

a) Inmates who have been sentenced to terms of incarceration in state correctional facilities who are housed in the PPS 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 or the Municipal Court of Philadelphia, 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 in the PPS 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 in the PPS 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 in the PPS awaiting a hearing by the Philadelphia Court of Common Pleas or in the Philadelphia Municipal Court.

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 in the PPS awaiting trial on the new charge.

f) Inmates with aggregated sentences that allow confinement of a defendant in a state correctional institute where the sentences, when aggregated, exceed two years.

g) Inmates with sentences of confinement that exceed two years.

2. That the President Judge of the Court of Common Pleas of Philadelphia and the President Judge of the Municipal Court of Philadelphia to adopt procedures by which the judges of those courts will designate confinement in state correctional facilities to all defendants who are sentenced to more than two years, in the aggregate, for all offenses for which they are being sentenced.

Defendants incorporate herein by reference the points and authorities set forth in the accompanying Memorandum of Law in Support of Defendants' Motion for a Preliminary Injunction.

Respectfully submitted,

s/ Jeffrey M. Kolansky

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June 27, 2008

CERTIFICATE OF SERVICE

Richard G. Tuttle, counsel for defendants City of Philadelphia and Commissioner Louis Giorla, hereby certifies that the foregoing Motion for Preliminary Injunction was served on the following, through the Court's ECF electronic document filing and transmission service, on June 27, 2008:

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s/ Richard G. Tuttle

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

DWIGHT WILLIAMS; ANTHONY	:	CIVIL ACTION
OUELLETTE; KOLEYON	:	
PHILLIPS; ANTHONY DIGGS;	:	NO. 08-1979
KENNETH SMITH; EDWARD	:	
ZAMICHELII; LOUIS EUBANKS;	:	
JAMES SAUNDERS; THOMAS	:	
SCOTT; SHANNON BOLLI; and	:	
MARISOL LOPEZ, on behalf of	:	
themselves, and all others similarly	:	
situated,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
CITY OF PHILADELPHIA; LOUIS	:	
GIORLA, in his official capacity as	:	
Commissioner, Philadelphia Prisons,	:	
	:	
Defendants.	:	

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION FOR PRELIMINARY INJUNCTION**

Defendants, City of Philadelphia and Prison Commissioner Louis Giorla, through their undersigned counsel, submit this Memorandum of Law in Support of Defendants' Motion for Preliminary Injunction, pursuant to Fed. R. Civ. P. 65 and 28 U.S.C. § 1651.

The City and the Commissioner (hereinafter, the “City”) seek a hearing on their application for a preliminary injunction directed to The Honorable C. Darnell Jones, II, President Judge of the Court of Common Pleas of Philadelphia; The Honorable Louis Presenza, President Judge of the Municipal Court of Philadelphia; and Jeffrey A. Beard, Ph.D., Secretary of Department of Corrections (collectively, the “State Officials”). If the evidence at hearing

demonstrates that the plaintiffs have a reasonable likelihood of success on the merits of their claims alleging unconstitutional conditions of confinement, the City seeks an injunction:

1. Ordering the Secretary of Corrections to accept and transfer to state custody, the following groups of inmates confined to the Philadelphia Prison System (the “PPS”) who fall within the following categories:

a) Inmates who have been sentenced to terms of incarceration in state correctional facilities who are housed in the PPS 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 or the Municipal Court of Philadelphia, or as a witness in other proceedings, or on 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 in the PPS 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 in the PPS 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 in the PPS awaiting a hearing by the Philadelphia Court of Common Pleas or in the Philadelphia Municipal Court.

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 in the PPS awaiting trial on the new charge.

f) Inmates with aggregated sentences that allow confinement of a defendant in a state correctional institute where the sentences, when aggregated, exceed two years.

g) Inmates with sentences of confinement that exceed two years.

2. Ordering the President Judge of the First Judicial District of Pennsylvania and the President Judge of the Municipal Court of Philadelphia to adopt procedures by which the judges of those courts will designate confinement in state correctional facilities to all defendants who are sentenced to more than two years, in the aggregate, for all offenses for which they are being sentenced.

Procedural and Factual Background.

