IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DWIGHT WILLIAMS, et al.,	:	**CIVIL ACTION**
Plaintiff,	:	**No. 08-1979**
vs.	:	
THE CITY OF PHILADELPHIA, ET AL.	:	
Defendants.	:	

Proposed Order #1

AND NOW, this _____ day of July, 2008, upon consideration of Defendants City of Philadelphia and Commissioner Giorla's Motion to Dismiss pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure and any response thereto, said motion is GRANTED.

It is hereby ORDERED and DECREED that the Plaintiffs shall file and serve an Amended Complaint upon and against The Honorable C. Darnell Jones, II, President Judge of the Court of Common Pleas of the First Judicial District of Pennsylvania, The Honorable Louis Presenza, President Judge of the Philadelphia Municipal Court and Jeffrey A. Beard, Ph.D., Secretary of the Commonwealth of Pennsylvania Department of Corrections seeking an injunction for prospective injunctive relief to alleviate the alleged unconstitutional conditions of confinement within the Philadelphia Prison System within 10 days of this Order. The Failure to follow this Order shall result in the dismissal of this case with prejudice, upon petition by the City of Philadelphia, Commissioner Giorla or the District Attorney.

_____

Surrick, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DWIGHT WILLIAMS, et al.,	:	**CIVIL ACTION**
Plaintiff,	:	**No. 08-1979**
vs.	:	
THE CITY OF PHILADELPHIA, ET AL.	:	
Defendants.	:	

Proposed Order #2

AND NOW, this _____ day of July, 2008, upon consideration of Defendants City of Philadelphia and Commissioner Giorla's Motion to Join pursuant to Rule 19 of the Federal Rules of Civil Procedure and any response thereto, said motion is GRANTED.

It is hereby ORDERED and DECREED that the Plaintiffs shall file and serve an Amended Complaint upon and against The Honorable C. Darnell Jones, II, President Judge of the Court of Common Pleas of the First Judicial District of Pennsylvania, The Honorable Louis Presenza, President Judge of the Philadelphia Municipal Court and Jeffrey A. Beard, Ph.D., Secretary of the Commonwealth of Pennsylvania Department of Corrections seeking an injunction for prospective injunctive relief to alleviate the alleged unconstitutional conditions of confinement within the Philadelphia Prison System within 10 days of this Order. The Failure to follow this Order shall result in the dismissal of this case with prejudice, upon petition by the City of Philadelphia, Commissioner Giorla or the District Attorney.

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Surrick, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DWIGHT WILLIAMS, et al.,	:	**CIVIL ACTION**
Plaintiff,	:	**No. 08-1979**
vs.	:	
THE CITY OF PHILADELPHIA, ET AL.	:	
Defendants.	:	

CITY DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(7) OR IN THE ALTERNATIVE MOTION TO JOIN UNDER RULE 19 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Defendants City of Philadelphia and Prison Commissioner Louis Giorla, by and through their counsel of record, hereby file this Motion To Dismiss, or in the Alternative, Motion to Join The Honorable C. Darnell Jones, II, President Judge of the Court of Common Pleas, First Judicial District of Pennsylvania, The Honorable Louis Presenza, President Judge of the Philadelphia Municipal Court and Jeffrey A. Beard, Ph.D., the Secretary of Department of Corrections of the Commonwealth of Pennsylvania pursuant to Rule 12(b)(7).

1. The City of Philadelphia and Prison Commissioner Louis Giorla hereby incorporate by reference their memorandum of law as though fully set forth at length.

WHEREFORE, based on the foregoing reasons, the City of Philadelphia and Commissioner Giorla request this Court to dismiss this matter or order the joinder of the following individuals pursuant to Rule 19(a) of the Federal Rules of Civil Procedure:

a. Honorable C. Darnell Jones, II, President Judge of the Court of Common Pleas, First Judicial District of Pennsylvania, Court of Common Pleas of Philadelphia;

b. Honorable Louis Presenza, President Judge of the Philadelphia Municipal Court; and

c. Jeffrey A. Beard, Ph.D., Secretary of Department of Corrections of the Commonwealth of Pennsylvania.

Date: June 27, 2008 /s/ Jeffrey M. Kolansky

Jeffrey M. Kolansky

/s/ Jeffrey M. Scott

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DWIGHT WILLIAMS, et al.,	:	**CIVIL ACTION**
Plaintiff,	:	**No. 08-1979**
vs.	:	
THE CITY OF PHILADELPHIA, ET AL.	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF THE CITY DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(7) OR IN THE ALTERNATIVE MOTION TO JOIN UNDER RULE 19 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Defendants City of Philadelphia and Prison Commissioner Louis Giorla, by and through their counsel of record, hereby file this Motion to Dismiss, or in the alternative, Motion to Join The Honorable C. Darnell Jones, II, President Judge of the Court of Common Pleas of the First Judicial District of Pennsylvania, The Honorable Louis Presenza, President Judge of the Philadelphia Municipal Court and Jeffrey A. Beard, Ph.D., Secretary of the Commonwealth of Pennsylvania Department of Corrections pursuant to Rules 12(b)(7) and Rule 19 of the Federal Rules of Civil Procedure.

