UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 76-6086-CIV-MIDDLEBROOKS

OLLIE CARRUTHERS, *et al.*,

Plaintiffs,

v.

SCOTT ISRAEL, *et al.*,

Defendants.
_____/

PLAINTIFFS' REPLY TO COURT ORDER TO SHOW CAUSE

Undersigned counsel for the Plaintiffs, Christopher C. Cloney, pursuant to the Court's Order of August 5, 2015 [DE 894], to show cause for why the Consent Decree [DE 654] should not be dissolved or amended responds that the decree should not be dissolved at this time. Plaintiffs have identified practices and conditions that pose an unreasonable risk of harm to prisoners held at the Broward County jails. Plaintiffs and the Sheriff have agreed to continue their talks to develop a revised set of remedies to address these conditions and practices, and resolve this case. Based on the collaborative efforts of the parties in the past that have narrowed the claims in dispute, and in light of the pending updated report from Dr. James Austin, the Court's appointed Population Management Expert, which will provide a roadmap to substantially reducing the Jail's population, and thereby alleviating conditions, Plaintiffs suggest that, rather than entering a scheduling order setting deadlines for discovery and a date for an evidentiary hearing to allow the parties to present evidence as to the current conditions and the appropriate relief required to remedy unconstitutional conditions, the parties be afforded a reasonable period of time to continue their ongoing discussions and collaborations as discussed below. In addition, as to areas of agreement

and accommodation, Plaintiffs suggest a period of implementation and progress reporting be incorporated into the Consent Decree pending final resolution of this case by agreement or trial.

Background

The parties to this conditions of confinement class action entered into the Stipulation for Entry of Consent Decree on July 27, 1994 (the "Consent Decree"), which was then ratified and confirmed by Judge Hoeveler on January 31, 1995. On June 7, 1995, Judge Hoeveler issued an amended Order incorporating the settlement agreement of the parties.

The Consent Decree acknowledged that conditions of confinement had been determined to be unconstitutional and provided that all Broward County correctional facilities would be operated and maintained, at a minimum, by applying the most stringent provisions of applicable federal and Florida law and the standards set forth in Chapter 33-8 of the Florida Administrative Code, the American Correctional Association Standards for Adult Local Detention Facilities, and the National Commission on Correctional Health Care Standards of medical, dental and mental health services. Consent Decree at pg. 2, ¶ 4; pg. 4, at ¶ 10. The Consent Decree established a jail population cap and compliance monitoring, and also specifically provided, *inter alia*, that use of force must only be used as a last resort, mentally ill inmates who present a threat to others or themselves shall be supervised by documented sight checks by staff at intervals not to exceed 15 minutes, and any inmate identified as a suicide risk shall not be housed in a single occupancy cell unless observed 24 hours. *Id.* at pg. 6, ¶¶ 3 – 4.

In September 1996, the Defendants moved to terminate the Consent Decree. The Court, pursuant to Stipulation of the Class and Broward and Federal Rule of Evidence 706, on November 20, 2001, appointed Steven J. Martin as an expert witness to conduct inquiry into the conditions at the Broward County jail facilities. Pursuant to that Order, Mr. Martin, with the retained assistance

of Steven S. Spencer, M.D., and Jeffrey L. Metzner, M.D., conducted inspections and issued their reports on May 19, 2002. Mr. Martin and Dr. Spencer produced a second set of expert reports on January 21 and 27, 2003. The parties agreed to a third series of on-site and document inspections being conducted resulting in reports being issued by Dr. Metzner on November 16, 2003, Dr. Spencer on January 11, 2004, and Mr. Martin on January 13, 2004.

In 2004 the parties engaged in a series of legal skirmishes, discovery proceedings, and inspections that culminated in two stipulations for settlement (the "Stipulations"). *See* Exhibits A and B to Defendants Joint Response to Court Order Requiring Response (the "Response") (DE 886). The Stipulations narrowed the scope of continuing monitoring, inspection and judicial oversight of jail operations and conditions to those relating to mental health services, inmate rules and discipline, inmate safety and security, facility capacity, and inmate access to religious publications and services and access to legal materials. The Stipulations also stopped class counsel from engaging in formal discovery. *See, e.g.,* Second Stipulation for Settlement (DE 886-2) at 7[EB1]. Mr. Martin and Dr. Metzner produced additional reports on conditions and operations at the Jail through mid-2006.

In 2010, the Jail experienced a significant increase in the prisoner population that resulted in substantial overcrowding affecting all Jail facilities. In October 2010, the Court, pursuant to Fed. R. E. 706, appointed James Austin, Ph.D. as the Court's population management expert. (DE 875). Dr. Austin was charged with producing a publicly filed report that:

> (1) identifies and analyzes the County's criminal justice processes and policies that affect the population level at the Broward County Jail (BCJ),
>
> (2) develops strategies and remedies to address those processes and policies so that the population level at BCJ can be reduced without significantly affecting public safety,
>
> (3) includes a baseline ten-year jail population forecast that would advise the County on the impact of current criminal justice trends, and

> (4) identifies realistic options that have been successfully implemented in other jurisdictions that will reduce the needs for current and future beds—especially for the pretrial felon population.

