IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

LAWRENCE CARTY, et al.,	:	Civil No. 94-78
Plaintiffs,	:	
v.	:	
KENNETH MAPP, et al.,	:	
Defendants.	:	

PLAINTIFFS' MOTION TO ENFORCE THE COURT'S ORDER APPOINTING DR. JAMES AUSTIN TO CONDUCT A POPULATION MANAGEMENT ASSESSMENT, OR IN THE ALTERNATIVE TO RE-APPOINT DR. AUSTIN

Plaintiffs respectfully move the Court to enforce its Order appointing James Austin, Ph.D. as its population management expert and ordering Dr. Austin to produce a criminal justice assessment aimed at reducing the prisoner population at the Criminal Justice Complex (CJC) and CJC Annex (collectively, "the Jail."). June 21, 2011 Order (Doc. 695). In the alternative, Plaintiffs ask the Court to re-appoint Dr. Austin and order the he produce the criminal justice assessment he previously proposed. The grounds for this motion are set forth below.

Background

The CJC and CJC Annex remain dangerous and mismanaged. The latest round of reports from court-appointed experts David Bogard and Kathryn Burns, M.D., M.P.H., paint a bleak picture of conditions at the Jail. The facilities are dangerously understaffed.[1] Contraband,

[1] "Insufficient staffing levels of both treatment and custody staff continue endangering the lives and safety of inmates and staff." First Report of Kathryn Burns, MD, MPH on Compliance with Mental Health Provisions of the Settlement Agreement ("Burns Report") (Doc. 786-1) at 1. Mr. Bogard's Oct. 1, 2014 Staffing Plan requires a near-doubling of corrections staff, with 36

including weapons and drugs, is readily available.[2] Prisoner-on-prisoner assaults occur regularly.[3] Instances of potential excessive uses of force are not investigated.[4] Staff is woefully

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additional corrections officers, 3 additional sergeants and 4 additional lieutenants Oct. 1, 2014 Staffing Plan Report ("Staffing Plan") (App. 1, Doc. 788-1) at 23. There are too few officers to make the required 15-minute cell checks on all prisoners and this is a particularly implicates the special management units. Final Baseline Security Report, David M. Bogard ("Bogard Report") (Doc. 788-1). ¶IVB.6. There are also not enough officers to maintain established supervision protocols for prisoners at high risk of suicide. *Id.* Staff themselves attempt to explain the problems of inadequate supervision as a function of chronic understaffing. *Id.* at 23. 62% of all officers are working 40-60% more than their regularly scheduled 40-hour workweek. These numbers are problematic, and moreover the impact of overtime is significantly compounded by the current practice of overtime primarily as second shift, meaning that officers are regularly working 16 consecutive hours. Staffing Plan at 5. "Requiring officers to work large amounts of overtime on a regular basis in a jail setting is a dangerous practice. It is simply impossible for officers to maintain the requisite level of vigilance over that many hours, and the result can be poor decision making, excessive force due to exhaustion, and falling asleep while on duty." *Id.*

[2] Staff are rarely subject to random, unannounced, lawful searches for the purpose of contraband control. Bogard Report at 41. Verbal reports from staff and prisoners confirm the bartering and selling of contraband. *Id.* Prisoners were observed in both jails using and keeping contraband created from issued property and rules regarding this type of contraband are not enforced. *Id.* at 56. Contraband policies are undermined by inadequate or inoperable CCTV, the outdoor recreation area remaining vulnerable to undetected contraband, and understaffing contributing to inadequate prisoner searches. *Id.* at 54. Incident reports from Cluster 1, the mental health cluster, describe inmate-on-inmate assaults that "involve the use of shanks and other weapons." Burns Report at 19.

[3] BOC reports more than 100 inmate/inmate assaults and disturbances occurred at CJC from 2012 until April 2014. Staffing Plan at 4. During that period there were very few formal administrative investigations despite many or most of those 100 violent events involving a use of force. *Id.* at 9. Prisoner assaults have occurred as a result of lax security practices involving the operation of security gates, housing unit doors and cell doors that had been left unlocked. Bogard Report at 42. Incident reports from the mental health unit (Cluster 1) "are filled with reports of inmate-on-inmate physical fights, assaults and attacks requiring emergency transport to the outside hospital for physical care. Some of these incidents involve the use of shanks and other weapons." Burns Report at 19.