INTRODUCTION

This is a class action for injunctive and declaratory relief for the named individual plaintiffs and the putative class they represent to secure relief from the alleged unconstitutional conditions of confinement that exist and which, absent judicial intervention, will

continue to persist in the Philadelphia Prison System ("PPS"). The alleged putative class consists of all persons confined to the PPS, whether pretrial detainees or convicted prisoners. In the PPS, there are persons awaiting trial, convicted persons with maximum sentences of 24 months or more, persons that violated State parole and persons confined due to writ for various reasons, including but not limited to, (a) inmates which have been sentenced to terms of incarceration in state correctional facilities who are housed in the county jail (PPS) awaiting various hearings and Court appearances; (b) inmates who have been paroled from a state correctional facility by the Board of Probation and Parole and have committed an act or acts in violation of the terms of their parole and are awaiting a hearing by that Board prior to recommitment to a state facility; (c) inmates who have been paroled from a state correctional facility by the Board of Probation and Parole and have been charged with new criminal acts and are awaiting trial on those charges; (d) inmates who have been convicted of criminal offenses and placed on probation under the supervision of the Board of Probation and Parole and have committed an act or acts in violation of the terms of their probation and are awaiting a hearing by the Court of Common Pleas of Philadelphia County; (e) inmates who have been convicted of criminal offenses and placed on probation under the supervision of the Board of Probation and Parole and have been charged with new criminal offenses and are awaiting trial on the new charge; (f) inmates with sentences that qualify them for aggregations which will result in maximum sentences of 24 months or longer, thus making the prisoners eligible for confinement in a state correctional facility.

Under State law (42 Pa.C.S. § 9762), when the maximum sentence is two years or more, but less than five years the convicted prisoner may be committed to the Bureau of Corrections for confinement or may be committed to a county prison within the jurisdiction of the court.

When the maximum term of a sentence is less than two years, the convicted prisoner shall be committed to a county prison within the jurisdiction of the court "except that as facilities become available on dates and in areas designated by the Governor in proclamations declaring the availability of State correctional facilities, such persons may be committed to the Bureau of Correction for confinement." 42 Pa.C.S. § 9762 (2007).

The Philadelphia Court of Common Pleas and the Philadelphia Municipal Court (both part of the First Judicial District of Pennsylvania), are the only governmental bodies authorized to determine whether a convicted person is sentenced to guilt without penalty, probation, fine, partial confinement, and total confinement, 42 Pa.C.S. § 9721(a)." Neither The City of Philadelphia nor Commissioner Giorla have the authority to prevent a Philadelphia judge from imposing a sentence in county confinement, even where the maximum sentence is two years or more, but less than five years. Likewise, The Philadelphia District Attorney's Office has no authority to impose a sentence in county confinement, even where the maximum sentence is two years or more, but less than five years. At most, the Philadelphia District Attorney's Office can recommend state confinement.

In the County of Philadelphia, the Philadelphia Court of Common Pleas and Municipal Courts have developed a custom, policy and practice over several decades of committing convicted persons to the Philadelphia Prison System, whose level of offense makes them eligible to serve their term of confinement in one of the many State correctional institutions. Commonwealth v. Edwards, 2006 Pa.Super 225, 906 A.2d 1225, 1229 (Pa. Super. Ct. 2006)(Trial judges in this Commonwealth are granted the discretion to commit convicted criminals with maximum sentences of two years or greater to the Pennsylvania Department of

Corrections.)(citing Commonwealth v. Hartle, 2006 Pa.Super 45, 894 A.2d 800, 807 (Pa. Super. 2006)).

As of this filing, there are over 400 inmates in the custody of the City of Philadelphia that should be confined in a state correctional facility, based on their individual sentences. Unless the President Judges of the Philadelphia Court of Common Pleas and Municipal Court are joined as a parties, the practice of confining "state" prisoners to the alleged unconstitutional conditions of the Philadelphia Prison System, then complete relief cannot be "accorded" to the putative class members and the Defendants.

Likewise, the joinder of Jeffrey A. Beard, Ph.D., Secretary of Department of Corrections is equally necessary to "accord" the putative class members complete relief. "[Currently], there are over four-hundred inmates [that] are serving state sentences of two to five or more years in PPS facilities. These inmates represent nearly 20% of the Prisons' sentenced population. Neither the Prisons nor the City are reimbursed for costs associated with their care which is estimated at more than $11,000,000.00 annually. Removal of these inmates from PPS would result in a marked reduction in the Prisons budget, coupled with the availability of over four-hundred beds." *Philadelphia Prison System Strategic Plan FY09-FY13, A Report to Mayor Michael A. Nutter, April 24, 2008* at 9-10, attached hereto as Exhibit D.

The PPS, in the past, has requested that the Bureau of Prisons accept "state" prisoners in the custody of the Philadelphia Prison System because these prisoners were taking up valuable bed space needed for those that who should be committed to the PPS. The State has refused to accept its responsibility to accept and incarcerate the "state" prisoners in the Philadelphia Prison System, despite its knowledge of the alleged overcrowded conditions, at the various prison facilities in Philadelphia County. The putative class members of the instant lawsuit consist of

persons in custody based on local and State parole violations, new arrests (pretrial detainees) and convicted prisoners. Some of these convicted prisoners should have been committed to a State correctional facility based on their length of sentence.