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 allegedly unconstitutional conditions of confinement that exist and which, absent judicial intervention, will allegedly continue to persist in the PPS. The putative class consists of all persons confined to the PPS, whether pretrial detainees or convicted prisoners.

Allegations of the Complaint.

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. (Complaint ¶14). 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. (Complaint ¶15). The plaintiffs 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. (Complaint ¶16). The plaintiffs allege that these practices made the conditions of confinement intolerable, as they allegedly deprived inmates of recreation, movement, and services. (Id.) 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. (Complaint ¶20). (The Defendants disputed this preliminary finding and continue to dispute it in this case).

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. (Complaint ¶24). The plaintiffs now claim that most of the plans and programs presented by the City have *not* been implemented. (Complaint ¶25). The plaintiffs allege that the City continues to be deliberately indifferent to constitutional rights of those confined to the PPS. (Complaint ¶¶25, 29). The Defendants deny these allegations.

The plaintiffs allege that the City has expanded triple-ceiling and increased the dormitory population, and that inmates are confined in these conditions for months at a time. (Complaint ¶26). The plaintiffs also claim that in an attempt to control and service those confined to the PPS, the PPS relies 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. (Complaint ¶ 28). 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. (Complaint ¶29). The Defendants deny these allegations.

The plaintiffs have brought this putative class action alleging that the practices, policies, acts and omissions alleged in the 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 seek declaratory and injunctive relief, claiming that such relief is necessary to correct the unconstitutional conditions of confinement. They claim that the harms suffered will be irreparable, if, as they allege, the unconstitutional policies, practices and conditions will continue to exist for the foreseeable future. Complaint ¶38. The plaintiffs also bring a pendent state claim under the Pennsylvania Constitution, alleging 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.” Complaint ¶40.

The Presence of State-Eligible Inmates Contributes to Crowding.

The City offers to prove at hearing that, within the PPS, there are persons awaiting trial, convicted persons with maximum sentences of 24 months or more, persons who have violated state parole and persons confined due to writ for various reasons. Those groups, include, without limitation (a) inmates who have been sentenced to terms of incarceration in state correctional

facilities but who are housed in the county jail awaiting various hearings and Court appearances;

b) inmates who have been paroled from a state correctional facility by the state 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; and (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. (For ease of reference, such inmates will be referred to from time to time hereafter, collectively, as “state-eligible” inmates).

Under state law (42 Pa.C.S. § 9762), when the maximum sentence imposed upon a defendant 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 person convicted in state court in Philadelphia 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 has 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 Court 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 the 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 who should be confined in a state correctional facility, based on their individual sentences or terms of confinement. The evidence at hearing will show that unless the Secretary of

Corrections and the President Judges of the Philadelphia Court of Common Pleas and the Philadelphia Municipal Court are enjoined from sending and/or keeping state prisoners within county confinement, the conditions of which plaintiffs complain will, as a factual matter, be difficult or impossible to change.

Evidence at hearing will show that state-eligible 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. See *Philadelphia Prison System Strategic Plan FY09-FY13, A Report to Mayor Michael A. Nutter, April 24, 2008* at 9-10, attached as Exhibit D to the City's Motion for Joinder Under Rule 19.

The evidence will also show that, in the past, the PPS has requested that the Bureau of Prisons accept state-eligible prisoners in the custody of the PPS because these prisoners were taking up valuable bed space needed for those that who were properly committed to Philadelphia County. The state has refused to accept its responsibility to accept and incarcerate such state-eligible prisoners in the Philadelphia Prison System, despite its knowledge of the alleged overcrowded conditions at the various prison facilities in Philadelphia County.

If the evidence at hearing shows that the plaintiffs have a reasonable likelihood of success on their claim that overcrowding is causing unconstitutional conditions of confinement, then the rights of the putative class members cannot be fully vindicated unless the State Officials are enjoined as requested herein.

ARGUMENT

A. Crowding in the PPS results in significant part from assignments of state-eligible prisoners to county confinement.

The Criminal Justice System in the County of Philadelphia is not fully under the control of the City of Philadelphia. As the Third Circuit observed in 1987 (in terms that remain true today)

[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).

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 total confinement, 42 Pa.C.S. § 9721(a). “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, which 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. 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)¹.

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 levels 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)).