Oct. 4, 2010 Order (DE 875) at 1-2.

Dr. Austin has produced an interim report, and was asked by the parties in early 2015 to update his report and recommendations for population reduction reforms to reflect current population data and trends. Dr. Austin has requested the data from the Sheriff, and is in the process of updating his report.

In November 2014, Greg Jones and Renand Fleuridor, detainees in the Broward County Jail ("BCJ"), separately filed *pro se* motions in this case asserting violations of the Consent Decree (the "Motions") (DEs 879, 880, 882, 883, 884). By Order dated December 16, 2014, the Court required Defendants to respond to the Motions. On January 20, 2015, the Defendants filed their Response. On May 4, 2015, a Joint Status Report responding to Fleuridor and Jones' complaints was filed by the Class, the Sheriff of Broward County, and Broward County in response to an April 17, 2015 Order (DE 892) requiring an update on efforts to resolve the claims of non-compliance raised by the Motions.

On August 5, 2015, the Court issued an Order *sua sponte*, requiring the parties to show cause as to why the Consent Decree should not be dissolved or modified.

Argument

I. Legal Standard

Certainly, "not all injunctions operate in perpetuity." *Florida Ass'n for Retarded Citizens, Inc. v. Bush*, 246 F.3d 1296, 1298 (11th Cir. 2001). Nevertheless, federal courts have a duty to enforce compliance with court orders to remedy constitutional violations when Defendants have failed to meet their constitutional obligations. *See Brown v. Plata*, —U.S. —, 131 S. Ct. 1910, 1928–29 (2011) ("If government fails to fulfill its obligation [to provide care consistent with the

Eighth Amendment], the courts have a responsibility to remedy the resulting Eighth Amendment violation." (internal citations omitted)); *see also Procunier v. Martinez*, 416 U.S. 396, 405 (1974) ("[A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution."). Although "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government, . . . prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84–85 (1987); *Ort v. White*, 813 F.2d 318, 321 (11th Cir. 1987) ("Clearly, [w]hatever rights one may lose at the prison gates, . . . the full protections of the eighth amendment most certainly remain in force." (internal citations and quotations omitted)). The federal court's responsibility to remedy constitutional violations cannot be discharged out of deference or fatigue. *See Brown v. Plata*, — U.S. —, 131 S. Ct. 1910, 1928–29 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration."); *Florida Ass'n for Retarded Citizens, Inc. v. Bush*, 246 F.3d 1296, 1298 (11th Cir. 2001) ("[T]he age of the case . . . does not provide a basis for declining to enforce an existing order of the court.").

As noted by the Court, the party seeking relief from the consent decree bears the burden of establishing that revision is warranted. DE 894 at pg. 2 n. 1 ("The Party seeking termination of [a consent] decree must show that the basic purposes of the decree have been fully achieved and that there is no significant likelihood of recurring violations of federal law once the decree has been lifted." (citing *Allen v. Alabama State Bd. of Educ.*, 164 F.3d 1347, 1350 (11th Cir. 1999))); *see also Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383 (1992) ("[A] party seeking modification of a consent decree bears the burden of establishing that a significant change in

circumstances warrants revision of the decree."). A desire to be disencumbered from a consent decree does not justify such relief if Defendants are unable to carry their burden, because "a party may obtain relief from a court order when 'it is no longer equitable that the judgment should have prospective application,' not when it is no longer convenient to live with the terms of a consent decree." *Id.* at 383 (emphasis added).

Notwithstanding the absence of formal discovery, because the inmates are afforded free phone access to Plaintiffs' counsel, Plaintiffs' counsel have identified systemic problems that subject prisoners to a serious risk of harm. The Court, therefore, should afford the parties a reasonable period of time to continue their ongoing discussions and collaborations, and for areas of agreement, should modify the Consent Decree to address these areas, and include implementation deadlines and progress reporting. The Court has considerable equitable powers by which to modify the Consent Decree and stipulations. *See Brown*, 131 S. Ct. at 1946 ("The [court] … retains the authority, and the responsibility, to make further amendments to the existing order or any modified decree it may enter as warranted by the exercise of its sound discretion."); *Freeman v. Pitts*, 503 U.S. 467, 487 (1992) (The "essence" of a court's equity power "lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action," and "equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision."); *Hutto v. Finney*, 437 U.S. 678, 687 n. 9 (1978) ("Once invoked, the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies." (internal citations and quotations omitted)).