If, assuming arguendo, the allegations contained in plaintiffs' complaint are accepted as true, then these prisoners are being subjected to overcrowded and unconstitutional conditions of confinement. The rights of the putative class members cannot be fully vindicated unless the Jeffrey A. Beard is ordered to accept all "state" prisoners in the custody of the Philadelphia Prison System. Thus, the joinder of Jeffrey A. Beard to this alleged prison overcrowding case, is essential to the full adjudication of the claims and defenses raised by the parties to this litigation.

Based on these reasons and those set forth in the below argument, the City Defendants respectfully request this Court grant the instant motion and dismiss this case for failure to join necessary parties. In the alternative, the City Defendants request this Court to order the joinder of The Honorable C. Darnell Jones, II, President Judge of the Court of Common Pleas, First Judicial District of Pennsylvania, Court of Common Pleas of Philadelphia; The Honorable Louis Presenza, President Judge of the Philadelphia Municipal Court; and Jeffrey A. Beard, Ph.D., Secretary of Department of Corrections for the Commonwealth of Pennsylvania pursuant to Rules 12(b)(7) and 19(a) of the Federal Rules of Civil Procedure.

FACTS[1]

The Plaintiffs allege that by June, 2006, the population in the Philadelphia Prison System (PPS) had increased to 8,900 inmates, representing an increase of 25% from 2000. Plaintiffs allege that to house the greatly increased population, the prison defendants instituted triple celling at CFCF, Riverside Correctional Facility, and at the House of Correction. The plaintiffs

[1] The facts are completely derived from the Plaintiffs' Complaint. The Defendants deny these facts but for purposes of this motion will rely upon the facts as though the facts were true.

claim that because the defendants did not provide a sufficient number of correctional officers and other staff: they resorted to "lock-downs" and "restricted movements" at each of the facilities on a regular basis. The plaintiffs allege that these practices made the conditions of confinement even more intolerable, as they deprived inmates of recreation, movement, and services. The Defendants deny these allegations.

The Plaintiffs claim that in Bowers v. City of Philadelphia, the Court, after certifying the matter as a class action, and after a full hearing on a Motion for Preliminary Injunction, ruled that the totality of circumstances regarding the conditions in the police districts and the intake/admissions areas of the PPS were so dangerous, punitive, and severe, as to violate the Eighth and Fourteenth Amendments. (The Defendants disputed this finding and still to this day, dispute this finding).

The Plaintiffs claim that during the hearing and post-hearing proceedings in *Bowers,* the City of Philadelphia presented a 24-Point Plan for a coordinated criminal justice system to reduce the population at PPS. The plaintiffs now claim that most of the plans and programs presented by the City have *not* been implemented. The plaintiffs claim that the City continues to be deliberately indifferent to constitutional rights of those confined to the PPS. The Defendants deny these allegations.

The plaintiffs, in support of this contention, allege that the City has expanded triple ceiling and increased the dormitory population and, as a result, inmates are confined in these conditions for months at a time. The plaintiffs claim that on any given date, there are well over 2,000 inmates housed in triple-cells, and hundreds more in overcrowded dormitory areas. The plaintiffs also claim that in an attempt to control and service those confined to the PPS, the PPS relied on "restricted movements" and "lockdowns," of inmates when there are insufficient

numbers of correctional officers to provide adequate services, security, and safety to inmates and to the staff. The plaintiffs further claim that as a result of the overcrowding and the failure of the City to provide adequate services, supplies, and staffing at the PPS, the plaintiffs and members of the plaintiff class have been, and without judicial intervention, will be subjected to a pervasive system of unconstitutional conditions. The Defendants deny these allegations.

The plaintiffs now bring this putative class action and allege that "[t]he practices, policies, acts and omissions alleged in this Complaint are in violation of the Eighth and Fourteenth Amendments to the United States Constitution in that they deprive plaintiffs and members of the plaintiff class their rights to be free from deprivations of liberty without due process of law and to be free from cruel and unusual punishment. The plaintiffs allege that if appropriate declaratory and injunctive relief that is necessary to correct the unconstitutional conditions of confinement is not granted, the harms suffered will be irreparable, as the unconstitutional policies, practices and conditions will continue to exist for the foreseeable future." Exhibit A at ¶38. The plaintiffs also bring a pendent state claim under the Pennsylvania Constitution and allege that "[t]he policies, practices, and conditions alleged in this Complaint deprive plaintiffs of their rights under the Pennsylvania Constitution and the laws of the Commonwealth of Pennsylvania to be free of deprivations of liberty without due process of law, and to be free from cruel and unusual punishment." Exhibit A at ¶ 40.

LEGAL ARGUMENT

I. LEGAL STANDARD FOR JOINDER UNDER RULE 12(B)(7) AND RULE 19(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 12(b)(7) permits a defendant to move for dismissal of a complaint for "failure to join a party under Rule 19. Fed. R. Civ. P. 12(b)(7); Fed. R. Civ. P. 19. If a necessary party cannot be joined, the court must determine whether, "in equity and good conscience," the action

should proceed or be dismissed. Fed. R. Civ. P. 19(b). N. Mich. Hosps., Inc. v. Health Net Fed. Servs., LLC, 2008 U.S. Dist. LEXIS 42587 (D. Del. May 30, 2008).