¹ Pursuant to 61 P.S. § 636, “[e]very person who shall, after the completion of said prison, be convicted in any court of criminal jurisdiction in the city or county of Philadelphia, of any crime, the punishment of which would be imprisonment in the jail and penitentiary house of Philadelphia, for a period of time under two years, shall be sentenced by the proper court to suffer punishment in the Philadelphia county prison...” These convicted individuals have no constitutional or statutory right to serve their commitments in the County in which they were convicted and sentenced. In each of these 400 separate commitments, the Philadelphia Courts retain jurisdiction over the committed person and yield jurisdiction when the person is instead committed to the Bureau. See Commonwealth v. Mefford, 2004 PA Super 468, 863 A.2d 1206, (Pa.Super. 2004) (en banc).

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 as Exhibit C to the City’s Motion for Joinder Under Rule 19. Of the 11% or 1,357 convicted prisoners, 12% or 162 of those convicted prisoners, had a maximum sentences of 24 months or longer. Unfortunately, the trend of state-eligible prisoners serving time in the Philadelphia Prison System has accelerated since March of 2005.

As noted, there are currently “over four-hundred inmates [who] 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 as Exhibit D to the City’s Motion for Joinder Under Rule 19.²

² 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 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.

The influx of state-eligible prisoners increases the Philadelphia Prison System's daily census. Likewise, the influx of state-eligible prisoners contributes to the unavailability of daily bed space to those who actually belong in a county facility, like Riverside and CFCF. The City expects that the evidence at hearing will show that the Court of Common Pleas and the Philadelphia Municipal Court have rarely taken into consideration the alleged overcrowded conditions of the Philadelphia Prison System in determining place of confinement where the defendant is eligible, alternatively, for state *or* county confinement. 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 are helping to create the alleged unconstitutional conditions. The courts are committing people to the PPS who should not be there, and are thus causing the alleged overpopulation and need for triple-celling. The City of Philadelphia has no authority to block or prevent the order of commitment of a state-eligible prisoner and must accept that prisoner, without objection, into the allegedly unconstitutional conditions.

B. The problems, such as they are, can be ameliorated by requiring the transfer of state-eligible inmates to state facilities.

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..." Crowding can be reduced, of course, through the simple expedient of transferring inmates from more-crowded facilities to less-crowded facilities.

State law in Pennsylvania has long provided for transfers between state and county facilities. 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.

In County of Allegheny, et al. v. The Commonwealth of Pennsylvania, Bureau of Correction et al., 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 (i) that the political subdivision has not been provided adequate resources to maintain its detention facilities in accordance with constitutional standards and (ii) adequate security cannot be maintained. The court observed, “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.” County of Allegheny, 490 A.2d at 406. The court upheld the county’s right to seek a writ of mandamus directed to state corrections officials -- in that context, essentially an injunction -- requiring transfer of state-eligible prisoners to appropriate state facilities.

Courts in other jurisdictions have recognized that, where local prison overcrowding can be relieved, in whole or in part, by transfers of eligible prisoners to state facilities, an injunction

requiring such transfers, entered by the court considering constitutional claims based upon overcrowding, is an entirely proper remedy.

In Benjamin v. Malcolm, 803 F.2d 46 (2d Cir. 1986), prisoners at Riker's Island, New York City's local jail, sued the City of New York alleging unconstitutional conditions of confinement due to overcrowding. The litigation lasted for years. Eventually, the district court concluded that delays in transfers of prisoners with state sentences to state custody were significantly contributing to the overcrowding. The court enjoined New York State prison authorities to accept each prisoner "who has been sentenced to a term of imprisonment in a state prison" within "48 hours after papers for transfer . . . had been completed." 803 F.2d at 47. The Second Circuit affirmed that order, making the following observation:

[T]he State argues that it has no responsibilities, constitutional or otherwise, with respect to state-ready prisoners other than those imposed on it by New York law. This argument must be rejected, however, for the reason that the prisoners whom it refuses promptly to accept into its prisons are not those of some other state, country or planet, but its own prisoners who have been convicted by New York State courts of New York State felonies. The State cannot therefore wash its hands of its *federal constitutional responsibility* for the detention conditions of such prisoners because they are temporarily housed in City facilities . . .