Allowing the Sheriff and Plaintiffs time to negotiate a settlement has two principle benefits: First, the parties may reach a settlement, or a partial settlement that narrows the claims in dispute,

thereby preserving the resources of the parties and the Court that otherwise would be devoted to discovery and preparations for an evidentiary hearing on current conditions at the Jail. *See Cason v. Seckinger*, 231 F.3d 777, 781–83 (11th Cir. 2000) (holding that, when plaintiffs opposing a motion to terminate or modify request an evidentiary hearing to prove the existence of current and ongoing violations of their federal rights, the district court must afford that opportunity); *Loyd v. Ala. Dept. of Corr.*, 176 F.3d 1336, 1342 (11th Cir. 1999) (holding that it was an abuse of discretion for the district court to refuse to grant an evidentiary hearing concerning current conditions at a prison and the scope of prospective relief challenged). Second, should the Sheriff and Plaintiffs reach a settlement, that remedy could be entered and become effective more quickly than if the remedy was one the Court entered after a hearing.

After participating in initial settlement discussions, the County informed the Sheriff and Plaintiffs this past Friday (August 28, 2015) that it would not agree a joint response to the Court's Oder to Show Cause. Instead, the County's response (DE 899), asserts that the County, although it funds the operation of the jails, has no control over the operations of in the jails and therefore is not liable for any unconstitutional conditions or practices within. This is simply a misstatement of the law. As the Eleventh Circuit has stated:

> The federal courts have consistently ruled that governments, state and local, have an obligation to provide medical care to incarcerated individuals . . . . This duty is not absolved by contracting with an entity such as Prison Health Services. Although Prison Health Services has contracted to perform an obligation owed by the county, the county itself remains liable for any constitutional deprivations caused by policies or customs of the Health Service . . . . [I]f, either expressly or by default, Broward County permitted others to decide or determine policy, it is liable for their actions if these policies prove unconstitutional."

Ancata v. Prison Health Services, 769 F.2d 700, 705, 706 fn 11 (11th Cir. 1985). *See Monell v. Dep/'t of Social Services*, 436 U.S. 658, 690-91 (9178) (municipal liability can be

premised on customs and practices of municipal employees "even though such customs has not received formal approval through the body's official decision-making channels.")

As in *Ancata,* the fact that Broward County has delegated final authority to make decisions on Jail policy to the Sheriff, or to a private health care vendor (now Armor), does not relieve the County of liability. *See Mandel v. Doe,* 888 F.2d 783, 793-94 (11th Cir. 1989) (a single decision to deny medical care by the jail's physician assistant (PA) gave rise to municipal liability, since the county had effectively delegated the authority to make decision of medical services to him). Moreover, the County can be held liable to failing to investigate and remedy longstanding unconstitutional practices at the jail, whoever is carrying them out. *See Fundiller v. Cooper City,* 777 F.2d 1436, 1443 (municipal liability claim stated based on allegation of "persistent failure to take disciplinary action against officer [for using excessive force] can give rise that the municipality has ratified conduct, thereby establishing a "custom" within the meaning of *Monell*.")

II. Current and Ongoing Violations of Plaintiffs' Federal Rights

The Jail holds both pretrial detainees as well as sentenced inmates. While convicted prisoners may be subject to punishment as long as the Eighth Amendment is not violated by "cruel and unusual" punishment, pretrial detainees receive heightened protection as they are protected from punishment by the Due Process provisions of the Fifth and Fourteenth Amendments. *Bell v. Wolfish*, 441 U.S. 520, 535-36 & n.16 (1979); *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004) ("Due process requires that a pretrial detainee not be punished prior to a lawful conviction."). For pretrial detainees, "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *see Bell*, 441 U.S. at 538 – 39, 545 (holding that a condition amounts to punishment when it is not reasonably related to a legitimate

goal, or when it is excessive in relation to the goal assigned); *cf. Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004) (The "more protective fourteenth amendment standard . . . requires the government to do more than provide the 'minimal civilized measure of life's necessities.' ").

Courts evaluating the claims of pretrial detainees under the Fourteenth Amendment have used the Eighth Amendment's analytical framework of deliberate indifference to analyze these claims. *See Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991) (holding that "institutional level challenges to [Jail conditions and] systemic deficiencies can provide the basis for a finding of deliberate indifference," for example, "[d]eliberate indifference to inmates' health needs may be shown . . . by proving that there are 'such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care.'" (internal citations and quotations omitted)).

Prison officials may not "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year" merely because no harm has yet occurred, and a "remedy for unsafe conditions need not await a tragic event." *Helling v. McKinney*, 509 U.S. 25, 33 (1993); *accord Farmer v. Brennan*, 511 U.S. 825, 845 (1994). Conditions that have "a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise" violate the Eighth Amendment in combination, even if the conditions separately would not be unconstitutional. *Wilson v. Seiter*, 501 U.S. 294, 304 (1991).