Generally, a Rule 12(b)(7) motion should be granted when there is an absent party without whom complete relief will not be possible in the case or whose interest in the controversy is such that to proceed without this party might prejudice it or the parties already present in the case. 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1359, at 424 (2d ed. 1990). A court ruling on a 12(b)(7) motion may consider evidence outside the pleadings. Albahary v. City of Bristol, 963 F. Supp. 150, 156 n.2 (D.Conn. 1997). The movant has the burden of showing why the absent party should be joined. Sunrise Financial, Inc. v. PaineWebber, Inc., 948 F. Supp. 1002, 1006 (D.Utah 1996); 5A Wright & Miller, Federal Practice and Procedure § 1359, at 426-27. To meet this burden, the movant may submit affidavits or other relevant evidence. Sunrise Financial, 948 F. Supp. at 1006. Rojas v. Loewen Group Int'l, 178 F.R.D. 356, 361 (D.P.R. 1998).

"As a general matter any party may move to dismiss an action under Rule 19(b). A court with proper jurisdiction may also consider *sua sponte* the absence of a required person and dismiss for failure to join. Republic of the Phil. v. Pimentel, 2008 U.S. LEXIS 4889, 18-19 (U.S. June 12, 2008)(citing Minnesota v. Northern Securities Co., 184 U.S. 199, 235 (1902); Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)). Rule 19(a)(1) "stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or 'hollow' rather than complete relief to the parties before the court." General Refractories Co. v. First State Ins. Co., 500 F.3d 306, 315 (3d Cir. 2007) (quoting Fed. R. Civ. P. 19 advisory committee's notes).

"When a person needed for just adjudication (as set forth in Rule 19) has not been included in an action, a party may move for dismissal under Rule 12(b)(7)." 2-12 Moore's Federal Practice - Civil § 12.35. "Unless Rule 19(a)'s threshold standard is met, the court need not consider whether dismissal under Rule 19(b) is warranted." Associated Dry Goods Corp. v. Towers Financial Corp., 920 F.2d 1121, 1123 (2d Cir. N.Y. 1990). Federal Rule of Civil Procedure 19 provides procedure for the mandatory joinder of parties determined to be necessary or required for just adjudication of an action. Rule 19(a)(1)(A) states: "A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if in that person's absence, the court cannot accord complete relief among existing parties."

"Under Rule 19(a), the joinder of parties is compulsory or "necessary" if their joinder is "feasible." General Refractories Co. v. First State Ins. Co., 500 F.3d 306, 312-313 (3d Cir. Pa. 2007). "Specifically, the rule states in material part: A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. Courts treat clauses (1) and (2) in the disjunctive just as the rule phrases them. See Koppers, 158 F.3d at 175 ("As Rule 19(a) is stated in the disjunctive, if either subsection is satisfied, the absent party is a

necessary party that should be joined if possible."). General Refractories Co. v. First State Ins. Co., 500 F.3d 306, 312-313 (3d Cir. Pa. 2007).

"Under Rule 19(a)(1) [this Court must] ask whether complete relief may be accorded to those persons named as parties to the action in the absence of any unjoined parties. As should be apparent, we necessarily limit our Rule 19(a)(1) inquiry to whether the district court can grant complete relief to persons already named as parties to the action; what effect a decision may have on absent parties is immaterial. Id., 500 F.3d at 313 (citing Angst v. Royal Maccabees Life Ins. Co., 77 F.3d 701, 705 (3d Cir. 1996) ("Completeness is determined on the basis of those persons who are already parties, and not as between a party and the absent person whose joinder is sought.")); Dickson v. Murphy, 202 Fed. Appx. 578, 580 (3d Cir. Pa. 2006). The issue of joinder can be complex, and determinations are case specific." Republic of the Phil. v. Pimentel, 2008 U.S. LEXIS 4889 (U.S. June 12, 2008).[2]

Based on the following reasons, the joinder of The Honorable C. Darnell Jones, II, The Honorable Louis Presenza and Jeffrey A. Beard ("State Officials") is both feasible and necessary to the adjudication and defenses of all claims raised by the existing parties.

[2] It should be noted that the City Defendants will file a Third-Party Complaint against the "State Officials" in addition to filing this Motion under Rule 12(b)(7). See Tate v. v Frey, 735 F2d 986, 989 (6th Cir. 1984)(In a county prison overcrowding case, Sixth Circuit held that joinder of state corrections officials was proper under Rule 14 because the "state's controlled intake procedure contributed to the overcrowding of the County Jail." Court Further held that "complete relief would be elusive, if not impossible, to achieve absent joinder of the state as a third-party to this action."). See also Ryan v. Burlington County, 860 F.2d 1199, 1208 (3d Cir. 1988)(Union County filed a third-party complaint against State Commissioner Fauver alleging that "any unconstitutionality of conditions at the Jail to overcrowding resulting from the refusal of the Commissioner to accept for custody those prisoners who had been sentenced to state prison." Union County, 713 F.2d at 987.)).