Benjamin v. Malcolm, 803 F.2d at 51 (emphasis in original).

Tate v. Frey, 735 F.2d 986 (6th Cir. 1984), was a case in which inmates in the Jefferson County Jail in Louisville, Kentucky, claimed unconstitutional conditions of confinement allegedly arising out of overcrowding at that county facility. The defendant county joined corrections officials of the State of Kentucky, and sought a preliminary injunction requiring the state to accept transfers of prisoners awaiting transfer to state facilities. The district court granted that injunction, and was affirmed by the Sixth Circuit, whose opinion included pertinent observations about the reasons for joinder of state officials in these circumstances:

A review of Kentucky state law indicates that the responsibility to provide for the confinement of convicted felons rests upon the state. Kentucky Revised Statute § 532.100 provides that convicted felons be committed to the state for incarceration. Consequently, the third party plaintiffs have properly identified a substantive basis for their claim against the state in the third-party complaint. Additionally, evidence submitted during the hearings disclosed that the state through implementation of its controlled intake procedure has refused to timely accept convicted felons as required by state law, which inaction the district court specifically determined contributed to the unconstitutional overcrowding of the Jefferson County Jail. In light of the district court's determination that the controlled intake procedure contributed to the overcrowding of the Jefferson County Jail, complete relief would be elusive, if not impossible, to achieve absent joinder of the state as a third-party to this action. Accordingly, the district court properly permitted the joinder of the state as a third party defendant pursuant to Rule 14(a), Fed. R. Civ. P.

* * * *

Having examined the record transmitted to this court on appeal it is manifest that the district court did not abuse its discretion in granting the preliminary injunction against the third party defendants [state officials]. Accordingly, the district court's grant of a preliminary injunction against the third party defendants is AFFIRMED.

Tate v. Frey, 735 F.2d at 989, 991 (footnote omitted).

The plaintiffs in this case are alleging unconstitutional overcrowding. If that contention is supported by the evidence, and rises to the level of a likelihood of success on the merits, it will be entirely appropriate for this Court to order state officials to accept transfers of state-eligible prisoners to state facilities to alleviate those conditions pending trial on the merits.

C. This Court may require the cooperation of the President Judges of the Philadelphia Courts in directing state-eligible prisoners toward state confinement.

This Court equally has discretion to require actions by the state judiciary which would help ease overcrowding. As noted, the judges of the First Judicial District have the ability, under state law, effectively to choose state confinement or county

confinement for sentenced prisoners whose sentences range from two to five years. This Court has recently overseen an action, filed by the law firm now representing plaintiffs, in which the President and Administrative Judges of the Philadelphia Traffic Court were joined as defendants. In that case, the plaintiffs sought to end the allegedly unconstitutional practice of sentencing indigent “scofflaws” to confinement in the Philadelphia Prison System. See Ebony Davis v. City of Philadelphia, Philadelphia Traffic Court, Honorable Francis E. Kelly, Individually as President Judge of Philadelphia Traffic Court, Honorable Fortunato Perri, Individually as Administrative Judge of Philadelphia Traffic Court, Officers John Doe(s), and Officers Richard Roe(s), Individually as Officers of the Philadelphia Police Department, U.S. Dist. Ct., E.D. Pa., Civil Action No. 03-1400 (Complaint attached hereto as Exhibit A).

The Davis case ended in a Settlement Agreement by which procedures were established by the Traffic Court, and codified by the Pennsylvania Supreme Court in its rulemaking capacity, to protect the constitutional rights of “scofflaw” defendants. (See Motion attached hereto as Exhibit B).

In short, where the state judiciary can contribute administratively to the protection of federal constitutional rights of persons who are headed toward confinement in Pennsylvania, this Court has the undisputed right and ability to require such administrative cooperation if it is necessary to effect complete relief.

The Third Circuit has provided another concrete example of this Court’s authority to enjoin action by a state judge where necessary to protect individual federal rights. In In re Grand Jury Proceedings (Wright II), 654 F.2d 268 (3d Cir. 1981), the court upheld an order by the district court requiring a Judge of the Court of Common Pleas of

Delaware County to participate in the review of potentially exculpatory information developed by a federal grand jury, for possible introduction in a state criminal proceeding. That cooperation was necessary to protect the federal constitutional rights of the accused in Delaware County.

