defendants also suggested to the District Court that compliance might place them in contempt of the state courts that send them prisoners. Even if a state court would hold the defendants in contempt for refusing to house inmates at the NCCC, or if compliance would otherwise violate state law, Supremacy Clause considerations require that the judgment of the federal court be respected. In any attempt by a state court to hold defendants in contempt for taking actions required by the judgment of the District Court, that judgment would provide a complete defense. The respect due the federal judgment is not lessened because the judgment was entered by consent. The plaintiffs' suit alleged a denial of their constitutional rights. When the defendants chose to consent to a judgment, rather than have the District Court adjudicate the merits of plaintiffs' claims, the result was a fully enforceable federal judgment that overrides any conflicting state law or state court order. The strong policy encouraging settlement of cases requires that the terms of a consent judgment, once approved by a federal court, be respected as fully as judgment entered after trial.

***4** *Id.* at 38 (citations and footnote omitted). The court in *Badgely* ordered immediate and absolute compliance with a population cap (something this court has not yet done).

Cases cited by defendants, *Washington v. Penwell,* 700 F.2d 570 (9th Cir.1983), and *Overton v. City of Austin,* 748 F.2d 941 (5th Cir.1984), are not to the contrary. In *Washington,* a consent decree provision requiring funding of prison legal services was vacated because the court held there was no constitutional right to general legal services. Here there can be no doubt that plaintiffs' claims allege colorable constitutional claims.[3] *See Wilson v. Seiter,* 501 U.S. 294 (1991) (applying Eighth Amendment to conditions of convicted prisoners' confinement); *Bell v. Wolfish,* 441 U.S. 520 (1979) (applying Fourteenth Amendment to conditions of pretrial detainees' confinement). *Overton* involved a challenge to a city's electoral system; the court refused to approve a consent decree because the defendant city council was without power under the state constitution and statutes, absent voter approval, to approve necessary changes to the city charter, so that a judgment holding the electoral system invalid under federal law was required for the changes. Here, there is no state constitutional or statutory provision prohibiting the release or nonadmission of detainees under state judicial commitment orders.

The City still seems to argue that its officials were without power to bind future administrations to the consent decrees because dictum in *Bates v. Johnson,* 901 F.2d 1424 (7th Cir.1990) (holding that an oral command from the bench is not an injunction), suggested that consent decrees involving public officials should be construed as non-binding on the officials' successors. *See id.* at 1426. But our Court of Appeals has opined to the contrary:

> The City concedes, as it must, that the election of a new administration does not relieve it of valid obligations assumed by previous administrations. Just as the City would not have been free to break its contract with a vendor or other contractor because of the election of a new administration, so too changes in administrative policy alone do not permit the City to unilaterally default on its obligations to the court and other litigants.

Harris v. City of Philadelphia, 47 F.3d 1311, 1327 (3d Cir.1995). As the Seventh Circuit Court of Appeals recently explained in an opinion holding that a decedent's successor in litigation is bound by his predecessor's consent to proceed before a magistrate judge, "A successor takes over without any other change in the status of the case.... Any other approach would make a shambles of litigation; a party could sell its interest or change its internal structure (as partnerships do frequently) and require the court to start from scratch." *Brook & Weinberg v. Coreq, Inc.,* 53 F.3d 851, 852 (7th Cir.1995) (citation omitted).

Actions against state officials are actions against the office-holder. Subsequent office-holders step into their predecessors' shoes and are bound by judgments against the office. *See* Fed.R.Civ.P. 25(d); *Newman v. Graddick,* 740 F.2d 1513, 1517–18 (11th Cir.1984) (rejecting argument that state officials may not bind their successors). In a suit against a state officer in his official capacity, it is not even necessary to identify the official by name, *see id.* at 25(d)(2) (official may be identified by

title), because the suit is against the office-holder. If it were otherwise, consent decrees involving state officials would be meaningless.

***5** The Motion to Modify will be denied to the extent it argues the consent decrees are void.

B. *Change in Law*

Under Fed.R.Civ.P. 60(b)(5)-(6), a party may obtain relief from a consent decree relating to a constitutional right by demonstrating a "significant change in circumstances." *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 383 (1992). The change may be either of law or fact. A change in law may warrant modification "if the parties had based their agreement on a misunderstanding of the governing law." *Id.* at 390.