II. THE HONORABLE C. DARNELL JONES, II AND THE HONORABLE LOUIS PRESENZA MUST BE PERMITTED TO BE JOINED AS PARTIES BECAUSE COMPLETE RELIEF CANNOT BE ACCORDED AMONG THE CURRENT PARTIES

The Criminal Justice System in the County of Philadelphia is not under any control of the City of Philadelphia. Instead "a number of different actors have legal duties with respect to the system of criminal justice. For example, it is the duty of the state court judges to determine the bail status of those accused, 42 Pa. Cons. Stat. Ann. § 1123 (Purdon Supp. 1986), and to set the sentences of those convicted. 42 Pa. Cons. Stat. Ann. § 9701 et seq. (Purdon 1982 and Supp. 1986). The Mayor and City Council, moreover, have the authority to determine the size of the police force through their control of the City Budget. 351 Pa. Admin. Code §§ 2.2-300, 4.4-101 (1986). Any action by one of actors in the system is likely to have some repercussions in terms of the other actors' duties." Harris v. Pernsley, 820 F.2d 592, 601-602 (3d Cir. Pa. 1987).

In the City and County of Philadelphia, the Philadelphia Court of Common Pleas and the Philadelphia Municipal Court are the only authorized State Agencies that determine whether a convicted person is sentenced to guilt without penalty, probation, fine, partial confinement, and/or total confinement, 42 Pa.C.S. § 9721(a)." In making its determination of partial confinement and/or total confinement, the Philadelphia Courts, not the City of Philadelphia, must "consider" sentencing guidelines adopted by the Pennsylvania Commission on Sentencing. Commonwealth v. Tuladziecki, 513 Pa. 508, 514 (Pa. 1987). It is well established that the Sentencing Guidelines are purely advisory in nature. Commonwealth v. Yuhasz, 592 Pa. 120, 132-133 (Pa. 2007). As this Court explained in Commonwealth v. Sessoms, 516 Pa. 365, 532 A.2d 775, 780-81 (Pa. 1987), the Guidelines do not alter the legal rights or duties of the defendant, the prosecutor or the sentencing court. The guidelines are merely one factor among many that the court must consider in imposing a sentence. Sessoms, 532 A.2d at 781. "In imposing a sentence, the judge is directed to give two numbers representing the minimum and

maximum period of incarceration." Commonwealth v. Yuhasz, 592 Pa. 120, 131 (Pa. 2007). "In imposing a sentence of total confinement the court shall at the time of sentencing specify any maximum period up to the limit authorized by law and whether the sentence shall be commenced in a correctional institution or other appropriate institution." Id.

Once the Philadelphia Courts determine that partial or total commitment is necessary to fulfill the mandates of the Commonwealth's penal system, the Courts are guided by 42 Pa.C.S. § 9762, a statute that provides for location of commitment. In cases where the maximum sentence is five or more years, the convicted person is confined to the Commonwealth of Pennsylvania, Bureau of Corrections. When the maximum sentence is two years or more, but less than five years, the convicted prisoner may be committed to the Bureau of Corrections for confinement or may be committed to a county prison within the jurisdiction of the court. ("State" prisoners). And, when the maximum term is less than two years, the convicted prisoner shall be committed to a county prison within the jurisdiction of the court "except that as facilities become available on dates and in areas designated by the Governor in proclamations declaring the availability of State correctional facilities, such persons may be committed to the Bureau of Correction for confinement." 42 Pa.C.S. § 9762 (2007).

In the County of Philadelphia, the Philadelphia Courts have developed a custom, policy and practice over several decades of committing convicted persons to the Philadelphia Prison System, whose level of offense makes them eligible to serve their term of confinement in one of the many State correctional institutions. Commonwealth v. Edwards, 2006 Pa.Super 225, 2006 Pa.Super 225, 906 A.2d 1225, 1229 (Pa. Super. Ct. 2006)(Trial judges in this Commonwealth are

granted the discretion to commit convicted criminals with maximum sentences of two years or greater to the Pennsylvania Department of Corrections.)(citing Commonwealth v. Hartle, 2006 Pa.Super 45, 894 A.2d 800, 807 (Pa. Super. 2006)).

Historically, in the County of Philadelphia, the disposition of cases and sentences within one year from date of preliminary arraignment until sentencing results in a significant number of convictions and commitments that are eligible for both county and state commitment under 42 Pa.C.S. § 9762. "Of the 12,333 defendants entering the justice process in the months of March through May, 2005, an estimated 26 percent or about 3,176, had been both convicted and sentenced by the end of one year. Of those sentenced, an estimated 42 percent—or about 11 percent of the entire defendant cohort—received sentences involving confinement beyond time-served credit for those who had been detained." Goldkamp Study at 77 and Figure 41, attached hereto as Exhibit C. Of the 11% or 1,357 convicted prisoners, 12% or 162 of those convicted prisoners, had a maximum sentences of 24 months of longer, making each prisoner eligible for confinement in a State correctional facility. Unfortunately, the trend of "State" prisoners serving time in the Philadelphia Prison System has almost quadrupled since March of 2005.