[4] There remains no policy for establishing permissible forms of force and the administrative review of use of force is inconsistent and underreports incidents. Bogard Report at 76. "In the past two and a half years BOC reports only one investigation of staff for improper use of force." *Id* . at 85. Some staff did not prepare reports when involved in or witness to the use of force, reports that were prepared failed to provide essential descriptive details or documented whether there were required notifications, authorizations, approvals related to the use of force techniques and/or restraint devices. *Id.* at 83. "The significant inadequacies of these incident reports and the

undertrained.[5] Prisoner supervision is often non-existent.[6] Security practices are lax and, at times, dangerous.[7] The seriously mentally ill are left to languish essentially untreated, and are often victimized by fellow prisoners and staff.[8]

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fact that such a high percentage were flawed, raises significant concerns about both policy as it relates to identifying the requirements for use of force documentation, and also training." *Id.*

[5] Chronic understaffing undermines in-service training, but to date BOC has not provided any documentation regarding training curricula or evidence of actual staff training. Bogard Report at 119. "The absence of official policies and procedures means that staff can't be reasonably trained in the agency's norms and expectations." *Id.* The pre-service training, POST, is geared towards law enforcement and does not prepare future corrections officers for jail specific practices. *Id.* at 107. Documentation clearly reveals that employees are not receiving their 40 annual hours of in-service training. *Id.* One specific deficiency is the training in use of self—contained breathing apparatus (SCBA), which could delay emergency response. *Id.* at 37.

[6] Staff primarily conduct hourly cell checks instead of "approximately every fifteen minutes" leaving prisoners largely with no direct contact or supervision . Bogard Report at 23. This is exacerbated by the practice of having custody staff leave prisoner-occupied housing units unsupervised for extended periods in order to provide additional coverage during meal service. *Id.* Housing unit staff also leave their respective housing units with unsecured and unsupervised inmates while they provide escort and supervision duties related to recreation. *Id.* Even with officers present, housing unit staff allow prisoners to partially and/or completely cover cell doors with sheets, staff wear headphones while on duty, and inconsistently enforce rules and regulations. Bogard Report at 28.

[7] Mr. Bogard concludes that "the vast majority of [security] deficiencies and hazards identified previously remain unabated." Bogard Report at 35 There are recurrent lapses in housekeeping tool control, largely due to staff not consistently ensuring that utility closest are locked or that access is controlled at all times. *Id.* at 40. Incident reports further revealed that "prisoner assaults have occurred as a result of security gates, housing unit doors and cell doors being left unlocked." *Id.* at 42. CCTV also remains inoperable at the Annex and CJC has insufficient camera coverage in the cameras that are operable. *Id.* at 42.

[8] "Mental health care at CJC is deficient in virtually every aspect." Burns Report at 22. The lack of policies or procedures, insufficient staffing levels, limited treatment and interventions available, no adequate suicide prevention program, and lack of appropriate safe housing all threaten those prisoners who are mentally ill. *Id.* Further, detention staff are untrained on work with prisoners with mental illness, resulting in the use of physical force, restraints, and lock down as substitutes for treatment. *Id.* Additionally, at the time Dr. Burns made her report there were two prisoners who had been found not guilty by reason of insanity, who after being hospitalized and discharged, were returned to the jail and continued to be held in custody for over a year without any current or pending charges. Burns Report at 1. Dr. Burns was

These problems are not new. They have plagued the Jail since this case was filed. They have endured despite the Court approving and adopting the 1994 Settlement Agreement, entering numerous subsequent remedial orders, and holding Defendants in contempt four separate times. In 2013 the Court approved a new Settlement Agreement, which incorporates virtually all existing remedies, adds new ones, and is designed to set "a long-overdue path to ensuring Defendants' compliance in this case." Pl. Memo in Support of Mot. To Approve Class Settlement (Doc. 775-2) at 24, *incorporated by reference into* Aug. 29, 2013 Order (Doc. 780).