Where, as here, a class of plaintiffs is alleging unconstitutional overcrowding, and if that contention is supported by the evidence to the level of a likelihood of success on the merits, it is entirely appropriate for this Court to order that state confinement be specified for state-eligible defendants, where a judge of the First Judicial District initially has a choice in the matter.

The City emphasizes that it does not seek injunctive relief which would affect any judge's discretion in determining the length of confinement of any convicted defendant. Rather, the City's motion is directed solely to place-of-confinement, a matter over which state court judges do not have final control in any event. See 61 P.S. § 72. The City seeks an administrative solution to the problems associated with prison crowding, and expects and intends that this Court would, in exercising its discretion in shaping the terms of an injunction, assiduously avoid, to the fullest extent feasible, any interference with powers that are solely judicial in character, *i.e.*, powers that are not subject to supersession or modification by other actors in the correctional system.

D. The Eleventh Amendment does not bar the relief sought in the instant motion.

This case involves only claims for prospective relief -- a declaratory judgment and an injunction -- and not money damages. The City's motion is directed to three individual officials, viz., The Honorable C. Darnell Jones, II, The Honorable Louis Presenza and Jeffrey A. Beard, Ph.D., Secretary of Department of Corrections. 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 (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.).

E. **To the extent, if at all, that the present motion is considered at a time when the State Officials have not been fully joined as parties for all purposes, the Court may, nevertheless, issue an injunction binding upon the State Officials under the provisions of the All Writs Act, 28 U.S.C. § 1651.**

Federal courts have the unquestioned power, under the All Writs Act, 28 U.S.C. § 1651,³ to enter injunctive orders binding upon non-parties to the litigation, where such an order is "necessary or appropriate" to aid the federal court in the exercise of its jurisdiction. The word

³ The All Writs Act provides, in full, as follows:

1651 Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

“necessary” in the All Writs Act is not given a narrow interpretation. Whittel v. Roche, 88 F.2d 366, 371 (9th Cir. 1937). As the Third Circuit explained

In In Re Grand Jury we explained that the term "necessary" does not have to be interpreted in a narrow or rigorous manner. In Re Grand Jury, 654 F.2d at 276. Rather, a court may avail itself of the Act and issue a writ where helpful "to achieve the ends of justice entrusted to it." *Id.* (quoting Adams v. United States ex rel McCann, 317 U.S. 269, 273 (1942)).

Jones v. Lilly, 37 F.3d 964, 968 (3d Cir. 1994).

The Supreme Court has emphasized that an order under the All Writs Act may be directed to a non-party where necessary or useful to effectuate the carrying out of actions otherwise ordered or required by the federal court:

This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained: "This statute has served since its inclusion, in substance, in the original Judiciary Act as a 'legislatively approved source of procedural instruments designed to achieve "the rational ends of law."'" Harris v. Nelson, 394 U.S. 286, 299 (1969), quoting Price v. Johnston, 334 U.S. 266, 282 (1948). Indeed, "[u]nless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." Adams v. United States ex rel. McCann, 317 U.S. 269, 273 (1942).

The Court has consistently applied the Act flexibly in conformity with these principles. Although § 262 of the Judicial Code, the predecessor to § 1651, did not expressly authorize courts, as does § 1651, to issue writs "appropriate" to the proper exercise of their jurisdiction but only "necessary" writs, Adams held that these supplemental powers are not limited to those situations where it is "necessary" to issue the writ or order "in the sense that the court could not otherwise physically discharge its appellate duties." 317 U.S. at 273. In Price v. Johnston, *supra*, § 262 supplied the authority for a United States Court of Appeals to issue an order commanding that a prisoner be brought before the court for the purpose of arguing his own appeal. Similarly, in order to avoid frustrating the "very purpose" of 28 U.S.C. § 2255, § 1651 furnished the District Court with authority to order that a federal prisoner be produced in court for purposes of a hearing. United States v. Hayman, 342 U.S. 205, 220-222 (1952). The question in Harris v. Nelson, *supra*, was whether, despite the absence of specific statutory authority, the District Court could issue a discovery order in connection with a

habeas corpus proceeding pending before it. Eight Justices agreed that the district courts have power to require discovery when essential to render a habeas corpus proceeding effective. The Court has also held that despite the absence of express statutory authority to do so, the Federal Trade Commission may petition for, and a Court of Appeals may issue, pursuant to § 1651, an order preventing a merger pending hearings before the Commission to avoid impairing or frustrating the Court of Appeals' appellate jurisdiction. *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966).