Currently, there are "over four-hundred inmates [that] are serving state sentences of two to five or more years in PPS facilities. These inmates represent nearly 20% of the prisons sentenced population. Neither the Prisons nor the City are reimbursed for costs associated with their care which is estimated at more than $11,000,000.00 annually. Removal of these inmates from PPS would result in a marked reduction in the Prisons budget, coupled with the availability of over four-hundred beds." *Philadelphia Prison System Strategic Plan FY09-FY13, A Report to Mayor Michael A. Nutter, April 24, 2008* at 9-10, attached hereto as Exhibit D.[5] According to

[5] There is pending legislation before the General Assembly regarding this cohort of convicted prisoners. Under consideration in the Pennsylvania General Assembly are House Bills No.4-7 (2007) which

the current available data, the number of days of commitment for all persons committed to the Philadelphia Prison System with a sentence of two years or more, but less than five years, is approximately equal to 139,672 bed days. Exhibit B.

The influx of these convicted "State" prisoners increases the Philadelphia Prison System's daily census. Likewise, the influx of these "State" prisoners contributes to the unavailability of daily bed space to those who actually belong in a county facility, like Riverside and CFCF. The First Judicial Courts fail take into consideration the alleged overcrowded conditions of the Philadelphia Prison System. If the plaintiffs' allegations are believed, the Judges of the Philadelphia Court of Common Pleas and the Philadelphia Municipal Court are committing the putative class members to unconstitutional conditions of confinement and the First Judicial Courts are creating the alleged unconstitutional conditions, by committing people to the PPS who shouldn't be there, and thus causing the alleged overpopulation and need to use triple celling. Exhibit A . The City of Philadelphia has no authority to block or prevent the order of commitment of a "State" prisoner and must accept the "State" prisoner, without objection, into the alleged unconstitutional conditions. Exhibit A.

As the Supreme Court of Pennsylvania recognized in Jackson v. Hendrick, 498 Pa. 270, 273 (Pa. 1982), "[t]here can be no doubt that many of the difficulties in the prisons would be alleviated were the prisons not so overcrowded…" Opinion of April 7, 1972." Jackson v. Hendrick, 498 Pa. 270, 273 (Pa. 1982). The City of Philadelphia is without legal authority to remove these convicted "State" prisoners from its facilities to other counties or to the State Corrections Bureau. Thus, these "State" prisoners continue to be committed to allegedly unconstitutional conditions, take up necessary bed space, and use up valuable City resources. As

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mandate the housing of anyone serving over a two year sentence in state facilities. Even if these bills are passed, the mandate of the current legislation would not have any real effect until three years from the date of passage.

a result of the continued practice of the First Judicial District-committing convicted "State" prisoners to the Philadelphia Prison System, complete relief cannot be granted to the plaintiffs because the City of Philadelphia has no authority to remove these convicted "State" prisoners without court intervention. Thus, the joinder of The Honorable C. Darnell Jones, II and The Honorable Louis Presenza to this claim for prospective injunctive relief, based on alleged prison overcrowding, is essential to the full adjudication of the claims and defenses raised by the parties to this litigation.

III. JEFFREY A. BEARD, SECRETARY OF CORRECTIONS, MUST BE PERMITTED TO BE JOINED AS A PARTY BECAUSE COMPLETE RELIEF CANNOT BE ACCORDED AMONG THE CURRENT PARTIES

In Allegheny County et al. v. The Commonwealth of Pennsylvania, Bureau of Correction et al., 507 Pa. 360; 490 A.2d 402 (Pa. 1985), the Supreme Court of Pennsylvania held that it would be an arbitrary exercise of discretion for a State agency charged with responsibility for the operation and maintenance of the various State correctional facilities to deny assistance to a political subdivision where it is demonstrated that the political subdivision has not been provided adequate resources to maintain its detention facilities in accordance with constitutional standards and adequate security cannot be maintained. Moreover, where a crisis situation exists the political subdivision has a right to demand that prisoners who are committed to the custody of a State agency and temporarily placed in county facilities be transferred to appropriate State facilities in order to relieve overcrowding.

In criminal justice matters (prosecution and confinement), the Commonwealth of Pennsylvania has the responsibility and "obligation to maintain order and to preserve the safety and welfare of all citizens. That responsibility requires the governmental unit to provide adequate

and secure facilities for the housing of those individuals who have demonstrated by their conduct that they pose a danger to the other members of society. The sovereign governmental power is reposed in the state. Although it is entirely proper and indeed customary for the state to delegate a portion of that obligation among its political subdivisions, such delegation of responsibility does not relieve the state of its primary duty to assure the satisfactory discharge of the obligation." Id., 490 A.2d at 409-411 (citations omitted).

