UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

JIMMY (BILLY) McCLENDON, et al.,

Plaintiffs,

vs. **No. CIV 95-24 JAP/KBM**

CITY OF ALBUQUERQUE, et al.,

Defendants,

vs.

E.M., R.L., W.A., D.J., P.S., and N.W. on behalf of themselves and all others similarly situated,

Plaintiff-Intervenors.

CITY OF ALBUQUERQUE'S RESPONSE TO PLAINTIFF INTERVENORS' MOTION FOR ORDER TO SHOW CAUSE AND FOR FURTHER REMEDIAL RELIEF

Comes now Defendant City of Albuquerque ("City"), by and through counsel of record, Kennedy, Moulton & Wells, PC, by Debra J. Moulton, and respectfully asks this Court to reject both the request for further remedial relief and a finding of contempt regarding Defendant City as set forth in Plaintiff-Intervenors' Motion for An Order to Show Cause and For Further Remedial Relief Regarding City Defendants ("Motion for Order to Show Cause"). Plaintiff-Intervenors are not entitled to the relief requested.

I. APPLICABLE PROCEDURAL AND FACTUAL BACKGROUND

As the Court is aware, this class action lawsuit has been pending for twenty years. The core issues in this case are related to conditions of confinement and this Court has repeatedly limited the scope of this litigation to conditions of confinement. As the issues have resolved, Plaintiff Intervenors now seek to explore alternate avenues to prolong this litigation by raising

issues other than those of conditions of confinement. The Court must now reject the Plaintiff-Intervenors' attempt to shoehorn misplaced and untimely claims into a case where they clearly do not belong.

Over a twenty year span, the issues litigated in ***McClendon*** have focused first on conditions at the Bernalillo County Detention Center and then at the Bernalillo County Metropolitan Detention Center. The monitoring done both by class counsel and the Court has also been limited to the jail conditions outlined in the original Settlement Agreement. Indeed, in Plaintiff-Intervenors' Prayer for Relief at the conclusion of their Amended Complaint in Intervention for Declaratory and Injunctive Relief, all requests for relief are related to conditions at the jail. (Doc. No.150, Prayer for Relief, p. 42-43). There is no mention by Plaintiff-Intervenors of pre-trial intervention in their own Amended Complaint.

Approximately one year after the complaint was filed, the parties entered into separate Stipulated Settlement Agreements which were incorporated into two court orders issued at the end of 1996 (Doc. Nos. 255-256). In the Order dated November 5, 1996, which incorporates the Settlement Agreement Between Plaintiff Intervenors and Defendants, the issues agreed upon focused exclusively on the issue of conditions at the jail; there is no mention of treatment of class members prior to their incarceration. The Court then dismissed all claims on the merits, except claims regarding equal protection and limited portions of Plaintiff Intervenors' access to the courts claim (Doc. No. 289). The Court retained jurisdiction "…for the purpose of enforcing the settlement agreement." Thereafter, numerous motions and orders were entered regarding these and subsequent settlement agreements.

Plaintiff-Intervenors cite two documents in support of their position that the City should be held in contempt for failing to implement the terms of stipulated orders that have been entered

into by the parties and approved as orders of the Court. The first is a Supplemental Order to Enforce Previously Ordered Population Limits at the BCDC Main Facility, which was filed on June 27, 2001. (Doc. No. 319). In that Supplemental Order, the Court held that, in order to achieve compliance for population limits, the defendants shall "Provide direction to law enforcement officials under the control of the City and/or the County to issue citations where appropriate and to use the "walk through procedures," rather than incarcerating individuals, where appropriate." (p.5). In reading these agreements in their entirety, the focus and clear intent was to reduce the population of what was then the downtown jail. It was felt that issuing citations and using walkthrough procedures for arrests would naturally limit the number of individuals incarcerated. There is no reference in the document limiting this provision to members of the sub-class. Indeed, there is no mention of the sub-class at all. Since 2001, there are no Stipulated Orders or Agreements that address this issue.

The second document Plaintiff-Intervenors cite in support of their position that the City should be held in contempt for failing to comply with the parties' stipulations and the Court's Orders is a Stipulated Agreement filed on January 31, 2002. (Doc. No. 361). This Stipulated Agreement is completely devoid of any reference to the arrest of sub-class members by City or County law enforcement prior to incarceration. All issues discussed in the Stipulated Agreement dated January 31, 2002 are related to jail conditions. (One such issue is the employment of all existing population management tools and the need to convene the population management review team when the average daily population at the main facility exceeds 110% of the court-ordered population cap for any three-day period).

