1990 WL 83321
Only the Westlaw citation is currently available.
United States District Court, D. Puerto Rico.

Carlos MORALES FELICIANO, et al., Plaintiffs,
v.
Rafael HERNANDEZ COLON, et al., Defendants.

CIV. No. 79-4 (PG). | June 7, 1990.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER

PEREZ-GIMENEZ, Chief Judge.

***1** On September 8, 1986, the parties entered into a stipulation requiring defendants to provide each prisoner within the jurisdiction of the Administration of Corrections (AOC) at least 55 square feet of living and sleeping space no later than December 31, 1987.[1] That stipulation was provisionally approved by the court on September 26, 1986, and was finally approved, following notice to the class pursuant to Fed.R.Civ.Pro. Rule 23 and a hearing, on January 26, 1987. In response to defendants' October 1, 1987 motion for partial and temporary relief from the stipulation and order, the court granted an extension until January 1, 1989. On December 23, 1988, nine days before the deadline for compliance, defendants filed a second motion for partial and temporary relief regarding the 55 square foot standard. This constituted defendants' third effort to modify the order approving the parties' September 1986 stipulation. This motion, which is the subject of this opinion and order, requested that the 35 square foot standard remain in effect at La Pica, Limon, Punta Lima, Sabana Hoyos, Guavate, and Zarzal prison camps "at least for an additional year and a half." Subsequently, defendants filed a series of supplements to their motion. The Amended Fourth Supplement, filed on November 27, 1989, added Vega Alta and Fajardo, two institutions housing female prisoners, to the list of facilities for which delay was sought.

Hearings were held on May 3, 4, 7, and 8, 1990.[2] Testimonial evidence was adduced from Lorenzo Villalba Colon, the Chairman of the Parole Board of the Commonwealth of Puerto Rico, Manuel Romero, a deputy monitor appointed by this court, Jose Jimenez-Quinones, the Executive Director of the Expedited Bail Project, Nancy Boneta, Director of Penal Institutions for the AOC, Charles Montgomery, the Director of Institutional Operations of the AOC, Dr. Raul Villalobos, Director of the Correctional Health Program of the Department of Health, and Steve J. Martin, plaintiffs' correctional expert.[3] The court also received documentary evidence offered by the parties.

***2** The question of the precise relief defendants are seeking was clarified during the course of the hearings.

> Q. [by the court] You are only requesting that that [delay in achieving 55 square feet] be done as to the 6 penal camps and the two women's institutions?
>
> A. [Mr. Del Valle] Yes you Honor and we stated that to the Court.
>
> Q. So I understand then that the 5th supplement should be read in light of the statement you just made?
>
> A. Yes your Honor.
>
> Q. Are we talking about La Pica, Limon, Sabana Hoyos, Punta Lima, Guavate and Zarzal, Fajardo and Vega Alta?

Q. [by Mr. Del Valle] Is that the position of the Corrections Administration Doctora Otero?

> A. [by Dra. Otero]

The temporal limits of the modification sought by defendants with respect to these eight institutions also require clarification. Originally, as has been noted, defendants requested a delay in the implementation of the 55 square foot standard for at least 18 months.[4] Subsequently, in a fourth supplement filed on November 27, 1989, defendants requested that dormitories at the six camps be allowed to remain at the 35 square foot standard until July 1, 1990, and that the dormitories at the two institutions for female prisoners, Vega Alta and Fajardo, be allowed to remain at the 35 square foot standard "until the new women's facility at Ponce is completed." Finally, in their Fifth Supplement filed on March 26, 1990, in which defendants rested their request for modification and a continuance of the May 3 hearing on a comprehensive compliance plan to be developed by Mr. Charles

Montgomery, the Director of Institutional Operations for the Administration of Corrections, and to be filed by defendants in July 1990, defendants requested that

> the hearing scheduled for May 3 be continued and enforcement of the 55 square foot standard be postponed at least until the parties and the Court have had the opportunity to consider the comprehensive plan to be filed in July of 1990.
> Fifth Supplement, p. 19.