Despite the promise of a new Agreement, little has changed at the Jail. The very first remedy listed in the 2013 Agreement requires Defendants to reduce the Jail's prisoner population:

> Defendants shall actively manage their prisoner population, including seeking pretrial detention alternatives and reduced bails, and offering sentences of time served for prisoners charged with misdemeanors and non-violent offenses.

2013 Settlement Agreement (Doc. 765-1) ¶IVA.1.

This is not a new remedy: The 1994 Settlement Agreement had an almost identical provision. *See* 1994 Settlement Agreement ¶I.8 I(similar language).

This population reduction remedy is foundational; compliance with it makes it easier to reach compliance with all other substantive provisions of the Agreement. The fewer prisoners there are at the Jail, the easier it is to supervise them appropriately, to house them safely, to separate known enemies, and to provide them with all services required under the Agreement.

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particularly concerned with the use of injectable mediation without any administrative authorization and the use of physical restraint to force inmates to take oral medications, two practices that she urged to "stop immediately." *Id.* at 9. "Inmates experiencing mental health crises are not receiving treatment to address or eliminate the crises. This creates an increased risk of harm, including self-injury, inmate on inmate or staff injury and staff on inmate injury." *Id.* at 11. The mental health staff are not adequately present at CJC/Annex and there are troubling practices in both their documentation and lack of appropriate equipment. *Id.* at 15-16.

The fewer seriously mentally ill prisoners who are housed at the Jail, the easier it is to adequately treat and safely house the remaining mentally ill prisoner population.

But, reducing the prisoner population would have a more immediate effect than easing the path to compliance. All of the problems that Mr. Bogard and Dr. Burns identified would be mitigated if the Jail held fewer prisoners. The chronic understaffing and lax security practices would pose less of a risk, since there would be fewer prisoners to manage. The mistreatment and warehousing of the mentally ill would be alleviated because fewer mentally ill prisoners would be held at the Jail.

Despite the importance of the population reduction provision, Defendants have never complied with it. In 2009, corrections expert Steve Martin found that there was little evidence that Defendants had actively managed the prisoner population. Mar. 23, 2009 Report of Steve J. Martin (Doc. 585) at 21. Mr. Martin further found that prisoners had been held longer than their maximum possible sentences while awaiting trial on minor charges, or had been held in excess of one year awaiting trial. *Id.* Among the examples he cited was prisoner AW, who had been incarcerated for 103 days on a disturbance of the peace charge, a crime that carries a maximum sentence of 90 days. *See* 14 VI Code Ann. §622. Another prisoner, MB, had been incarcerated since January 3, 2005 (1376 days) on second degree assault and destruction of property charges. Prisoner JJ had been incarcerated for 133 days on a simple assault charge, a crime that carries a maximum 6 month sentence. *See* 14 VI Code Ann.§299.

In light of this record, the Court appointed James Austin, Ph.D. as its population management expert, and ordered Dr. Austin to complete an assessment of the Territory's criminal justice system that

> (1) analyzes the Territory's criminal justice processes and policies that affect the population level at the Criminal Justice Complex (CJC) and CJC Annex [collectively, "the Jail"],
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> (2) includes strategies and remedies to address those processes and policies so that the population level at the Jail can be reduced without significantly affecting public safety,
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> (3) includes a baseline population forecast that would advise the territory on the impact of current criminal justice trends,
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> (4) identifies realistic options that have been successfully implemented in other jurisdictions that will reduce the need for future beds, and
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> (5) assesses the existing classification and disciplinary systems at the Jail and provides technical assistance to Defendants so they can make the best use of existing bed space to safely and appropriately house the prisoner population.

June 21, 2011 Order (Doc. 695).

Dr. Austin is a nationally-recognized expert who has assisted states and counties around the country to safely reduce their prisoner populations while enhancing public safety by implementing evidence-based criminal justice practices. *See* Ex. C (Austin curriculum vitae).

Dr. Austin has not conducted his court-ordered criminal justice assessment. Four months after the Court appointed Dr. Austin, Defendants filed a motion to reconsider his appointment. *See* Mot. For Reconsideration or Modification of the Court's Order Appointing James Austin (Doc. 705). Plaintiffs filed a response to the motion. Pl. Resp. to Mot. For Reconsideration or Modification of the Court's Order Appointing James Austin (Doc. 719). Defendants failed to file a reply, and the Court has not ruled on Defendants' motion.