In June of 2003, all class and subclass members were transferred from the downtown facility to the newly built Metropolitan Detention Center ("MDC"). At that time, Defendant City

continued operational control of MDC. In July of 2006, Defendant Bernalillo County assumed full operational control of MDC from Defendant City of Albuquerque. Defendant Bernalillo County then took responsibility for all aspects of jail operation, including creation of jail diversion programs for individuals with psychiatric or developmental disabilities and a plethora of population management tools.

Seeking a finding of contempt against the City under the circumstances described is not warranted based on either the law or facts of this case. As such, Plaintiff Intervenors' request for compensatory and coercive remedial orders against Defendant City, as well as other remedial relief, should be denied in its entirety.

II. CONTEMPT PROCEEDINGS ARE NOT JUSTIFIABLE IN THIS CASE.

The power to hold a party in contempt for violating an order may properly be exercised only if the order is clear and unambiguous. ***International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n***, 389 U.S. 64, 75-76, 88 S. Ct. 201, 207, 19 L.Ed.2d 236 (1967). Specificity in the terms of consent decrees is a predicate to a finding of contempt. ***Vertex Distributing, Inc. V. Falcon Foam Plastics, Inc.***, 689 F.2d 885, 889 (9th Cir. 1982); ***Harris v. City of Philadelphia***, 47 F.3d 1342, 1349 (3rd Cir. 1995). If a decree does not clearly describe prohibited or required conduct, it is not enforceable by contempt sanctions. As the Supreme Court has explained: "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid." ***International Longshoremen's Ass'n*** at 208.

The burden required to establish that contempt is warranted can only be established by "clear and convincing" evidence that a violation of a court's order occurred. ***United States v. Roberts***, 858 F.2d 698, 700 (11th Cir. 1988). The movant must demonstrate that the defendant has not "…been reasonably diligent and energetic in attempting to accomplish what was ordered." ***Aspira of New York, Inc. v. Board of Education***, 423 F. Supp. 647, 654 (S.D.N.Y. 1976). Further, when levying contempt sanctions, the Court must exercise the least possible power suitable to achieve the end proposed. ***Feliciano v. Gonzales***, 124 F. Supp 2d 774 (D. Puerto Rico 2000).

Exhibit A to the Supplemental Order dated June 27, 2001 illustrates that the Defendant City and specifically Albuquerque Police Department were "diligent and energetic" in attempting to accomplish what was ordered. (Doc. No. 319)). The document is an update to Judge Martha Vazquez from former Judge Rebecca Sitterly dated June 29, 2001 and provides information regarding the efforts that were already being taken to reduce the jail population. The first item listed dealt with pre-trial services walk-through for misdemeanor warrants. The notation indicates that 1,418 people were walked through rather than booked in the last 90 days. It is further noted that:

> These people were brought to jail on warrants, and therefore having already failed to appear on more than one occasion. Of these, nearly 80% are showing up at court after walk-through without further problems, which pretrial services feels is an outstanding success. Per attachments 2 A-D, showing pretrial ROR releases and walk-throughs for just the last four weekends, pretrial services has accomplished an average of nearly 100 releases per weekend. Of these, an average of more than 30 per weekend did not have to be booked, thus significantly impacting population.

(Doc. No, 319-1, p. 1). On page 3 of Judge Sitterley's report to Judge Vazquez, it is noted that "A program for Pre-Trial Services walk-through on open charges just started three weeks ago

and preliminary indications are that it is working as well as the walk-through on warrants." (Doc. No. 319-1, p. 3). Most significantly, it is noted that "APD has been convinced to direct its officers to cite and release offenders in the field for misdemeanor activity which is not violent and does not pose a threat to the safety of the community. This action has been seriously undertaken only as of June, but the beneficial effects were felt immediately in terms of jail population." Thus, even before this Order was entered, Defendant City had provided direction to law enforcement officials under their control to issue citations and release where appropriate and to use the "walk-through procedures," rather than incarcerating individuals, where appropriate. (Doc. No. 319-1, p. 8). This clearly establishes that Defendant City was compliant with the Court's order.

On June 7, 2001, then Chief of Police Gerald T. Galvin issued Department Special Order 01-41, wherein he discussed the processing of Misdemeanor Arrests. In the special order, Chief Galvin states that, "The Federal Court has directed that whenever possible individuals arrested for misdemeanor offenses be cited and released rather than booked." (***See***, Department Special Order 01-41, attached hereto as Exhibit A). Clearly this establishes that Defendant City provided direction to law enforcement officials under the control of the City to issue citations where appropriate and to use the "walk through procedures," rather than incarcerating individuals, where appropriate.

Defendant City respectfully requests that this Court deny Plaintiff-Intervenors' Motion for an Order to show cause.

III. THERE ARE NO STIPULATIONS OR COURT ORDERS AFTER JULY OF 2006 DIRECTING CITY DEFENDANTS TO IMPLEMENT A JAIL DIVERSION PROGRAM.