A. Overcrowding

The core stipulations and agreements of the parties to address unconstitutional conditions of confinement that remain at issue today may be summarized as follows:

1. Insofar as facilities permit, no inmate shall be subjected to more restrictive conditions of confinement, including but not limited to freedom of movement within the institution, and out-of-cell time, than those justified by the inmate's classification.
2. Force shall only be used as a last resort to control inmates and only to the degree that is reasonably necessary in self-defense, to prevent escape, to prevent injury to a person or property, to quell a disturbance, or when the inmate exercises physical resistance to a lawful command.
3. Each inmate is entitled to living facilities such that no inmate is required to sleep or eat on the floor, except as may be directed by a licensed medical or mental health professional.
4. Inmates in all facilities will be afforded medical, dental and mental health services, medication, appliances and medical related housing in compliance with applicable federal and Florida law and certain enumerated standards.

July 27, 1994 Stipulation For Entry of Consent Decree.

Serious overcrowding in a jail renders the conditions there violative of the Constitution, because it poses "an unreasonable risk of serious damage to [the inmates'] future health or safety." *Chandler v. Crosby*, 379 F.3d 1278, 1289 (11th Cir. 2004); *see also Rhodes v. Chapman*, 452 U.S. 337, 347–48 (1981) (double celling would be violative of the Constitution if it involved "deprivations of essential food, medical care, or sanitation"); *cf. Brown v. Plata*, 563 U.S. 493 (2011) (affirming a court-ordered population limit, because "[o]vercrowding has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve"); *Mercer v. Mitchell*, 908 F.2d 763, 769, 784 (11th Cir. 1990) (noting that "[j]ail overcrowding may violate the inmates' constitutional rights" and that "[a] court imposes a cap on a prison population for one reason: to ensure the safety of the convicted inmates and pretrial detainees in compliance with the eighth amendment, and the due process clauses of the fifth or the fourteenth amendments"). Overcrowded jail conditions stress the delivery of essential services and functions such as medical care and the supervision of inmates, subjecting inmates to an unreasonable risk of serious harm.

In response to the Court's Order dated July 2010, The Sheriff filed a Status Report and Impact Statement in response to the ten (10) questions detailed in that order. (DE 863). BSO's response to Question 7 is instructive:

7. *BSO's determination of the operational capacity* of *the Jail, including whether* BSO *agrees with the recommendation in the 2007 National Institute of Corrections technical assistance report that the Jail's operational capacity be* 85% of *the total rated capacity, and how exceeding that operation capacity may affect conditions and operations at the jail.*

- It is ideal not to exceed 85% capacity. As the percent capacity increases the ability to manage the inmate population and need for temporary bed usage is negatively impacted.

- The inmate population can be managed to a point when exceeding 85% capacity. This ability changes based upon the percent capacity and housing requirements of the inmate population on any given date. Inmate housing needs are fluid and change rapidly in the jail environment.

- Other than the increased use of temporary beds, it is difficult to quantify the affect on jail conditions at capacities in excess of 85% as such conditions will change depending upon the nature of the population, and how close the population is to capacity. As the population increases near capacity, it would be expected that jail conditions would be negatively impacted.

In June 2014, Dr. James Austin, the aforementioned Court's appointed Population Management Expert, reported his analysis setting the operational capacity at 85% for the two higher security facilities (Main and North), which have the highest rates of assaults and uses for force. The other two facilities (Rein and Conte), which are direct supervision units and have more open facilities, were set at the 90% limit based on the fact that they house lower security inmates and have significantly lower rates of assaults and uses of force. Dr. Austin's tours of the Conte and Rein facilities reinforced his perspective that the Conte and Rein facilities can safely operate at the 90% level.

Presently, the Sheriff daily reports overall population in excess of the 85%. Indeed, on August 17, 2015, the overall capacity was reported at 92.5%. Conte reported 99.5%, Rein 94.5%,

Main 89.5% and North 87%. The combined daily population report and the twice monthly temporary beds reports for the past six (6) months provide ample cause for concern:

Date	Reported POP	Reported % of capacity based on 5,144 available beds (not including the temp beds)	Total reported temp beds
2/1/15	4537	88.2%	197
2/15/15	4470	86.9%	192
3/1/15	4457	86.6%	162
3/15/15	4470	86.9%	67
4/1/15	4435	86.2%	34
4/15/15	4440	86.3%	58
5/1/15	4426	86.0%	83
5/15/15	4485	87.2%	72
6/1/15	4572	88.9%	118
6/15/15	4638	90.2%	151
7/1/15	4691	91.2%	204
7/15/15	4661	90.6%	217
8/1/15	4686	91.1%	212
8/15/15	4782	93.0%	232
8/31/15	4752	92.4%	262

Confinement levels in excess of the safe operational capacity severely impacts the Defendants' ability to conform to the applicable legal and operational standards. Such impact, combined with the pattern of increasing length of stay in the jails, creates a significant likelihood of recurring unconstitutional conditions of confinement. It cannot be said that the wrong to avoid will not reoccur.