Thus, the Court can only surmise that defendants' present position is that the 55 square foot requirement not be imposed at six camps and at the two closed institutions for female prisoners until some date, not yet known, that will be revealed in the comprehensive compliance plan defendants intend to file in July 1990. This statement of the issue before the court, standing alone, is sufficient to suggest the outcome of this proceeding.

In their initial motion, defendants requested modification based on (1) their expectation that 80% of the penal population would be able to be housed at the 55 square foot standard by January 1, 1989; (2) the practical impossibility of making use of all beds in the system due to security constraints; (3) defendants' willingness to "redouble efforts" under certain programs (e.g., executive clemency, opening of additional halfway houses) pursuant to the court's April 28, 1988 order granting a delay until January 1, 1989 to meet the 55 square foot standard; and (4) the conditions at the penal camps that would be affected by the modification. In the text of various supplements to their initial motion, however, defendants asserted a variety of shifting bases for their request for modification. These include delays in opening Bayamon 1072 and attendant delays in transfers of prisoners to that facility [Supplement of December 30, 1988], further delays in completion of the Bayamon facility resulting from construction worker absenteeism, heavy rainfall, and other factors, "last minute" water pressure problems at Limon, and delayed transfers to Vega Alta because of delay in the delivery of concrete mix, construction worker absenteeism, and other factors [Second Supplement filed January 5, 1989], additional delays in the occupancy of new spaces at Bayamon and Vega Alta resulting from heavy rainfall [Third Supplement, filed January 17, 1989], and various reasons "beyond defendants' control" that prevented the achievement of compliance with the 55 square foot standard at all closed institutions [[[Fourth Supplement, filed November 27, 1989].

***3** As has been noted, it was in their fourth supplement that defendants, for the first time, requested modification in connection with Vega Alta and Fajardo. In adding these facilities to their request for relief, defendants simply informed the court that

> (t)he 55 sq. ft. standard may not be achieved in Vega Alta and Fajardo, until the 200 bed facility for women is completed in the Institucion Regional del Sur in December of 1990. It should be considered that most of the Vega Alta spaces regularly provide 55 sq. ft. Thus most of the Vega Alta population would continue to be provided 55 sq. ft. Also, the Fajardo institution - recently being used for women - is a small institution almost exclusively housing pretrial detainees. These are detained for relatively short periods of time - not exceeding 6 months. The conditions of confinement at Fajardo compare favorable [sic] with those of other closed institutions.

In their November 27, 1989 pleading, defendants also informed the court of various legislative and executive measures taken to reduce the penal population and described increases in budget enjoyed by the AOC since fiscal year 77-78. Data regarding the number of prisoners housed in facilities providing 55 square feet of sleeping and living space also are set forth in this supplement.

It was not until their fifth supplement, filed on March 26, 1990, that defendants broached their theory that an "accumulation of changes that have taken place in the system since the Stipulation was signed" had caused defendants to undertake the development of a comprehensive compliance plan to deal with all elements of the litigation. In this pleading, defendants described Mr. Montgomery's diligent efforts to develop this plan, the fact of full compliance with the 35 square foot standard, the reduction and stabilization of the AOC's population, and various alleged improvements made throughout the system. Defendants also informed the court for the first time that the AOC had reached a state of "gridlock" resulting apparently from ""defendants' obligations in this case, Commonwealth law and/or AOC policy." Defendants also reminded the court of defendants' obligations in areas other than crowding and provided the court with a list of goals established by the AOC's Operations Division. Finally, the court was informed that

> Mr. Montgomery is convinced that in order to make substantial progress in meeting the obligations of the case it is necessary to develop a comprehensive plan that integrates all of defendants' obligations in light of obstacles to

> implementation and to move forward systematically.