On May 10, 2015, Dr. Austin sent an email to counsel notifying them that he wanted to make a site visit in June 2015 for the purpose of conducting his criminal justice assessment, and asked the parties to suggest personnel he should meet with to do this work. *See* Ex. A (5/10/15 Austin email). Eleven days later, Defendants responded that they would not provide a list of

personnel to Dr. Austin since they were "unaware of any provision of the Settlement Agreement that speaks to a criminal justice assessment." *See* Ex. B (5/21/15 D'Andrade email).

I. THE COURT SHOULD DENY DEFENDANTS' UNTIMELY RECONSIDERAITON MOTION AND ORDER THEM TO COMPLY WITH ITS ORDER APPOINTING DR. AUSTIN.

The Court's 2011 Order appointing Dr. Austin remains in effect, and Dr. Austin is prepared to begin his criminal justice assessment. The Court should order Defendants to comply with the Order, and provide Dr. Austin with access to "any records and personnel with their control that he deems necessary to complete his work, and that they and th[e] Court shall use their best efforts to ensure that Dr. Austin has access to any other documents or personnel that are not within Defendants' control that he deems necessary to complete his work." June 21, 2011 Order at 2 (Doc. 695).

Defendants' reconsideration motion remains pending. The Court should deny that motion, for the reasons set forth in Plaintiffs' response (Doc. 719). The motion was filed more than three months after the 14-day deadline for reconsideration motion under Local Rule 7.3, and therefore should not be considered. *See* Doc. 719 at 1-2.

The Court should deny Defendants' motion even if it considers their untimely objections. Defendants argue that Dr. Austin's appointment violated the limits on "prospective relief" in the Prison Litigation Reform Act, 18 U.S.C. §3626(a), and that Dr. Austin's review was territory-wide, and thus beyond the scope of this case. *See* Doc. 705 at 2-6. The federal courts consistently have held that the appointment of an expert, like Dr. Austin, is not "prospective relief" under the PLRA, and Dr. Austin's work was expressly limited to assessing the St. Thomas prisoner population under the terms of the Court's June 2011 Order. *See* Doc. 719 at 3-6.

Defendants now refuse to comply with the Court's Order and cooperate with Dr. Austin because the 2013 Settlement Agreement "does not mention a criminal justice assessment." *See* Ex. B. While true, this is immaterial. There was no need for the Agreement to require a criminal justice assessment since the 2011 Order did so.

The 2013 Agreement's population reduction remedy is almost identical to the 1994 Agreement's remedy that was the premise for Dr. Austin's 2011 appointment. (Doc. 765-1) To this day, Defendants continue to disregard this remedy. They hold prisoners at the Jail past their maximum sentences, and indefinitely detain at least one prisoner with no charges. *See* Part II, *infra.* Holding these men at the jail strains an already broken system. Dr. Austin has helped prisons and jails around the country reduce their populations safely. Even a small reduction at the Jail could have a very positive effect, and would reduce the serious risks to prisoners and staff safety that Mr. Bogard and Dr. Burns have detailed.

Dr. Austin's assessment can be a powerful means to monitor and ensure compliance with the population reduction remedy. Rather than displacing his appointment, the 2013 Agreement explicitly retains all "rights and responsibilities for monitoring, reporting and compliance" established by previous orders. (Agreement ¶VII. at 21). Under the 2011 Order, Defendants therefore remain responsible for cooperating with Dr. Austin's criminal justice assessment.

The 2013 Agreement does supersede all previous remedies (Agreement ¶VIII.P.7.). But, Dr. Austin's appointment is not a remedy. It merely is a means to effectuate a remedy. His appointment does not change the legal relationship between the parties. It does not create new substantive legal rights for Plaintiffs. It does not redress Defendants' violation of the population reduction remedy. It does not require the release of a single prisoner. It also does not require

Defendants to change a single aspect of operations or conditions at the Jail or in their criminal justice system.