As previously explained by Dr. Austin, jail populations are the product of two key factors, jail admissions and the length of stay (LOS). During the pendency of this action, one aspect of the Defendants' response to overcrowding and the resulting conditions has been the replacement of aging and outmoded detention buildings with new facilities increasing the total available beds

to 5,144. Unfortunately, although crime rates and the number of arrests and bookings into the jail have declined over the years, the Sheriff reports that the average LOS of a Broward inmate has increased from 27.4 days in 2010 to 37.88 as of June 2015. This increase creates the complained of overcrowding and has resulted in the use of "temporary beds" reportedly in conflict with the space requirements of the applicable housing standards.[1]

Despite BSO policy that the Department of Detention will provide each inmate with a permanent bed and that temporary beds will be used only as a last resort, and only when a permanent bed is not available,[2] the temporary beds reports establish that the use of "temporary" beds has become a permanent fixture of jail operations. The increasing use of these substitute beds, known as "boats," illustrates that the reported capacity is not the same as operational capacity because the Defendants may not safely and constitutionally place a detainee in every bed. Even when capacity is reported as low as 86%, temporary beds are deployed in an attempt to properly classify, treat, and protect inmates. The desired, and most effective solution, is the reduction of the jail population.

Plaintiffs and the Sheriff are working together to confirm the dimensions of the various housing areas and determine the objective capacity limits established by the FMJS and the Consent Decree. With those calculations in hand, Plaintiffs reasonably believe that the parties can come to

[1] Florida Model Jail Standard (FMJS) 12.05 ("Single beds, cots or bunks shall be spaced not less than thirty-six (36) inches laterally and end-to-end. Sleeping arrangements shall ensure that a minimum distance of six (6) feet is provided between inmate's heads, if a solid barrier is not used."); FMJS 5.08(a)(4) ("Day rooms shall contain a minimum of 35 square feet per prisoner for all cell areas, except disciplinary and administrative confinement.); ACA Standards for Adult Local Detention Facilities 4-ALDF-1A-12 (requiring 35 feet of unencumbered space in dayrooms for all prisoners).

[2] BSO Standard Operating Procedure 7.10.1 Document 886-7.

an agreed operational capacity that is not to be exceeded and agreement that upon approaching that limit, a specified series of actions would ensue, including the discretionary actions of non-parties (discussed at length in Dr. Austin's reports) supported by concrete plans and commitment to allocation of resources sufficient to re-open and adequately staff presently closed or alternative facilities. This process will facilitate the "safe placement and sufficient spacing" contemplated by the Court's Order of August 5, 2015, BSO SOP 7.10.1 and common sense.

On a second and broader front, intended to identify and facilitate the implementation of long-term mechanisms to address the cause of the increasing LOS, Dr. Austin continues to update a plan to reduce the Jail's population and he is preparing a report on his recommendations. The parties have agreed to disseminate the report to all stakeholders and to discuss means to implement his recommendations. In June 2014 Dr. Austin's overall assessment was that the number of people housed in the Broward jails could be reduced by as much as 875 inmates if his recommendations were implemented. Potentially, his updated report will provide a roadmap that will lead to even greater reductions. With the Court's oversight, a period of implementation and progress reporting can lead to fundamental changes in the systems that have led to the substantial and abiding overcrowding that plagues the Jail and poses an unreasonable risk of harm to Plaintiffs.

As to temperature within the housing units, the Sheriff has agreed to provide Plaintiffs with monthly temperature readings for each unit of the facilities for six months, as well as grievance records of temperature complaints.

B. Excessive Use of Force

"Force shall only be used as a last resort to control inmates and only to the degree that is reasonably necessary in self-defense, to prevent escape, to prevent injury to a person or property, to quell a disturbance, or when the inmate exercises physical resistance to a lawful command." July 27, 1994 Stipulation For Entry of Consent Decree. The Due Process Clause protects pretrial

detainees from the use of excessive force that amounts to punishment. *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989). Pretrial detainees cannot be subjected to "the use of excessive force that amounts to punishment," precisely because they "cannot be punished at all." *Kingsley v. Hendrickson*, 576 U.S. —, 135 S. Ct. 2466, 2470–71 (2015).