The City argues that *Wilson v. Seiter,* 501 U.S. 294 (1991), effects a change in the law warranting modification of the decrees. In *Wilson,* the Supreme Court held that in order to show that conditions of confinement are cruel and unusual, inmate plaintiffs must establish, in addition to a serious deprivation, that prison officials acted with deliberate indifference. Defendants argue *Wilson* is a "clear break" with Third Circuit precedent and that plaintiffs cannot show they acted with deliberate indifference.[4] Plaintiffs contend that *Wilson* effects a modest change and they would succeed at trial under the *Wilson* standard.

It is unnecessary to resolve whether *Wilson* effected a clear break or whether the City has been deliberately indifferent. A party to a consent decree is charged with knowledge of a case pending at the Supreme Court when the decree was entered. In *Rufo,* a defendant sought to rely on a recent case, *Bell v. Wolfish,* 441 U.S. 520 (1979), as effecting a change in the law warranting modification; the Supreme Court rejected this argument because "petitioners were undoubtedly aware that Bell was pending when they signed the decree" and thus it was "immaterial" to them how the case would be resolved. *Rufo,* 502 U.S. at 388.[5] *Wilson* was pending in the Supreme Court at the time defendants entered the 1991 consent decree. The parties undoubtedly were aware of *Wilson* when they signed the decree. Modification will not be granted based on a change in law.

C. *Change in Facts*

A change in fact may warrant modification under Fed.R.Civ.P. 60(b)(5)(6) if it makes "compliance with the decree substantially more onerous," constitutes an "unforeseen obstacle[ ]," or "when enforcement of the decree without modification would be detrimental to the public interest." *Rufo,* 502 U.S. at 384. Relief ordinarily is not granted "where a party relies upon events that actually were anticipated at the time it entered into a decree." *Id.* at 385.

The defendants argue that the challenged provisions of the consent decrees have caused an increase in crime, an increase in the failure to appear rate of felony defendants at pretrial hearings, and an increase in disrespect for the law. Plaintiffs vigorously dispute these allegations.

An evidentiary hearing is necessary to evaluate the defendants' allegations. When the Court of Appeals reinstated the Motion to Modify, the court immediately conferred with the parties to schedule an evidentiary hearing; the parties jointly requested the week of September 18, 1995. By letter of July 21, 1995, the City made an unopposed request to postpone the hearing until January, 1996:

> ***6** The Court has scheduled a hearing on the defendants' pending Motion to Vacate [sicModify] the 1986 and 1991 Consent Decrees, filed January 7, 1992 (the "Rule 60(b) Motion") to begin September 18, 1995. Since that hearing date was set, defendants have proposed a two-phase approach to the return of control to local authorities of admissions to and releases from the Philadelphia Prison System. If approved by the Court, implementation of Phase II of the defendants' proposal, currently scheduled for mid-October, 1995, should stay completely the qualified admissions moratorium and release mechanism now set forth in the Consent Decrees. In light of these developments, the City respectfully requests that the hearing on the Rule 60(b) Motions be continued to a date to be set in January, 1996. At that time, the prison system hopefully will have been operating under the control of local authorities for a significant period of time and defendants will be able to evaluate whether further proceedings on the Rule 60(b) Motion will be required.

The court will grant the City's request to continue the evidentiary hearing. The hearing will be to determine whether there has been a change in facts warranting modification of the decree under Fed.R.Civ.P. 60(b). At that hearing, when and if held, the City will have the

burden of demonstrating a significant change in facts in accordance with the Supreme Court's decision in *Rufo*.

II. ***Motion to Vacate***

The City argues in its Motion to Vacate that section 20409 of the 1994 Crime Bill, *see* 18 U.S.C. § 3626, requires the court immediately to vacate the consent decrees in their entirety. It also repeats the Fed.R.Civ.P. 60(b) argument, made in the Motion to Modify, that changed facts require vacation of the MAP, nonadmissions and release provisions of the consent decrees in their entirety.