Defendants concluded their final supplement by arguing the "standard for modification" and by requesting a delay in hearings scheduled on March 19, 1990 to commence on May 3. Thus, seven days after the hearing was set, defendants announced a new theory to support their motion for partial and temporary relief, filed on December 23, 1988. It was upon this theory that defendants reluctantly, but finally, went to trial on May 3, 1990.

***4** Defendants' argue that their decision to develop a comprehensive compliance plan, of unknown content or effect and to be filed sometime in July, supports modification under the "flexible standard" of modification relied on by several courts in recent cases. The court disagrees. Accordingly, based on its review of the evidence it heard during the May hearings and its review of the law, the court will deny defendants' motion for partial and temporary relief.

As of April 15, 1990, prisoners were being housed in violation of the 55 square foot standard at Stop 8, Fajardo, Sabana Hoyos, Zarzal, Guavate, Punta Lima, Limon, and La Pica. The population at these facilities ranged from 118% to 162% of the permitted capacity. [Agreed Statement of Fact #3].

As of April 26, 1990, 577 prisoners were assigned in excess of institutional capacities established pursuant to the 55 square foot standard. This number represented 6% of the total population of the Administration of Corrections [[[Defendants' Exhibit C][5] It is obvious, however, that all prisoners in an overcrowded institution suffer harm. Thus, it is relevant that as of April 26, 1990, the total number of prisoners housed in facilities providing fewer than 55 square feet of living and sleeping space to some or all prisoners in those institutions was 1,948, or 20.7% of the total penal population [[Defendants' Exhibit C].

At the time the September 1986 stipulation was entered into, the penal population in Puerto Rico was increasing by 18% per year, and that rate of growth is said to continue at this time. Dra. Otero testified as follows: "when we worked on the stipulation we get the projection of 18 [percent] and that's what we have up to now" [Tr. 144]. According to Dra. Otero, those projections were made very carefully and have been very good projections up to date [Tr. 144].[6]

***5** Conditions in the penal camps are appallingly dreadful. Mr. Montgomery, the AOC's Director of Institutional Operations, testified that crowding at the penal camps was exacerbated by a "gross lack of staff supervision and guidance." [Tr. 59] In general, he found uncontrolled accumulation of inmate property that reduced living space considerably [Tr. 59], inadequate sanitation [Tr. 59], and improper facility maintenance [Tr. 60]. According to Mr. Montgomery, inmates at the camps he visited are not even enjoying 35 square feet of living and sleeping space, as corridors and activity space are being included in the measurement.[7] He found inadequate numbers of showers and toilets at Punta Lima [Tr. 61]. At Zarzal, he observed garbage overflowing in the center of the compound [Tr. 62], only 50 chairs in a dining room that serves a population of 499 [Tr. 62], and unsatisfactory kitchen arrangements. [[[Tr. 63]. He also testified to inoperable plumbing, the impossibility of obtaining a verified count of prisoners, and the presence of "privileged" housing countenanced by security officers for favored prisoners [Tr. 64-65].

Mr. Montgomery found the sewer plant at La Pica to be inoperative [Tr. 65]. He described conditions at Guavate as "horrible," by which he meant "filthy, overcrowded and excess property" [Tr. 67]. He described Guavate as "the worst facility that I saw in the tour, although Zarzal is nothing to brag about" [Tr. 67]. He also testified to understaffing at that institution [Tr. 68] and to the presence of a large number of fighting cocks and a gaming arena observed by Dra. Otero on at least one prior occasion [Tr. 68-70].[8] According to Mr. Montgomery, apart from this form of entertainment, there are no organized recreational programs at Guavate [Tr. 71].

Camp Limon is characterized by "excessive personal property and almost total lack of staff supervision [Tr. 72]. Mr. Montgomery agreed that "you found the kitchen that smelled, you found that the kitchen stove should be replaced, you found that there was preferred housing" [Tr. 73].