Mr. Martin previously documented serious problems with Defendants' use of force practices, and their inadequate system for reviewing these incidents, and ineffective disciplining staff for excessive force. *See*[SM2], *e.g.*, Martin V 4-5 (internal reviews are inconsistent, untimely, and incomplete). Based on inmate reports to Plaintiffs' counsel, the frequency and severity of the use of violent force upon inmates in the Broward County jails is unwarranted and unconstitutional. These inmate complaints led to the cooperative review of use of force investigation reports by Plaintiffs' counsel and counsel for the Sheriff. That review can fairly be said to have revealed deficiencies in those investigations and the unwarranted sustaining of the force employed. In the midst of this concern and inquiry, in June, the Supreme Court decided *Kingsley*. Citing *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court reiterated the prohibition on punishment for pretrial detainees, and its rational-relationship-and-proportionality test as applied to double-bunking, to support its conclusion that an objective standard alone applies to the pretrial detainee's excessive force claim. *See Kingsley*, 135 S. Ct. at 2473.

The Supreme Court's confirmation of an objective standard for evaluating the use of force in the jails has led the Sheriff to begin a process of revamping the procedure, responsibilities, content and timeline of both the reporting use of force by staff and the subsequent investigation and evaluation of such use of force. Sheriff's counsel has offered Plaintiffs' counsel the opportunity to provide input and comment as the process evolves. Plaintiffs' counsel requests that the parties be afforded sufficient time to attempt to develop mutually acceptable measures to

reduce the use of force. That said, even unilateral reform by the Sheriff, as well as enhanced video coverage of areas of repeated incidents of use of severe force – such as Intake – is both welcome and necessary. In any event, whether unilateral or mutual reform is undertaken, a period of policy changes, education and training of detention staff, and perhaps proactive education/counseling of detainees at intake though videos or other means, will also prove effective.

C. Mental Health

The Consent Decree requires the Jail to provide mental health care consistent with "applicable federal law" and with the Florida Administrative Code, and the standards from the National Commission of Correctional Health Care (NCCHC). Stipulation for Entry of Consent Decree at 4. During his tenure, the Court's mental health expert Dr. Metzner documented a series of systemic problems in the Jail's mental health care system, particularly its failure to treat the acutely and chronically mentally ill. *See, e.g,* Metzner IV at 17, 31, 36-38, 41-42 (noting ongoing problems with the initiation of psychotropic medications after admission, the mental health sick call process, access problems to psychiatric hospitalization, untimely provider involvement for actively psychotic prisoners, inadequate treatment for prisoners refusing medications, improper therapeutic restraint policies and practices, and a lack of necessary psychosocial interventions for mentally ill prisoners housed in the Jail's mental health housing units). The Due Process Clause requires the Jail to adequately and timely treat pretrial detainees' serious mental health conditions. *See Cook v. Sheriff of Monroe Cnty.*, 402 F.3d 1092, 1115 (11th Cir. 2005) (holding that pretrial detainees "plainly have a Fourteenth Amendment due process right 'to receive medical treatment for illness and injuries, which encompasses a right to psychiatric and mental health care."). The constitutional right to adequate mental health care includes "a right to be protected from self-inflicted injuries, including suicide." *Id.* (quoting *Belcher v. City of Foley*, 30 F.3d 1390, 1396

(11th Cir. 1994). There is also a "clearly established right to have [one's] psychotropic medication continued if discontinuation would amount to grossly inadequate psychiatric care." *Greason v. Kemp*, 891 F.2d 829, 834 (11th Cir. 1990).

During his tenure, the Court's mental health expert Dr. Metzner documented a series of systemic problems in the Jail's mental health care system, particularly its failure to treat the acutely and chronically mentally ill. *See, e.g,* Metzner IV at 17, 31, 36-38, 41-42 (noting ongoing problems with the initiation of psychotropic medications after admission, the mental health sick call process, access problems to psychiatric hospitalization, untimely provider involvement for actively psychotic prisoners, inadequate treatment for prisoners refusing medications, improper therapeutic restraint policies and practices, and a lack of necessary psychosocial interventions for mentally ill prisoners housed in the jail's mental health housing units.) Even without formal discovery, Plaintiffs have gathered substantial evidence showing that many of these systemic problems persist.

Deficient Involuntary Medication Administration

Defendants have failed to establish a procedure by which to involuntary administer medication to seriously ill prisoners who are refusing treatment. This continues to subject Plaintiffs to a risk of serious harm, as admitted by Defendants' contracted medical staff in recent depositions. *See* John G. Martin, M.D. Deposition taken on April 27, 2015, *Edwards v. Armor Corr. Health Servs., Inc.*, No. 14-CV-61577 (S.D. Fla. filed July 9, 2014) ("Martin Dep." at 47:6 – 47:7 (current psychiatrist at the Jail, deposed in a wrongful death suit brought by the family and estate of R.P., who died in 2012 while in custody, explaining that the Jail lacks "the ability [and] the resources" to treat uncooperative mentally ill patients - transcript available to Defendants upon request); Stanley Frankowitz, D.O. Deposition taken on April 28, 2015, *Edwards v. Armor Corr.*