Dr. Austin's appointment is therefore most akin to the appointment of a court expert or special master to oversee implementation of remedies in institutional litigation. Federal courts uniformly have held in the analogous situation that these appointments in prison conditions cases are not "relief" subject to the restrictions of the PLRA. *See Williams v. Edwards*, 87 F.3d 126, 128, 133 (5th Cir. 1996) (holding that the appointment of an expert to make findings and recommendations regarding bed space in the Louisiana prison system is not prospective relief subject to the PLRA); *see also Coleman v. Brown*, No. 2:90-cv-0520, 2013 WL 4780945 (E.D. Cal. Sept. 5, 2013) (concluding that order requiring the special master to report on staffing levels and adequacy of inpatient prison programs was not relief under the statute); *see also Madrid v. Gomez*, 940 F. Supp. 247, 250 (N.D. Cal. 1996) ("a Special Master is simply a device utilized by the Court to assist in the formulation of appropriate relief or to monitor relief that is ordered. The appointment, however, is not itself relief."); *Benjamin v. Jacobson*, 156 F. Supp. 2d 333, 342 (S.D.N.Y. 2001) ("[M]onitoring itself, independent of the conditions to be monitored, cannot be relief. Monitoring merely informs the court and the parties where the defendants are in the process of providing the ordered relief. To find otherwise would conflate relief with the means to guarantee its provision."); *Coleman v. Wilson*, 933 F. Supp. 954, 957 (E.D. Cal. 1996) (special master not prospective relief under the PLRA); *cf. Carruthers v. Jenne,* 209 F. Supp. 2d 1294, 1300 (S.D. Fla. 2002) (counsel's monitoring under consent decree is not prospective relief since "monitoring is not an ultimate remedy and only aids the prisoners in obtaining relief.").

As the *Madrid* Court reasoned, the appointment of a special master does not result in "the actual change in the legal relations or in defendants' conduct or actions that cures the legal

wrong and makes plaintiff whole." *Madrid* 940 F. Supp. at 250. This same reasoning applies to Dr. Austin's appointment here. Nothing in the 2011 Order obligates Defendants to make a single change in operations or conditions at the Jail or elsewhere. Though Dr. Austin will make recommendations for reforms, the Order does not require Defendants to implement any of them. Therefore, Dr. Austin's appointment is no more a "remedy" superseded by the 2013 Agreement than it is "relief" subject to the PLRA.

Notably, the Territory has acknowledged in the United States' lawsuit regarding conditions at the Golden Grove Adult Correctional Facility (ACF) that the appointment of a special master "is simply a means of achieving previously ordered relief, rather than a form of relief itself." *United States v. Territory of the Virgin Islands,* 884 F. Supp. 2d 399, 409 n.5 (D.V.I. 2012). In this regard, Dr. Austin's appointment here operates in the same manner as the appointment of the special master in the ACF litigation.

II. THE COURT SHOULD RE-APPOINT DR. AUSTIN IF IT FINDS THAT ITS 2011 APPOINTEMNT HAS LAPSED.

Over forty years ago, the Supreme Court held that "an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *System Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961). When faced with particularly obstinate Defendants in an institutional reform case such as this one, one tool courts have used with great success is the appointment of a neutral expert to oversee implementation of remedies, and to report to the Court on compliance efforts. *See, e.g., Ruiz v. Estelle*, 679 F.2d 1115, 1161-62 (5th Cir. 1982) (upholding appointment of a court monitor to oversee implementation of a prison conditions decree under the court's inherent powers); *United States v.*

Michigan, 680 F. Supp. 928, 962 (W.D. Mich. 1987) (appointing an independent expert pursuant to Fed. R. Evid. 706 to oversee implementation of a prison conditions consent decree); *Morales Feliciano v. Romero Barcelo*, 672 F. Supp. 591, 623 (D.P.R. 1986) (appointing a court monitor to oversee implementation of a consent decree addressing Puerto Rico prison conditions, noting the court's "inherent equitable power to appoint a person . . . to assist it in administering in a remedy."); *cf. Halderman v. Pennhurst State School and Hospital*, 612 F. 2d. 84, 11 (3d Cir. 1979) (upholding appointment of a special master to implement a state hospital consent decree which likely would be "a complex and lengthy process, probably involving monitoring, dispute resolution, and the development of detailed enforcement mechanisms.").