Given this testimony by the AOC official to whom Dra. Otero has delegated plenary responsibility for institutional operations, which testimony was fully corroborated by that of plaintiffs' expert, Mr. Steve Martin, the court is outraged by defendants' assertion that conditions in the penal camps justify modification. Moreover, the fact that as many as 20% of the penal population are provided with less than 55 square feet of living and sleeping space hardly constitutes a basis for modification. No other factual justification cited in the original motion for partial and temporary relief, or in the first four supplements to that pleading, merits consideration by the court.[9] Defendants' final justification, set forth in their fifth supplement, amounts to nothing more than the announcement of a new operational policy and, for reasons explained below, provides no legal basis for modification of the existing order.

***6** No standard of review, "flexible" or otherwise, supports modification on the factual record before the

court.[10] Defendants' reliance on New York State Association for Retarded Children v. Carey, 706 F.2d 956 (2d. Cir. 1983), cert. denied, 464 U.S. 915 (1983), is altogether misplaced. The gist of the reasoning of the court of appeals in that case was that the modification sought by defendants would, according to the testimony of experts, best serve the Willowbrook class. These experts testified that implementation of the order as written would effectively deny members of the plaintiff class the proper medical supervision they require. One expert went so far as to describe implementation of the original decree as amounting to "malpractice."

In describing the case before it, the court of appeals stated,

> But it is not, as in Swift, in derogation of the primary objective of the decree, namely to empty such a mammoth institution as Willowbrook; indeed defendants offered substantial evidence that, again in contrast to Swift, the modification was essential to attaining that goal at any reasonably early date.

706 F.2d at 969. This court has heard no evidence, even crediting fully the evidence that was proffered by defendants after it was excluded for irrelevancy, that suggests that the modification sought by defendants would be anything other than in derogation of the primary objective of the court's order adopting the September 8, 1986 stipulation: the reduction of an unconstitutional level of population density, which is an essential precondition to the achievement of all other reforms required throughout the AOC. To suggest that the modification would in any manner be "essential to attaining that goal at any reasonably early date" simply is ludicrous.

Much more relevant to the decision in this case is the opinion of the court of appeals in Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987). In affirming the district court's denial of modification of a "crowding stipulation," the court found that the request for modification failed under either the "stricter standards" of United States v. Swift & Co., 286 U.S. 106 (1932), or under the "flexible approach to modification."[11] With respect to the former, the Texas Department of Corrections failed to establish any unforeseen factual change necessary for modification; regarding the latter, the court of appeals noted that "the modification sought by TDC would abrogate the primary objective of the decree, i.e., to reduce overcrowding in TDC through use of facilities meeting agreed-upon standards." 811 F.2d at 862.

***7** Here, as in Ruiz, defendants' motion for partial and temporary relief must fail under any test. As has been noted, there has been no unforeseen population increase or any other unforeseen fact that would justify modification under the standard announced in Swift. Moreover, and without question, the modification sought by defendants will abrogate the primary objective of the stipulation and order designed to eliminate unconstitutional conditions of crowding throughout Puerto Rico's correctional institutions.[12]

An analogous line of cases relates to defendants' argument that a change in policy, i.e., the decision to develop a comprehensive compliance plan, justifies modification. These cases address the effect of change of conduct on the part of defendants on the eve of a hearing in which plaintiffs are seeking injunctive relief. Unless a court is satisfied that the change of conduct will vindicate the rights asserted by plaintiffs and that there is no reasonable expectation of future injurious conduct, defendants' action does not render moot the issue before the court and thus will not prevent the issuance of prospective injunctive relief. See generally, Wright & Miller, Vol. 11, Sec. 2942 (1973), United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953), United States v. Oregon State Medical Society, 343 U.S. 326 (1952), Atlantic Richfield Co. v. Oil Chemical & Atomic Workers Int'l. Union, 447 F.2d 945, 947 (7th Cir. 1971). Here defendants offer even less than a change of practice in advance of the issuance of injunctive relief; they simply assert that their long overdue decision to attempt to develop a rational, comprehensive plan to achieve constitutional conditions in Puerto Rico's correctional institutions suffices to justify suspension of the prospective application of a stipulation and order, consented to by the parties, that goes to the heart of plaintiffs' constitutional entitlement.[13] Moreover, defendants offer virtually nothing by way of assurance that the change of policy, i.e., the development and implementation of a comprehensive plan, will ever materialize into a permanent change of practice guaranteed to eliminate unconstitutional conditions throughout the AOC:

> ***8** Q. [by Mr. Nachman] Now, do you have a commitment from the administration that if you submit a plan, that they will go along with it?
>
> A. [by Mr. Montgomery] I have every reason to believe that Doctor Otero is going to get me that.
>
> Q. Has she told you so, in so many words?
>
> A. I am not going to ask Doctor Otero, are you going to give me permission to do the plan, I think in fairness to her, she has to see the plan too.

> Q. Is it necessary for --- I mean let's assume that she does make that commitment?
>
> A. Yes Sir.
>
> Q. And is it necessary to also get the people higher up in the government involved, so that this can be accomplished? . . .
>
> A. Yes I would say from my experience and everything, from the organizational chart, it does not stop with her, she would have already signed the organizational chart, somebody else obviously has to do it.
>
> Q. Does that include getting the Governor involved in this whole project?
>
> A. Yes Sir, and I believe that the stimulus that you can provide, that's where I see the Court coming in.

Tr. 101-102. Dra. Otero also addressed this question in her testimony:

> Q. Do you endorse the plan the comprehensive plan that is being prepared by Mr. Montgomery?

A. I have been working with Mr. Chuck Montgomery on ideas, the plan is not something that he invented, the plan is the final decision between he and me, and between recommendations from experts and between conversations with monitors and with conversations with deputy monitors and with visiting and experience, and these 5 years experience is a lot, so that plan is to take all the parts and put it together, from that, I get the ideas and I get my worries, and he is the one who is putting everything together, once he puts that plan together then I have to react to that plan, I don't know if everything he is going to put there I will accept, but I will be willing to review it and I know because we are working together on this that most of the things that he is going to put there is because I agree on that, so I don't know why I cannot accept his plan and just support him, not only as Administrator of Corrections, but the next step will be take him to the Task Force of Corrections that is the organization that the Governor relies on for discussing previously that this has to go to the Governor, Mr. Chuck Montgomery has been in that Task Force before has talked about this on how he can do these things, he accepted the plan, he, in the meeting the president of the Task Force, the Secretary of Justice, told him he can [meet] with anybody he can, in order to see if that can be done, and from that he can get the support, I am planning to get the Task Force meet again, once he get the plan and discuss it in that Task Force, and if I am not pleased with the decisions made at the Task Force, he and me are going to get the Governor in this, because the problem is that the Governor is in this already, because we met in the Security Council most of the time and the Task Force's decisions and discussions are given to the Governor, so the Governor know about it, and he is giving all support we need to finish with this problems and if it was not for his support, I will not practically comply with many things that we have already (emphasis added).

***9** Tr. 123-24. Whatever may be derived from Dra. Otero's testimony, it surely does not amount to unequivocal assurance that an adequate, comprehensive plan will be submitted or that the resources and full support from all agencies of government that will be needed for implementation in fact will be made available. The court and the plaintiff class are being offered nothing more than a hope and a half-promise that at last, more than 10 years following the commencement of this litigation, the AOC will attempt to obtain endorsement and support of a comprehensive plan to address the multitude of problems confronting the agency.

In summary, modification will be denied. Upon careful consideration, however, the court has determined that it will not resume the scheduled hearings at this time to determine whether defendants should be held in contempt of the court's order approving the September 1986 stipulation. Having addressed this issue on two earlier occasions, the court entertains doubt, abundantly sustained by the record in this case, that defendants would be able to present a cognizable defense to contempt charges or to avoid coercive or remedial sanctions.[14] This having been said, however, the court will provide the defendants in this action with one final opportunity to prove their willingness and ability to comply with existing orders and to correct constitutional deficiencies throughout the AOC. This opportunity will be provided by permitting defendants to file their "comprehensive compliance plan" within 30 days of the entry of this order.