Consistent with the State's obligation to provide for adequate housing of confined inmates within its borders, the Secretary of Corrections is vested with the authority, pursuant to 61 P.S. § 72, to transfer inmates located in county prisons to the State correctional system. 61 P.S. §72 states:

> At the request of the county correctional administrator, the Secretary of Corrections or designee is hereby authorized and empowered to transfer inmates located in county prisons to the State correctional system for such reasons and upon such terms and conditions as the secretary may determine. The secretary or designee may transfer inmates in the State correctional system to the jurisdiction of a county correctional system upon such terms and conditions that the secretary or designee and the county correctional administrator determine to be in the best interests of the Commonwealth. Inmates located in a county prison may be transferred to another county prison upon such terms and conditions as the counties may determine. The Department of Corrections and county correctional facilities may contract with the Federal Government for the housing of Federal inmates in State and county correctional facilities.[6]

[6] The Act, before it was amended in 1992, addressed the issue of overcrowded prisons and authorized transfers of prisoners based on conditions of confinement. The statute read in part: "The Deputy Commissioner for Treatment of the Bureau of Correction in the Department of Justice is hereby authorized and empowered and, upon petition being presented to him by the board of inspectors, if there be such board, otherwise the superintendent or official in charge of any penitentiary, prison, workhouse, house of correction, or other institution for adult prisoners, located within any county, or by the county commissioners of the county in which the institution is located, setting forth that the said penitentiary, prison, workhouse, house of correction, or other institution for adult prisoners, cannot, by reason of overcrowded condition or other existing conditions, furnish proper and sufficient accommodations for the care, custody, control, and safety of the inmates thereof, and that it is requested that a certain number of inmates, set forth in such petition, should be transferred therefrom, may make an order authorizing and

While some discretion exists on the part of the Secretary of Corrections to accept prisoners under 61 P.S. § 72, the Secretary of Corrections has no ability to deny the transfer of prisoners located in the Philadelphia Prison System that meet the following five criteria:

> a) Inmates which have been sentenced to terms of incarceration in state correctional facilities who are housed in the County Jail awaiting various hearings and Court appearances, i.e. awaiting Post Conviction Hearing Act hearings, awaiting appearances before the Court of Common Pleas of [Philadelphia] County as a witness in other proceedings or trial on other charges.
>
> b) Inmates who have been paroled from a state correctional facility by the Board of Probation and Parole and have committed an act or acts in violation of the terms of their parole and are awaiting a hearing by that Board prior to recommitment to a state facility.
>
> c) Inmates who have been paroled from a state correctional facility by the Board of Probation and Parole and have been charged with new criminal acts and are awaiting trial on those charges.
>
> d) Inmates who have been convicted of criminal offenses and placed on probation under the supervision of the Board of Probation and Parole and have committed an act or acts in violation of the terms of their probation and are awaiting a hearing by the Court of Common Pleas of [Philadelphia] County.
>
> e) Inmates who have been convicted of criminal offenses and placed on probation under the supervision of the Board of Probation and Parole and have been charged with new criminal offenses and are awaiting trial on the new charge.

Allegheny County et al., 490 A.2d at 411-12. Only in very limited circumstances can the Secretary of Corrections use his discretion to deny the transfer of county prisoners to other facilities within the Commonwealth of Pennsylvania. 42 Pa.C.S. § 9762. Id., 490 A.2d at 412.

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directing the said board of inspectors, if there be such board, otherwise the superintendent or official in charge, to transfer to another prison, penitentiary, workhouse, house of correction, or other institution for adult prisoners, such person or persons whom the board of inspectors, if there be such board, otherwise the superintendent or official in charge, shall specify and designate: Provided, however, that before any transfer is made as aforesaid the court of common pleas of the county wherein any such penitentiary, prison, workhouse, house of correction, or any other institution for adult prisoners is located, shall give its consent to such transfer. " Tyrrell v. Taylor, 394 F. Supp. 9, 13 (E.D. Pa. 1975).

When the County administrator requests a transfer of a prisoner due to overcrowding or some other valid reason, and action in mandamus can be maintained. Id.

The City of Philadelphia and its Prison Commissioner have very valid reasons for requesting the transfer of its committed "State" prisoners to the State correctional system. "Unlike most other states where sentences of one year or more are served in state prisons, Pennsylvania allows sentences of up to two years to be served in a county facility. Judges also have the authority to stipulate those serving up to five years to serve that time in the county. [Currently], there are over four-hundred inmates [that] are serving state sentences of two to five or more years in PPS facilities. These inmates represent nearly 20% of the prisons sentenced population. Neither the Prisons nor the City are reimbursed for costs associated with their care which is estimated at more than $11,000,000.00 annually. Removal of these inmates from PPS would result in a marked reduction in the Prisons budget, coupled with the availability of over four-hundred beds." *Philadelphia Prison System Strategic Plan FY09-FY13, A Report to Mayor Michael A. Nutter, April 24, 2008* at 9-10, attached hereto as Exhibit D.

Turning to the case at hand, prior to the initiation of this lawsuit, the Philadelphia Prison Commissioner requested the Bureau of Prisons to accept "State" prisoners in the custody of the Philadelphia Prison System because these prisoners were taking up valuable bed space for those who were properly committed to Philadelphia County. The State refused to accept its responsibility and transfer the "State" prisoners from the Philadelphia Prison System, despite its knowledge of the alleged overcrowded conditions, at the various prison facilities in Philadelphia County. Instead, the City of Philadelphia was forced to enter into contracts with various correctional facilities, both in State and out-of-State, to house prisoners at no cost to the Commonwealth of Pennsylvania, but at a per diem per prisoner to be paid by the City of

Philadelphia. Now, these contracts, specifically the contract with Passaic County, NJ, are by this Court's Order, subject to the scrutiny of the putative class members. See Court Order dated June 6, 2008 at ¶5, attached hereto as Exhibit E.