The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, *Mississippi Valley Barge Line Co. v. United States*, 273 F. Supp. 1, 6 (E.D. Mo. 1967), summarily aff'd, 389 U.S. 579 (1968); *Board of Educ. V. York*, 429 F.2d 66 (10th Cir. 1970), cert den'd, 401 U.S. 954 (1971), and encompasses even those who have not taken any affirmative action to hinder justice.

United States v. New York Tel. Co., 434 U.S. 159, 172-74 (1977).

The “writs” mentioned in the All Writs Act include injunctions. *Alberta Gas Chemicals, Inc. v. United States*, 496 F. Supp. 1332, 1335 (U.S. Cust. Ct. 1980).

In a class action or putative class action, a federal court has the ability to enjoin actions by state courts (such as the First Judicial District) which tend to frustrate or impede efficient and comprehensive resolution of the federal case. See *In re Inter-Op Hip Prosthesis Prod. Liab. Litig.*, 176 F. Supp. 2d 758 (N.D. Ohio 2001) (In multidistrict litigation in which national class had been provisionally certified and proposed class settlement was preliminarily approved, federal court enjoined parallel state court actions under All Writs Act, since undue burden would have been imposed on the federal defendant by forcing it to respond to discovery in state and federal courts, funds available for plaintiffs would be depleted, and settlement might preempt need for thousands of separate cases).

Additionally, the All Writs Act has been invoked by federal courts to direct or restrain action by state court judges, where necessary to protect the progress of federal litigation. See *In*

re Grand Jury Proceedings (Wright II), *supra* (held, state court judge properly ordered to participate in review of federal grand jury evidence to ensure proper application of Fed. R. Civ. P. 6(e); Cinel v Connick, 792 F. Supp. 492 (E.D. La. 1992) (state criminal court order to produce documents enjoined under All Writs Act, where production would have interfered with invasion of privacy suit pending in federal court); Valley v. Rapides Parish Sch. Bd., 646 F.2d 925 (5th Cir. 1981) (held, federal district court has authority to enjoin state court interference with desegregation plan).

Notably, a federal court need not await direct interference with one of its orders before taking appropriate action to protect its jurisdiction over a pending. An injunction may be issued pursuant to the All Writs Act to protect the orderly conduct of proceedings then under way. In re Grand Jury (Wright II), *supra* (order entered compelling action by state judge at time when no federal order was extant); In re Bridgestone/Firestone Tires Prods. Liab. Litig., 333 F.3d 763 (7th Cir. 2003) (where earlier determination made in respect of the rights of a putative class, federal court may enjoin state court action which impedes that result); Bryan v BellSouth Communs., Inc., 492 F.3d 231 (4th Cir. 2007) (order staying state court class action where putative class claims in same dispute had earlier been dismissed by federal court); Harris v Wells, 764 F. Supp. 743 (D.Conn. 1991) (shareholder/director is enjoined under All Writs Act from initiating action in state court to compel inspection of certain corporate documents, where state action mirrors previous discovery requests made in ongoing federal litigation, and order required to prevent interference with federal court's flexibility and authority to decide case).

Stated differently, an injunctive order under the All Writs Act to compel necessary action by state officials does not operate in the manner of a proceeding for civil contempt, where violation of a clear, pre-existing command must be shown before further action can be taken. An

injunction under the All Writs Act may enjoin action which threatens to interfere with further consideration of the matters at issue in federal court. That is precisely the context in which the current request for injunction arises, since every admission to the PPS of a new state-eligible inmate affects discovery, the identity of persons in the class, and conditions of crowding. This Court cannot fix a problem, at the behest of the plaintiffs, if it faces the same limitations on its remedies as does the City. If neither the Court nor the City can control and regulate admissions of state-eligible inmates, the problems, such as they are, cannot be ameliorated fully, and perhaps not even in part. The City expects to demonstrate those propositions at hearing.