As this opinion and order suggests, the court has reached this conclusion with hesitance and foreboding. Lest there be any misunderstanding on the part of defendants, the court will outline carefully the expectations it attaches to its act of grace toward defendants.

The plan is expected to remedy the condition described by Mr. Montgomery in the following exchange:

> Q. [by the court] Sir, according to exhibit 2 and what I gather from it, and your comments on it, is that what the situation boils down [to] is that the prisons are being run by the prisoners and not the staff?
>
> A. [by Mr. Montgomery] That is just about it in a nut shell.

[Tr. 97]. Moreover, Mr. Montgomery testified that the

plan would be based ""totally" on American Correctional Association Standards [Tr. 61], and the court does not expect to be disappointed with respect to this representation. It is the court's expectation that the plan will address all outstanding orders in this cause, including Morales Feliciano v. Romero Barcelo, 497 F.Supp. 14 (D.Puerto Rico 1980), and all issues identified in the memorandum opinion written by the court in March of 1986. Morales Feliciano v. Romero Barcelo, 672 F.Supp. 591 (D.Puerto Rico 1986). In particular, the court expects the plan to provide for compliance with the 55 square foot standard at the earliest possible date. Mr. Montgomery testified that compliance with this requirement could be achieved in 18 months. This goal, he testified, will require construction, the possible release of inmates, and substantial expansion of halfway house facilities (Tr. 90-93). Without in any way suggesting that 18 months is an acceptable delay, the court assumes that it will not be affronted by a timetable that contradicts Mr. Montgomery's testimony. In fact, the court expects the plan to provide for significantly lower population densities in the camps and institutions for females by the end of 1990.

***10** When the plan is filed, the court will provide the parties with a reasonable period of time to attempt to reach agreement on the terms of a comprehensive compliance plan that will redirect the course of this litigation and ultimately bring about vindication of the constitutional rights of members of the plaintiff class in the shortest possible time. Failing agreement on such a plan, hearings will commence on October 1, 1990. In the absence of a legally cognizable defense to contempt, the court will act.[15] The court has considered, but not yet concluded, what remedies might be imposed at that time. Defendants are hereby put on notice, however, that compensatory fines for the benefit of members of the plaintiff class, coercive fines at a level calculated to bring about speedy compliance with the 55 square foot standard, and the accelerated award of good time to prisoners to reduce population density are among the remedies the court will be prepared to impose and enforce.

Quite beyond the issue of crowding, all parties and counsel understand the nature of conditions throughout the AOC. These abominable conditions, resulting largely from maladministration, are reflected in numerous reports submitted by the Court Monitor and confirmed by this court.[16] Thus, the court also will consider, finally and reluctantly, whether anything short of the imposition of a receivership will bring about compliance with minimal constitutional standards in the jails and prisons of the Commonwealth. If this drastic remedy is shown to be required, the court will not hesitate to impose it.

***11** In conclusion, the court recalls Mr. Montgomery's testimony that

> . . . I see us agreeing somehow, coming to some sort of agreement, that yes, this is the way that we are going to proceed, then I see the gun being at the Administration of Corrections' head (emphasis added).

The court has every hope that defendants will produce a workable and comprehensive plan that enjoys the full support of the Administrator of Corrections, the Secretary of Justice, who serves as the chairman of the Commonwealth's Corrections Task Force, the Governor of Puerto Rico, and plaintiffs' counsel. Mr. Montgomery's vision of judicial violence notwithstanding, it is neither the function nor the intention of this court to hold a gun to the head of any of the defendants in this litigation; it should be equally clear, however, that this court of equity will not suffer a wrong of such constitutional magnitude as is being imposed on prisoners throughout Puerto Rico to go any longer without an adequate remedy.