A. ***Section 20409***

Section 20409 states:

> Appropriate Remedies with respect to prison crowding
>
> (a) Requirement of showing with respect to the plaintiff in particular.—
>
> (1) Holding.—A Federal court shall not hold prison or jail crowding unconstitutional under the eighth amendment except to the extent that an individual plaintiff inmate proves that the crowding causes the infliction of cruel and unusual punishment of that inmate.
>
> (2) Relief.—The relief in a case described in paragraph (1) shall extend no further than necessary to remove the conditions that are causing the cruel and unusual punishment of the plaintiff inmate.
>
> (b) Inmate population ceilings.—
>
> (1) Requirement of showing with respect to particular prisoners.—A Federal court shall not place a ceiling on the inmate population of any Federal, State, or local detention facility as an equitable remedial measure for conditions that violate the eighth amendment unless crowding is inflicting cruel and unusual punishment on particular identified prisoners.
>
> (2) Rule of construction.—Paragraph (1) shall not be construed to have any effect on Federal judicial power to issue equitable relief other than that described in paragraph (1), including the requirement of improved medical or health care and the imposition of civil contempt fines or damages, where such relief is appropriate.
>
> ***7** (c) Periodic reopening.—Each Federal court order or consent decree seeking to remedy an eighth amendment violation shall be reopened at the behest of a defendant for recommended modification at minimum of 2–year intervals.

An uncodified portion of section 20409 states that it "shall apply to all outstanding court orders on the date of enactment of this Act. Any State or municipality shall be entitled to seek modification of any outstanding eighth amendment decree pursuant to that section."[6]

Defendants contend that subsection (c) requires vacating the consent decrees and that, following the vacation, subsections (a) and (b) require a trial and govern the standard of adjudication. Plaintiffs argue that subsection (c) does not apply to the consent decrees in this cause of action because it applies only to Eighth Amendment, not Fourteenth Amendment, decrees. Plaintiffs further argue that even if (c) applies, it does not require immediate vacation of the decrees and even if it did so require, it would be unconstitutional on due process and separation of powers grounds. Plaintiffs also contend that (a) and (b) are either inapplicable to the decrees in this cause of action or are unconstitutional on separation of powers grounds.

The plaintiff class includes both sentenced inmates, whose claims are governed by the Eighth Amendment, and pretrial detainees, whose claims are governed by the Fourteenth Amendment. *See Harris v. Reeves,* 761 F.Supp. 382, 400 (E.D.Pa.1991) ("The plaintiff class includes both sentenced prisoners and pretrial detainees."). The consent decrees in this cause of action seek to remedy both Eighth and Fourteenth Amendment violations.

In *Alexander v. Boyd,* 876 F.Supp. 773, 779 n. 8 (D.S.C.1995), the court held conditions of confinement of juveniles unconstitutional under the Fourteenth and not the Eighth Amendment; it then held that section 20409 does not apply to a case involving *only* Fourteenth Amendment claims. In this action, unlike *Alexander,* there are *both* Eighth and Fourteenth Amendment claims.

Section 20409 would seem to apply to a consent decree at least to the extent it is "seeking to remedy an eighth amendment violation" even if the decree also seeks to remedy another violation. The legislative history, if not the statutory language, supports this interpretation. In advocating the bill, Senator Helms, the chief sponsor, stated:

> The standard set forth in this amendment is intended to apply to State correctional facilities as well as local detention facilities, which often have mixed populations of sentenced and pretrial detainees. For example, the Philadelphia

> prison system, which is under a consent decree, has facilities that contain both types of prisoners.

140 Cong. Rec. S12,527 (daily ed. Aug. 25, 1994). If so, section 20409(c) would apply to the consent decrees in this action at least to sentenced prisoners if not to pretrial detainees.

But the constitutional questions presented by section 20409 are serious. Plaintiffs allege this provision withdraws from the courts a remedy for a constitutional right and reopens a final court judgment. *See Plaut v. Spendthrift Farm,* 1995 WL 224772 (April 18, 1995) (Congress cannot change the result of final court judgments). The City counters that section 20409 merely alters the prospective effects of an injunction. *See Pennsylvania v. Wheeling & Belmont Bridge Co.,* 59 U.S. (18 How.) 421 (1855).