Finally, the City and the Commissioner assume that issuance of an injunction binding on state officials pursuant to the All Writs Act is fully subject to the constraints of the Eleventh Amendment. See Benjamin v. Malcolm, 803 F.2d at 51. For that reason, the City and the Commissioner seek only prospective injunctive relief against individual state officials on the basis of federal law. Id., citing Ex Parte Young, 209 U.S. 123 (1908).

F. Standards for a Preliminary Injunction.

The Third Circuit has consistently applied a four part test for determining the appropriateness of a preliminary injunction:

To prevail on a motion for preliminary injunctive relief, the moving party must demonstrate that each of the following factors favors the requested relief:

- (1) the likelihood that the moving party will succeed on the merits;
- (2) the extent to which the moving party will suffer irreparable harm without injunctive relief;
- (3) the extent to which the nonmoving party will suffer irreparable harm if the injunction is issued; and
- (4) the public interest.

McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC, 511 F.3d 350, 356-57 (3d Cir. 2007).

Here, the application by the City will satisfy all four prongs. The City's offer of proof for hearing is and will be:

First, the policies of the State Officials are dramatically increasing upward pressure on the prison population in the PSS. The City's inability to move more than 400 state prisoners to state facilities, and its inability to prevent new state prisoners from arriving, has resulted in much of the triple-celling that occurs, and prolongs inmates' stays in triple cells.

Of course, the plaintiffs complain of allegedly unconstitutional conditions caused by triple-celling. See Complaint, ¶¶ 3, 15, 23, 26, 27, 29, 30. The City should emphasize, at this point, that it does not concede that conditions of confinement within the PPS are cruel, unusual, or unconstitutional in any respect. It remains, however, that the plaintiffs so contend; and if the Court were to find that the plaintiffs are right, the City then will contend, necessarily, that the conditions are the legal responsibility of the State Officials.

McNeil, *supra*, requires that, to be entitled to an injunction, the City must "demonstrate" a likelihood of success on the merits. The City willingly accepts that burden in connection with its motion, in the sense that the evidence at hearing will demonstrate the existence *vel non* of unconstitutional conditions. The City will abide that demonstration, whichever way it turns out. However, the City, does not, and need not, *contend* that conditions are unconstitutional. That contention is for the plaintiffs.

As to the second and third prongs of the test, the City will suffer greater harm from the denial of an injunction than the State Officials will suffer from its granting. The population of the PPS, according to the plaintiffs' complaint, is now 9,300 inmates (Complaint ¶1). The City will show, through information published by the Pennsylvania Department of Corrections, that the capacity of the Pennsylvania prison system, before triple-celling, is 41,608. Additionally,

there are sixty or so⁴ county facilities other than those in Philadelphia, available to the state under 61 P.S. § 72, to which it may send state prisoners to less-crowded counties by agreement between the state and those counties.

In short, the City will show at hearing that the ability of the state system to absorb state prisoners, without undue harm or impact, is far greater than the ability of the PPS to do so.

Finally, the public interest greatly favors entry of an injunction. The presence of state prisoners has enormously complicated the City's efforts to reduce overcrowding in the PPS for years. There is simply no good reason that state-eligible prisoners should be the problem of the City, and of the named plaintiffs, at a cost of \$11,000,000 per year, when the state can, and should, step up and bear its responsibilities under the state constitution. See County of Allegheny, 490 A.2d at 406.

⁴ Counsel is uncertain, at this writing, whether some smaller counties may share facilities, so the number is presented as an estimate. A firmer figure will be available at hearing.

CONCLUSION.

For the foregoing reasons, movants, the City of Philadelphia and Commissioner Louis Giorla, respectfully request a hearing on their Motion for Preliminary Injunction, with appropriate relief in accordance with the evidence presented and facts found.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Richard G. Tuttle, counsel for defendants City of Philadelphia and Commissioner Louis Giorla, hereby certifies that the foregoing Memorandum of Law in Support of Motion for Preliminary Injunction, with Exhibits, was served on the following, through the Court's ECF electronic document filing and transmission service, on June 27, 2008:

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