Wherefore, it is hereby

ORDERED that defendants' Motion for Partial and Temporary Relief of the September 8, 1986 Stipulation Regarding the 55 Sq. Ft. Standard should be, and hereby is, DENIED. It is further

ORDERED that, within 30 days of the entry of this order, defendants shall file a comprehensive compliance plan in accordance with the terms of their own representations to the court and in keeping with the requirements of this order. It is further

ORDERED that the parties shall enter into good faith negotiations regarding the adequacy of the plan filed by defendants and, with the assistance of the Court Monitor, attempt to reach agreement on the terms of the plan. It is further

ORDERED that, in the absence of an agreed-upon plan, hearings shall commence on October 1, 1990 to determine the nature of any supplemental relief, coercive or otherwise, that may be required.

SO ORDERED this 7th day of June 1990, in San Juan, Puerto Rico.

Footnotes

[1] The stipulation also required that 35 square feet of living and sleeping space be afforded to all prisoners by December 31, 1986. Defendants' motion to modify the 35 square foot requirement was denied on September 14, 1987. Morales Feliciano v. Hernandez Colon, 672 F.Supp. 627 (D.Puerto Rico 1987). Noncompliance with this provision of the stipulation resulted in a finding of contempt and the imposition of heavy fines. Order, July 23, 1987 and Order, August 15, 1988. The latter order was affirmed, Morales Feliciano v. Parole Bd. of Com. of P.R., 887 F.2d 1 (1st Cir. 1989), cert. denied 58 U.S.L.W. 3597 (1990), and, to date, defendants have paid more than $30,000,000 in fines pursuant to these orders. Only the 55 square foot standard is before the court at this time.

[2] The hearings were convened to consider not only defendants' motion to modify, but also to consider plaintiffs' June 9, 1989 motion for the willful disobedience of court orders entered on stipulations of the parties (contempt motion). On March 19, 1990, the court entered an order setting a hearing on both the modification and the contempt motions for May 3, 1990. In that order, the court indicated that it would first hear evidence from the parties on the modification motion and would proceed on the contempt motion only if it reached a decision to deny modification. On May 8, the hearing was adjourned after the court heard evidence on the modification motion, and this opinion and order is being entered on the basis of that evidence.

[3] Testimony of eight AOC superintendents was excluded on plaintiffs' objection for lack of relevancy. Defendants made a proffer of the testimony they claim would have been adduced had the objection not been sustained, and plaintiffs made a proffer of facts they claim would have been elicited on cross-examination of those witnesses.

> The court wishes to express its special appreciation to Mr. Montgomery and Mr. Villalba for their conscientious and candid testimony. Both of these witnesses are functionaries of the Commonwealth of Puerto Rico. Nonetheless, they expressed without reservation the obstacles they confront in their day-to-day efforts to achieve compliance with the court's orders in this litigation, and their dedication to constructive change is apparent. The court also wishes to express its appreciation to Mr. Martin, whose observations regarding the role of the court in institutional reform litigation were particularly helpful and well received.

[4] Since defendants' original motion was filed on December 23, 1988, May 23, 1990 marked the 18th month following the motion for temporary and partial relief.

[5] In determining the substantiality of defendants' compliance with the 35 square foot standard in this case, the court of appeals found that "the number of prisoners suffering that harm (7 to 10% of the prison population) is large . . . (emphasis added). Morales Feliciano v. Parole Bd. of Com. of P.R., 887 F.2d at 5. In the same opinion, however, the court found that this percentage range was sufficiently "modest" to overcome any alleged defense of impossibility. Id.