Health Servs., Inc., No. 14-CV-61577 (S.D. Fla. filed July 9, 2014) ("Frankowitz Dep.") at 155:19 (current physician, describing himself as "absolutely handcuffed and paralyzed" for dealing with uncooperative mentally ill patients - transcript available to Defendants upon request); *see also Campbell v. Sikes*, 169 F.3d 1353, 1373 (11th Cir. 1999) (holding evidence that Defendants "knew their treatment was grossly inadequate but proceeded with the treatment anyway" satisfies deliberate indifference to constitute a constitutional violation).

The inability to administer involuntary medication has caused, and will continue to cause, extreme suffering, permanent mental and physical deterioration, and even death, as in the case of R.P. R.P. was a U.S. Army veteran with a two-decade history of schizophrenia who had been in the mental health court system from 1999 to 2010. Frankowitz Dep. at 122:23 – 123:14. Dr. John Martin, the current psychiatrist at the Jail, testified that although R.P. was acutely psychotic, and his need for mental health medications clear, the Jail did not medicate R.P. because he was incapable of giving informed consent. Martin Dep. at 44:7 – 44:12. R.P., therefore, remained unmedicated for his 155 days in the Jail. During this time, he stopped eating and taking care of himself. The 6-foot-2-inch R.P. lost half his body weight, dropping to 120 pounds from 240, and developed gangrene in his foot. As admitted in their depositions, because of systemic deficiencies that continue to limit their ability to sufficiently treat severely mentally ill inmates, Defendants' employees watched R.P. slowly deteriorate, both mentally and physically, until he died in his cell. *See* Martin Dep. at 73:21–73:22; *see also Estelle v. Gamble*, 429 U.S. 97, 103 (1976) ("[A] failure [to treat a patient in Jail] may actually produce physical torture or a lingering death, the evils of most immediate concern to the drafters of the [Eighth] Amendment." (internal citations and quotations omitted)).

Housing schizophrenics, like R.P., at the Broward County Jail is common. *See* Martin Dep. at 72:3-72:9 ("We do have a lot of [schizophrenics]. . . ."). Dr. Martin, the Jail's psychiatrist recognizes that schizophrenics need treatment through anti-psychotic medications, *id.* at 34:19 – 34:25, and that without these medications, schizophrenics can be a serious danger to themselves and others. *Id.* at 35:6 – 35:12; 36:2 – 36:8 (Dr. Martin has seen untreated schizophrenics refuse to eat); *see also id.* at 35:23 – 35:25 ("I know of one [schizophrenic] patient who plucked his eyeballs out because he believed that that was the thing to do.").

Despite knowledge of the existence and risks of this population, Defendants have no appropriate and timely nonemergency involuntary medication process in the Jail and therefore do not adequately treat the severely mentally ill who are noncompliant with their medication. *See* Martin Dep. at 38:17 – 21 ("We don't treat [someone who is refusing their medications]. We don't give an emergency order for somebody who is just refusing. We give only if a person is severely agitated and you know, is potentially a danger to himself or other people. . . . [A]n emergency one time order.").

In fact, the Jail no longer even attempts to get court orders to allow staff to medicate noncompliant patients in the facility. *See* Martin Dep. at 38:3 – 38:10 ("I have tried [to get court orders] a few times, probably I'll say less than ten times in the beginning, in 2010, early 2011. And then stopped doing that, because we were not getting anywhere. We're not getting the orders signed by the judges. It's very rare, maybe on two or three occasions a judge may have written an order saying that the jail should have the patient evaluated and treated accordingly."), 133:22 – 133:25 (again repeating that the last time he tried to get a court order to involuntary medicate was "probably 2011, 2012. Somewhere around that time."), 132:23 – 133:6 ("I'm just telling you from history, from my experience, judges do not – we've tried this before. We have

failed. On numerous occasion. So we've given up. We don't – it's pointless. You know, you can say, you know, just for the sake of documentation, just to satisfy legal requirements that you did do this, no, but I'm trying to be practical and pragmatic; this is not happening. This does not happen." (emphasis added)). This is a longstanding problem at the Jail. Metzner IV at 39 – 40 (noting that securing an order from the court to permit involuntary medication is a necessary last resort for long-term treatment within the facility); Fla. Stat. Ann. § 916.107 ("In a situation other than an emergency situation, the administrator or designee of the facility shall petition the court for an order authorizing necessary and essential treatment for the client."); *Waldrop v. Evans,* 871 F.2d 1030,1036 (11th Cir. 1989) (holding "that prison officials have an obligation to take action or to inform competent authorities once the officials have knowledge of a prisoner's need for medical or psychiatric care").