***8** Bearing in mind the federal courts' "duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case," *Harmon v. Brucker,* 355 U.S. 579, 581 (1958), the court declines to address these issues of statutory interpretation and constitutional law at this time. The City is in the process of implementing a two-phase proposal consisting of the long-term solutions to prison overcrowding contemplated by the consent decrees. It is possible that this would obviate section 20409 issues. The hearing now scheduled on the Rule 60(b) issues might also serve as the hearing "for recommended modification" under section 20409(c); the possible requirement in (b) that a hearing be held and findings made before a "ceiling" could be reimposed would become irrelevant if the court decides not to reimpose the provisions allegedly constituting a ceiling or that constitutional conditions exist.

The court never has viewed the provisions that are now at issue as permanent. "The entire purpose of the Stipulation and Agreement is finally to address prison overcrowding in Philadelphia so that short-term measures, such as the amended release mechanism and the qualified admissions moratorium do *not* become permanent institutions." *Harris v. Reeves,* 761 F.Supp. 382, 400 (E.D.Pa.1991) (emphasis in original). Rather than unnecessarily deciding issues potentially presenting a conflict between two coequal branches of government, the court will deny without prejudice the portion of the Motion to Vacate based on section 20409. Following the scheduled hearing and the court's decision regarding modification, the City may renew the Motion to Vacate based on section 20409.

B. ***Rule 60(b)***

To the extent the Motion to Vacate seeks modification under Fed.R.Civ.P. 60(b) for changed facts, the court's hearing on the Motion to Modify alleging changed facts will also address that portion of the Motion to Vacate based on Rule 60(b).

However, the court rejects defendants' contention, presented under its argument on Fed.R.Civ.P. 60(b), that there is no substantial federal interest served by the prison planning process in the consent decrees, because it is without merit. Defendants have recognized the plaintiffs' legitimate interest in constitutional conditions of confinement and the relationship of those rights to the prison planning process:

> The prisoners [sic—prisoners and pretrial detainees] are entitled to constitutional conditions of confinement, not to a numerical "cap." This administration invites discussions with counsel for the plaintiff class about the substantive issues of this litigation and recognizes that the prisoners and the public have legitimate interests in the enlargement and improvement of Philadelphia's prisons and in sound penological policies. In fact, consistent with the desire of this Court to expedite the construction of sound prisons, on December 11, 1991, then Mayor-elect Rendell wrote then Managing Director Pingree asking that the prison planning and construction schedule be speeded up. As Mayor, Mr. Rendell will direct the implementation of this request as urgent City policy.

***9** Defendants' Memorandum in Support of the Motion to Modify at 18 n. 14.

Defendants cite *Evans v. City of Chicago,* 10 F.3d 474 (7th Cir.1993) (en banc), *cert. denied,* 128 L.Ed.2d. 460 (1994), and *Sweeton v. Brown,* 27 F.3d 1162 (6th Cir.1994) (en banc), *cert. denied,* 130 L.Ed.2d. 1082 (1995). In *Evans,* the court vacated a consent decree that, in an effort to end long delays in the payment of judgment creditors, had required the City of Chicago to pay judgment creditors by chronological order rather than the size of their judgment. *Evans* held that there was no longer a federal interest in the consent decree because a Seventh Circuit decision had eliminated the constitutional basis for the decree. Similarly, in *Sweeton,* the court vacated a consent decree that governed parole procedures because it found that subsequent cases had made clear there was no constitutional basis for the lawsuit.

Defendants point to no intervening change in law eliminating the basis for this action. They simply argue that "[q]uite simply, a federal court should not be involved in the minutiae of prison policies and procedures and construction as these are more properly reserved to the local government." Defendants' Memorandum at 27. Without endorsing this description of the court's role in the long-term prison planning process, it is clear there has been no change in law that would eliminate the bases for *Harris.* Although *Wilson v. Seiter,* 501 U.S. 294 (1991), discussed *supra,* may make it more difficult for some of the plaintiffs to succeed at a trial, it does not eliminate the constitutional rights on which their claims are based.

An appropriate order follows.