Defendant County took over full operational control of MDC in July of 2006. This included the responsibility for the creation of an effective jail diversion program. Defendant Bernalillo County has assumed the responsibility of the jail diversion program as it assumed responsibility for the operation of the jail. Further, if Plaintiff-Intervenors felt that the jail diversion program was the responsibility of the City, it would be incumbent on them to have raised the issue previously and not to wait fourteen years to do so.

IV. POPULATION MANAGEMENT TOOLS ARE MANAGED BY THE OPERATOR OF MDC.

The Stipulated Agreement dated January 31, 2001, stated that, "Defendants will continue to employ all existing population management tools and, whenever the average daily population at the main facility for any three-day period exceeds 110% of the court-ordered population cap, the population management review team will be activated." (Doc. 361, p. 2). Defendant Bernalillo County took over full operational control of MDC in July of 2006. Thereafter, the City would not be employing population management tools. For that matter, they would not even be aware of the average daily population at the main facility, as those responsibilities had been taken over by Defendant Bernalillo County. Further, the Stipulated Order from January of 2002 states that, "The parties agree to meet and confer within three days of a request by any party to mediate any disputes under this stipulated agreement." (Doc. No. 361, p. 2). If Plaintiff-Intervenors felt that Defendant City should have continued population management tools and were not doing so, that issue should have been raised long ago.

V. ALL REMEDIAL RELIEF REQUESTED BY PLAINTIFF-INTERVENORS IS OUTSIDE THE SCOPE OF THIS LITIGATION, IS DUPLICATIVE OF *UNITED STATES OF AMERICA V. CITY OF ALBUQUERQUE* AND MUST BE DENIED.

In their Motion for Order to Show Cause, Plaintiff-Intervenors claim that the City is violating their constitutional rights, by APD officers allegedly engaging in a pattern of use of excessive force and by allegedly failing to provide sufficient training to City personnel regarding the use of force. Plaintiff-Intervenors also allege that the City is discriminating against sub class members by virtue of their disabilities, allegedly by targeting sub class members, segregating them from the community, and allegedly failing to reasonably accommodate Plaintiff-Intervenors' disabilities and not reasonably accommodating them in the course of police investigations and arrests.

The history of this case demonstrates that Plaintiff-Intervenors' Motion for Order to Show Cause is without merit. In 1995, the instant case was filed alleging unconstitutional conditions of confinement and overcrowding at the Bernalillo County Detention Center. In 1996, a settlement was reached that focused exclusively on the conditions at the jail. For twenty years, this Court has retained jurisdiction for the sole purpose of enforcing the settlement. Plaintiff-Intervenors, in their request for remedial relief, are asking the court to now exceed the previous settlement agreements and Orders and engage in an entirely new activity--monitoring the Albuquerque Police Department. This request exceeds both the scope of the lawsuit and the jurisdiction of this Court in this matter.

In ***United States of America v. City of Albuquerque***, CV 14-CV-01025, Judge Brack approved a Settlement Agreement between the parties that sets out a number of conditions to ensure that APD delivers police services that comply with the Constitution and the laws of the United States. (CIV 14-1025, ***USA v. The City of Albuquerque v. The Albuquerque Police Officers' Ass'n***, Doc. No. 134). In the agreement, thirty seven pages are devoted to the City and APD's commitment involving the appropriate Use of Force, including detailed requirements for

Use of Force Training (p. 36). One such requirement is training regarding "use of force decision-making, based upon constitutional principles and APD policy, including interactions with individuals who are intoxicated, or who have a mental, intellectual, or physical disability;" (p. 37). The Agreement also agrees to "…minimize the necessity for the use of force against individuals in crisis due to mental illness or a diagnosed behavioral disorder and, where appropriate, assist in facilitating access to community-based treatment, supports and services to improve outcomes for the individuals." (p. 42-43). Also, APD has agreed to additional behavioral health and crisis intervention training to all officers; the training "will provide clear guidance as to when an officer may detain an individual solely because of her or her crisis and refer them for further services when needed." (p. 45). The Agreement also requires the establishment of a Mental Health Response Advisory Committee who will assist in "identifying and developing solutions and interventions that are designed to lead to improved outcomes for individuals perceived to be or actually suffering from mental illness or experiencing a mental health crisis." (p. 43). Additionally, APD will maintain a Crisis Intervention Unit ("CIU") staffed by specially trained detectives "…whose primary responsibilities are to respond to mental health crisis calls and maintain contact with mentally ill individuals who have posed a danger to themselves or others in the past or are likely to do so in the future." (p.36). Crisis prevention is also included in the Settlement Agreement and APD is to continue to use the Crisis Outreach and Support Team ("COAST") and CIU to follow up with individuals with a known metal illness who have a history of law enforcement encounters and to work proactively to connect them with mental health services providers. Finally, there are numerous mechanisms available in the Agreement to ensure that these provisions are being met.