As a result of the Commonwealth's failure to accept its prisoners, the City of Philadelphia has needed to meet the ever-changing population by placing three (3) prisoners in a cell, in some facilities within the Philadelphia Prison System. While the City maintains that the use of "triple celling" is constitutional, the use of triple-celling has resulted in the instant lawsuit.

The putative class members of the instant lawsuit consist of persons in custody based on local and State parole violations, new arrests (pretrial detainees) and convicted prisoners. Some of these convicted prisoners should have been committed to a State correctional facility based on their length of sentence. Some of these convicted prisoners fall under categories (a) through (e) set forth above. If the allegations contained in plaintiffs' complaint are accepted as true, then these prisoners are being subjected to overcrowded and unconstitutional conditions of confinement. The rights of the putative class members cannot be fully vindicated unless the Commonwealth of Pennsylvania, Bureau/Department of Corrections, is ordered by mandamus, to accept all "State" prisoners in the custody of the Philadelphia Prison System.[7] Thus, the joinder of Jeffrey A. Beard, Secretary of Corrections, to this claim for prospective injunctive relief, based on alleged prison overcrowding, is essential to the full adjudication of the claims and defenses raised by the parties to this litigation.

[7] The putative class members that are currently convicted and serving sentences in the Philadelphia Prison System enjoy no due process right to a hearing prior to an administrative transfer from one prison to another, including a transfer for security reasons. And, it be absurd if the putative class members would object to be transferred out of a facility that fails to provide constitutional conditions of confinement. See Reese v. Sparks, 760 F.2d 64, 67 (3d Cir. Pa. 1985)(citing Montanye v. Haymes, 427 U.S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 2543 (1976)); Cobb v. Aytch, 643 F.2d 946 (3d Cir. 1981)(in banc).

IV. ALL THE PREREQUISITES FOR A JOINDER UNDER RULE 19(A) HAVE BEEN SATISFIED IN THE CASE.

The case at bar is a claim for prospective relief and not money damages. The Defendants seek to join The Honorable C. Darnell Jones, II, The Honorable Louis Presenza and Jeffrey A. Beard, Ph.D., Secretary of Department of Corrections ("State Officials"). Because this case is not a claim for money damages but a claim for prospective injunctive relief, the 11th Amendment will not bar a claim against the "State Officials". Idaho v. Coeur D'Alene Tribe, 521 U.S. 261, 288 (U.S. 1997)(O'Connor, J, concurring)("In Young, the Court held that a federal court has jurisdiction over a suit against a state officer to enjoin official actions that violate federal law, even if the State itself is immune from suit under the Eleventh Amendment.); Friends & Residents of St. Thomas Twp., Inc. v. St. Thomas Dev., Inc., 176 Fed. Appx. 219, 227 (3d Cir. Pa. 2006)(The Eleventh Amendment allows suits against state officials in their official capacities where Plaintiff seeks prospective, injunctive relief for violation of federal law. Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)); Pa. State Troopers Ass'n v. Pennsylvania, 2007 U.S. Dist. LEXIS 19539, 10-12 (M.D. Pa. 2007)(District Court permitted suit to proceed against The State Police, a Commonwealth party, because the plaintiffs sought prospective injunctive relief.).

Likewise, the "State Officials" are subject to process and their joinder will not deprive this Court of jurisdiction. Based on these reasons and those mentioned above, the Joinder of the "State Officials" under Rule 19(a) is necessary in order to accord complete relief among existing parties. In the absence of the joinder of the "State Officials" the City of Philadelphia and Commissioner Giorla will be subjected to substantial risk of incurring obligations that they have no control over, such as the prosecution, sentencing and confinement of the inmates located within the Philadelphia Prison System. The failure of this Court to order the joinder of the "State

Officials" will only result in partial or 'hollow' relief rather than complete relief to the parties before the court." General Refractories Co. v. First State Ins. Co., 500 F.3d 306, 315 (3d Cir. 2007) (quoting Fed. R. Civ. P. 19 advisory committee's notes).

CONCLUSION

Based on the foregoing reasons, the City of Philadelphia and Commissioner Giorla request that this Court dismiss this matter, or in the alternative, order the joinder of the following individuals pursuant to Rule 19(a) of the Federal Rules of Civil Procedure:

a. Honorable C. Darnell Jones, II, President Judge of the Court of Common Pleas, First Judicial District of Pennsylvania;

b. Honorable Louis Presenza, President Judge of the Philadelphia Municipal Court; and

c. Jeffrey A. Beard, Ph.D., Secretary of Corrections of the Commonwealth of Pennsylvania.

Date: June 27, 2008 /s/ Jeffrey M. Kolansky

Jeffrey M. Kolansky

/s/ Jeffrey M. Scott

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of City Defendants Motion to Dismiss or in the alternative Motion to Join The Honorable C. Darnell Jones, II, Honorable Louis Presenza, and Jeffrey A. Beard, Ph.D., Secretary of Department of Corrections pursuant to Rule 12(b)(7) was filed on the Court's ECF System and is available for viewing. A copy has been served upon the following individuals via the ECF System.

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