ORDER

AND NOW, this 30th day of August, 1995, upon consideration of the Motion of the City of Philadelphia and the Honorable Edward G. Rendell, in His Official Capacity as its Mayor, to Modify the December 30, 1986 Consent Decree and the March 11, 1991 Decree, plaintiffs' Memorandum in Opposition to the motion, defendants' Reply Memorandum, plaintiffs' Surreply, Defendants' Motion to Vacate the 1986 and 1991 Consent Decrees, plaintiffs' Memorandum in Opposition to the motion, defendants' Supplemental Memorandum of Law in support of the motion, Defendants' Reply, and plaintiffs' Supplemental Memorandum of Law, it is ORDERED that:

1. An evidentiary hearing will be held on the Motion to Modify regarding the alleged change in facts warranting modification under Fed.R.Civ.P. 60(b); the remainder of the motion is denied.

2. An evidentiary hearing will be held on the Defendants' Motion to Vacate regarding the alleged change in facts warranting modification under Fed. R. Civ. P. 60(b). To the extent the motion requests immediate vacation of the consent decrees under 18 U.S.C. § 3626, it is denied without prejudice.

Footnotes

1 The Court of Appeals stated:

> We offer no comment on the merits of the Motion to Modify but merely note that, in light of the passage of time and the possibility of relevant changes, a reexamination does not seem inappropriate.... We do not suggest that upon remand the district court is obliged to hold an immediate hearing. Indeed, on the state of this record the purpose of such a hearing is unclear, in light of the pendency before the district court of a more recent Motion to Modify [sic—the Motion to Vacate] filed by the City. In response to our inquiry as to whether the court's consideration of the later Motion makes moot our consideration of this part of the appeal, all parties assured us that it does not. We have no reason to hold otherwise, particularly in light of the possibility that the dismissal of the Motion to Modify, should it remain intact, might influence subsequent proceedings. *Harris,* 47 F.3d at 1332.

2 This provision has been repealed insofar as it requires "that persons committed to county jails and prisons shall be confined separate and apart from other persons committed thereto." Pa. Stat. Ann. tit. 61, § 785 (1995 Supp.).

3 It may be that the holding, in a somewhat parallel state proceeding, that conditions in the Philadelphia prison are unconstitutional is preclusive as to the defendants in *Harris. See Jackson v. Hendrick,* No. 71–2437 (Pa.Ct. Common Pleas, Apr. 7, 1972), *aff'd,* 309 A.2d 187 (1973), *modified on other grounds,* 321 A.2d 603 (Pa.1974); *Harris v. Pernsley,* 755 F.2d 338, 342 (3d Cir.1985) ("The present plaintiffs ... will contend, if the case goes to trial, that the Philadelphia defendants are collaterally estopped [by *Jackson*] from attempting to defend the constitutionality of conditions of confinement...."). *But see Harris v. City of Philadelphia,* 47 F.3d 1311, 1315 n. 2 (3d Cir.1995).

4 Defendants rely on this court's statement in approving the 1991 consent decree that their agreement to build a 1,000 bed prison and a courthouse "shows the City's good faith." *Harris v. Reeves,* 761 F.Supp. 382, 401 (E.D.Pa.1991). Since that time, the court has held the defendants in contempt three times and been affirmed by the Court of Appeals. *See Harris v. City of Philadelphia,* 47 F.3d 1311 (3d Cir.1995); *Harris v. City of Philadelphia,* 47 F.3d 1333 (3d Cir.1995); *Harris v. City of Philadelphia,* 47 F.3d 1343 (3d Cir.1995).

5 Nor must a decree be modified should a new case place the state's constitutional obligations below what they had agreed to do in the decree. *See Rufo,* 502 U.S. at 389.

6 Two courts have held that section 20409 does not apply to class action lawsuits in prison overcrowding cases, even though the explicit language seems to prohibit classwide relief. *See Rentschler v. Carnahan,* 160 F.R.D. 114, 118 (E.D.Mo.1995); *Tabech v. Gunter,* 869 F.Supp. 1446, 1451 (D.Neb.1994). Both of these cases cite the joint conference committee report, stating "The Conferees note that this section has no effect on the certification or success of class action law suits." H.R.Conf.Rep. No. 103–711,

103d Cong., 2d Sess. (1994). *Tabech* also holds that even if section 20409 applies to class action lawsuits, a named class representative qualifies as an "individual plaintiff" under section 20409(a). This reasoning suggests that named class representatives are also "particular identified prisoners" under section 20409(b).