[6] Defendants introduced no other evidence in support of Dra. Otero's testimony, and the court has no knowledge of the basis for this projection. It is noteworthy, however, that the increase in population between January 3, 1989 and January 31, 1990 was only 8.5% [Fifth Supplement, p. 5]. This reduced rate of growth was attributable to legislation increasing awards of bonificacion (good time) and revising criteria for the setting of bail in cases involving misdemeanor charges. Therefore, although the court is not confident of the accuracy of Dra. Otero's testimony that the 18% growth rate continues at this time, it appears that the defendants have been planning on the basis of that annual growth rate at least since September 1986, when the stipulation was executed. Thus, they cannot argue credibly that unanticipated growth in population provides a basis for modification.

[7] This method of measurement is permitted by the parties' September 8, 1986 stipulation. Mr. Montgomery's testimony only underscores the fact that a minimal constitutional standard was applied by the parties and the court in addressing the problem of extreme overcrowding of Puerto Rico's correctional institutions.

[8] On that occasion, Dra. Otero gave instructions that the fighting cocks were to be removed. Her orders, however, had been ignored as of April 21, 1990, the date of Mr. Montgomery's visit to Guavate [Tr. 69, Plaintiff's Exhibit 2].

[9] Although defendants put on no direct evidence in support of their argument regarding the practical impossibility of making use of all beds in the system due to security constraints, Mr. Montgomery's testimony implicitly supported the obvious conclusion that some number of beds must remain empty at any time to permit proper classification procedures to be implemented. This truism, however, comes as no surprise to Dra. Otero, who testified to her knowledge of classification principles [Tr. 119] and to her general correctional expertise [Tr. 154], and cannot serve as a basis for modification of the court's order.

[10] The court incorporates herein the reasoning set forth in its earlier order denying modification of the order approving the September 1986 stipulation. Morales Feliciano v. Hernandez Colon, 672 F.Supp. 627 (D.Puerto Rico 1987).

[11] The facts in Ruiz are highly apposite to those before this court. In the Texas litigation, defendants were attempting to avoid compliance with a provision of a stipulation that was designed to ameliorate unconstitutional crowding throughout the system. The provision in question related to construction standards applicable to new penal facilities.

[12] Other cases relied on by defendants in their post-trial brief are easily distinguishable and offer no support for modification on the record before this court. Kozlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989), Keith v. Volpe, 784 F.2d 1457 (9th Cir. 1986),

Duran v. Elrod, 760 F.2d 756 (7th Cir. 1985), Donovan v. Robbins, 752 F.2d 1170 (7th Cir. 1985), Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984),Smith v. Fairman, 690 F.2d 122 (7th Cir. 1982), cert. denied, 461 U.S. 964 (1983), Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981).

13 Particularly relevant to the case at hand is the Supreme Court's admonition "to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." United States v. Oregon State Medical Society, 343 U.S. at 333.

14 Defendants have admitted noncompliance with the court's order. Thus, the only question remaining would be the existence of a valid defense.

15 Of course, even in the absence of agreement, a plan that the court found satisfactory to bring about timely compliance with its orders and with the mandates of the United States Constitution, and to implement the purposes of its orders, could be a basis for modification of existing orders, if the plan contains sufficient guarantees of timely and complete execution. In this connection, however, the court announces that its patience with repetitive efforts to modify a recent stipulation has reached its end. Defendants should ponder the implications of the following observation by the court of appeals in Newman v. Graddick, 740 F.2d 1513, 1521 (11th Cir.1984):

> The contention could be made that this decision would simply mean that the defendants could continually delay enforcement of a remedy for unconstitutionality by seeking modification every time enforcement is sought. This should not be a necessary result. The good faith of the defendants and the substantiality of the alleged improvements would always be a consideration before a hearing on modification would be required.

Id. at 1521.

16 The court is truly saddened by Mr. Montgomery's testimony that his first priority for reform of the system is the fundamental organization of the AOC:

> Until we can get a handle on the organization from top to bottom with clear lines of delegated authority all the way down, so everybody knows who answers to who and who, and who jumps when someone speaks . . .

Surely, this much - if nothing more - could have been accomplished since 1980.