Mr. Bogard and Dr. Burns have both made it painfully clear that the Jail is in crisis. Defendants have compounded the problem by flouting the population reduction remedy. There continue to be prisoners who are held at the Jail awaiting trial for far longer than their maximum possible sentence. These include the following:

> **Delvin Durant:** On Aug. 15, 2014, the Virgin Islands Superior Court entered an Order in *People v Durant*, Crim. No. ST-13-CR-154. It states that Mr. Durant was charged with two counts of simple assault and battery and one count of disturbing the peace. The statutory maximum for simple assault is 6 months and for disturbing the peace is 90 days. At the time of the Order, Mr. Durant had been in custody since April 2, 2013 (500 hundred days), far in excess of the maximum imprisonment sentence. The Court orders the charges dismissed.
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> **Kenson Jolly:** There is a May 9, 2014 Order from *People v. Jolly,* Crim. No. ST-13-MMS-22 stating that Mr. Jolly was charged with disturbance of the peace, with a statutory maximum penalty of 90 days. Mr. Jolly had been in custody since Dec. 14, 2013 (146 days), "unable to post bail and far in excess of the maximum sentence required by law." Mr. Jolly's criminal charges were dismissed with prejudice, but he remained jailed until May 27, 2014, when he was transferred to the behavioral unit of RLS Hospital via a March 7, 2014 involuntary commitment order secured by his court-appointed guardian.[9]

[9] 3/7/14 Order *in re Jolly*, VI Superior Ct family division involuntary commitment #5/2012.

> **Jahniah Peters:** There is a Jan. 16, 2015 Order in *People v. Peters,* Crim. No. ST-14-CR-254, dismissing the charges against Mr. Peters with prejudice since he had served more than six months, longer than the maximum sentence for his charged offense.
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> **Prisoner GL:** Mr. GL was found not guilty by reason of insanity (NGRI) of first degree murder charges in 1998. He remained housed in BOC and Department of Health facilities until he was transferred to the Sylmar Health & Behavioral Center (Calif.) on Mar. 17, 2009. He was discharged back to the CJC on Jan. 29, 2013, where he has remained since. There are no pending charges against Mr. GL. Dr. Burns, who has 25 years of experience in correctional mental health, and has assessed over 100 prisons and jails around the country, stated that she knows of no other correctional system that keeps NGRI patients like Mr. GL indefinitely housed in a jail, rather than discharging them to a hospital for appropriate treatment. *See* Feb. 23, 2015 hearing tr. at 97:22-24, 129:24-131:21 (Burns).

Dr. Austin is eminently qualified to conduct a criminal justice assessment that will set a path to safely reducing the Jail's population. He has successfully collaborated with local and state correctional officials around the country to help them reduce their prison and jail populations through reliance on community-based alternatives to incarceration, at considerable savings to the taxpayers and without risk to public safety. He has participated in producing major jail master plans and assessments on such major urban jails as Cook County, IL; Bexar County and Harris County, TX; Baltimore City, MD; and Washington, DC. He is currently working in more than ten jurisdictions to help prison and jail officials reduce crowding and improve correctional facility conditions. He was a principal expert relied on by the three-judge panel in *Coleman v. Schwarzenegger* and *Plata v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal.2009) in addressing whether and how California can safely reduce prison overcrowding, at great financial savings to the state. *Id.* at 914 n.39, 923, 926, 970, 972, 975-980, 982-983. 988. 990-991, 997-999 & ns.88-91. He currently is serving as the Court's Fed. R. Evid. 706 population

management expert in *Carruthers v. Israel*, No. 76-6086 (S.D. Fla.), appointed to devise a population management plan and a baseline population estimate for the Broward County, Fl. Jail.

Dr. Austin filed a declaration in 2011 setting out his methodology and schedule for completing a criminal justice assessment. He has reviewed this declaration, and confirms that he can complete a comprehensive assessment using the same methodology within six months, assuming he receives the cooperation, and access to data, he needs to carry out his work. *See* Balaban Dec. ¶ 2. The fact that Dr. Austin would serve as this Court's expert should speed his access to the files and personnel he needs to carry out his duties, as set forth in the appended proposed Order.