Plaintiff-Intervenors filed an *Amicus Curiae* Brief in ***USA v. City of Albuquerque*** and raised concerns about APD's treatment of mentally and developmentally disabled persons. (CIV 14-1025, ***USA v. The City of Albuquerque v. The Albuquerque Police Officers' Ass'n***, Doc. No. 134, p. 6). Judge Brack points out that the Agreement represents ambitious reform and that many details still may need to be refined. Contrary to the Plaintiff-Intervenors' request to decline acceptance of the proposed Settlement Agreement, Judge Brack approved the Settlement Agreement, but noted that he "…hopes Amici continue to be vigilant in ensuring that this ambitious new approach improves APD's responses to people in crisis and does not lead APD to regress." The Settlement Agreement provides a number of avenues whereby Plaintiff-Intervenors have input into the reform process.

Additionally, the ACLU of New Mexico filed a Motion to Intervene on Behalf of People Who Have Mental Disabilities, Who Experience Homelessness, And Who Are Native American, Who Have Encounters With The Albuquerque Police Department. (Doc. 106). On June 2, 2015, United States District Judge Robert C. Brack denied the ACLU's Motion to Intervene. The Court held, in pertinent part, that as to the concerns regarding mental health and the Albuquerque Police Department, the issue is adequately addressed by the Proposed Intervenors' participation in the "newly created Mental Health Response Advisory Committee." (Doc. 135, p. 10). As such, the sub class clearly has a viable and more appropriate forum within which to address the issues regarding the Albuquerque Police Department raised in the Motion for Order to Show Cause. ***McClendon***, a case addressing unconstitutional conditions of confinement and overpopulation in a county jail, is not the appropriate avenue for addressing such concerns.

Inasmuch as Judge Brack has exercised jurisdiction over matters involving APD and virtually all interactions with sub class members, it would be duplicative and burdensome for any

additional monitoring and, as such, Defendant City requests that this Court deny Plaintiff Intervenors' request for further remedial relief.

VI. CONCLUSION

For the reasons set forth above, Defendant City respectfully requests that the Court reject both the request for further remedial relief regarding City Defendant and a finding of contempt as requested by Plaintiff-Intervenors.

Respectfully submitted,

Kennedy, Moulton & Wells, P.C.

/s/ Debra J. Moulton
Debra J. Moulton
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I HEREBY CERTIFY that
on this 31st day of August, 2015,
a true and correct copy of
the foregoing pleading was
sent via the CM/ECF system,
which caused all counsel of record
to be served by electronic means,
as more fully reflected on
the Notice of Electronic Filing:

/s/ *Debra J. Moulton*
Debra J. Moulton

City of Albuquerque

Albuquerque Police Department
Gerald T. Galvin, Chief of Police
400 Roma NW
Albuquerque, NM 87102
(505) 768-2200

June 7, 2001

DEPARTMENT SPECIAL ORDER 01-41

TO: **ALL PERSONNEL**

SUBJECT: **PROCESSING OF MISDEMEANOR ARRESTS**

The City of Albuquerque has been under a Federal court order for over four years to reduce the number of inmates that are housed at the Bernalillo County Detection Center (BCDC). The maximum capacity of our downtown county jail is 586. We have been over our maximum on numerous occasions. This overcrowding creates enormous problems for the jail including security and health issues. The Federal Court has directed that whenever possible individuals arrested for misdemeanor offenses be cited and released rather than booked.

The arresting officer has several options after making a misdemeanor arrest. The officer can cite and release in the field, if appropriate. The officer can transport to BCDC and process and release the offender without the offender being booked. When this action is taken, offenders are still fingerprinted and checked for outstanding warrants. In instances where the misdemeanor arrests are for domestic violence, driving on a revoked or suspended license (122-G), or concealed identification, formal booking is required. Whenever an officer transports an offender to BCDC, the officer must ensure that the offender's vehicle is secured in accordance with SOP procedures prior to the transport.

Officers will have the discretion to formally book those individuals even though they are not domestic violence offenders, 122-G offenders, or concealed identification offenders, if in the officer's opinion, the release of this offender will create an eminent danger if allowed back into the community. An example would be a misdemeanor arrest for assault where there is a great likelihood that the offender would return to the scene and create another disturbance.

The new process and release program provides a more efficient, less time-consuming method of processing low-level misdemeanants. It allows for the same safeguards to the community (warrant checks, fingerprinting, etc.) as the booking process but just as important, allows for the officers to be back in service much faster. In addition, this program should assist the detention center with the over-crowding situation.

BY ORDER OF:

GERALD T. GALVIN
Chief of Police

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EXHIBIT
A