Finally, Plaintiffs ask that Defendants bear the costs of Dr. Austin's appointment, as the Court ordered in 2011. *See* Doc. 695 at 2. Rule 706 permits this Court to allocate court-appointed expert costs to one party. The commentary to Rule 706's precursor states:

> No doubt in the usual case the judge will provide that the expense of the experts shall be taxed as cost and paid by the loser. He may require the parties to contribute proportionate shares of the fee in advance. He may think it wise to excuse an impecunious party from paying his proportionate share.

United States Marshal's Service v. Means, 741 F.2d 1053, 1057-59 (8th Cir. 1984) (en banc) (citing Model Code of Evidence, Rule 410 as the "basis of current Fed. R. Evid. 706," and upholding an order requiring the Government to advance the costs of a court-appointed expert for indigent defendants). *See* Fed. R. Evid. 706 (b) ("the compensation [of a Rule 706 expert] shall be paid by the parties in such proportion and at such time as the court directs."); *see also* *McKinney v. Anderson*, 924 F.2d 1500, 1511 (9th Cir.) (district court may apportion all of the Rule 706 expert costs to one party), *vacated on other grounds,* 502 U.S. 903 (1991).

Here, it is Defendants abiding non-compliance that has harmed Plaintiffs and resulted in the ongoing enforcement proceedings in this case. Given that Plaintiffs are prisoners, and do not

have the resources of the Virgin Islands government, it is appropriate for Defendants to bear Dr. Austin's costs. *See, e.g., Nelson v. Dawson*, 2009 WL 453965, at *9 (D. Idaho Feb. 20, 2009) (allocating all costs of a Rule 706 expert to prison officials, noting that the prisoner plaintiffs are indigent); *Carruthers*, Case No. 76-6086, slip op. at 3 (S.D. Fla. Aug. 2, 2001) (apportioning the costs of two Rule 706 experts to Defendants, given that the prisoner plaintiffs were indigent and it was Defendants' "conduct [that] occasioned these proceedings.). Plaintiffs believe that the Dr. Austin's work will lead to long-term reductions in the prisoner population at the Jail, which in turn could result in significant cost-savings for Defendants. By way of example, New Orleans saved an estimated 2 million dollars in just the first three months after implementing one of the reforms Dr. Austin recommended through his work on the parish's criminal justice system.[10]

Conclusion

It has been over 20 years since the Court first ordered Defendants to actively manage its prisoner population so that there are as few men and women held at the jail as is necessary. Defendants have flouted this remedy since. The dangerous conditions and security hazards at the Jail that the parties' experts have documented require action now by the Court. The appointment of Dr. Austin can lead to compliance with the population management remedy, and set a path to permanent reductions in the prisoner population that will ease the risks prisoners and staff currently face at the Jail.

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[10] Matt Davis, *Changes in NOPD's arrest policies save city nearly $2 million in jail fees so far this year*, THE LENS (New Orleans), Mar. 29, 2011, *available at*. http://www.fox8live.com/news/local/story/The-Lens-Changes-in-NOPD-s-arrest-policies-save/Qz7hqcyi5UqeqER9Tn4Xug.cspx

Respectfully submitted,

/s/ ERIC BALABAN
Eric Balaban
National Prison Project of the ACLU
Foundation
915 15th Street
Seventh Floor
Washington, D.C. 20005
(202) 393-4930

/s/ BENAJAMIN CURRENCE
Benjamin Currence
Norre Gade
2nd Floor #12
P.O. Box 6143
St. Thomas, U.S.V.I. 00804-6143
340/775-3434

Attorneys for Plaintiffs

Dated: June 2, 2015

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading, and accompanying declaration, exhibits, and proposed Order were served by the Notice of Electronic Filing administered by this Court to the following counsel for Defendants at the following address:

Carol Thomas-Jacobs
Asst. Attorney General
V.I. Department of Justice
Office of the Attorney General
GERS Bldg., 2nd Floor
34-38 Kronprindsens Gade

St. Thomas, USVI 00801
cjacobs@doj.vi.gov

Shari D'Andrade
Assistant Attorney General
Virgin Island Department of Justice
GERS Building, 2nd Floor
34-38 Kronprindsens Gade
St. Thomas, VI 00802
sdandrade@doj.vi.gov

/s/Eric Balaban
Eric Balaban