Instead, Dr. Martin and the Broward County Jail attempt to transfer severely mentally ill out of the Jail by way of court-ordered transfers, including use of the Baker Act, and through involvement in their criminal cases, such as encouraging dismissals or incompetency determinations. *See, e.g.,* Frankowitz Dep. at 101 – 102:10 (describing that when he has noncompliant patients who need medical care, he has discussions with Monique Mullins and "[s]ometimes she may look to see what the patient's charges are. Sometimes somebody's got an open container charge with a $25 bond, she may see if that patient can be released. You can send them to the hospital, relatives can pick them up."); Martin Dep. at 123:12 – 124:6 ("[T]he only option that we have is to send him to the State Hospital where he'll be medicated and he'll be rendered competent, and then he can come back to face his charges and deal with them. . . . [T]here's one more possibility . . . . and [is the] Baker Act . . . ."), 58:15 – 58:21 ("[We make the decision to Baker Act to] indicate to the court that we really think this guy needs to be in a – he

needs treatment. We cannot treat him here." (emphasis added)). *But see* Metzner IV at 9 – 10 ("Inmates charged with 'violent felonies' are not eligible to be hospitalized via the Baker Act. In addition, the receiving institutions have the right not to admit inmates who they cannot handle from a safety perspective. . . . During 2005 there were a total of 56 inmates (4 – 5 inmates per month) who needed involuntary hospitalization but were not eligible for the Baker Act related to their felony charge.").

If removing noncompliant and severely mentally ill patients from the facility is unsuccessful, these patients remain untreated in the Jail and are at risk of serious injury or death. *See* Martin Dep. at 67:10 – 67:20 (Dr. Martin describes what happened when the Baker Act attempt was unsuccessful for R.P.: "He's back in the facility. I mean I did not – just because [I] saw him once or saw him two, three times, doesn't mean that I'm taking care of him, because he's not amendable to treatment and care. He's being monitored by me and several others. That's all I can say. I mean I'm not taking care of him really. I mean, I'm not prescribing any medication. . . ."), 68:7 – 68:8 ("[H]e's not getting any treatment from us."), 68:11- 68:18 ("[H]e's not in a position to give informed consent for treatment. So we cannot treat him. We can monitor him, but we cannot treat him."), 128:4 ("[W]e monitor and observe."), 132:7 – 132:8 ("It is the responsibility of the court system to take care of this patient.").

Today, according to Defendants' contracted healthcare provider, there are at least 30 – 40 people who are not being treated by medical and mental health staff because they are too ill to give informed consent. Martin Dep. at 136:7 – 136:9 ("[E]ven today, we probably have 30 to 40 people who . . . don't take medication. . . ."); Frankowitz Dep. at 39:16 – 41, 62:17- 63:2 (noting it is "very common" to have an unmedicated schizophrenics refuse medical treatment). Although, since at least the early 2000s, Defendants have known that they have lacked an appropriate and

timely nonemergency involuntary medication process, they still have not created a streamlined process for nonemergency involuntary medication. *See, e.g.,* Metzner III at 9 ("BSO currently [does] not have a streamlined process in place for initiating nonemergency involuntary medications."). The same is true of their longstanding failure to timely hospitalize acutely and chronically mentally ill prisoners in need of inpatient care. Metzner IV at 17 ("Access problems for inpatient hospitalizations for inmates who meet criteria for the Baker Act but have violent felony charges. Such inmates essentially do not have access to inpatient psychiatric hospitalization unless they have been found incompetent to proceed. This generally results in inadequate treatment being provided."); Metzner III at 9 ("Staff did contact public defenders about most of these inmates in an attempt to have competency assessments initiated. Many of these inmates did not qualify for transfer to a state hospital under the Baker Act due to the nature of their alleged crimes. There were generally 5 – 8 inmates at any given time in the BSO, who were awaiting transfer to the state hospital after having been found incompetent to proceed.").

Defendants' current staff, including Dr. Martin, is extremely concerned for their patients' wellbeing and believes that Broward County Jail must implement serious changes. *See* Martin Dep. at 137:8 – 137:13 ("[T]hey are people who need help. They need to be treated. . . . Get a general master, have regular hearings, you know, on a regular basis. The system needs to be corrected." (emphasis added)). Dr. Martin recommended changes to the present system that parallel the unimplemented recommendations that Dr. Metzner made in early 2006. *Compare* Martin Dep. at 134:18 – 135:14 (describing the system at the State Hospital that allows for involuntary treatment: "[There is] a general master who comes to the State Hospital. [There is] a hearing, you know, due process. [There is a] physician [that sits] there explaining to the general master that, you know, this person needs to be on this medication. The patient is sitting there, you

know, probably talking to himself, et cetera. It's obvious to the . . . general master too, but the person also has his public defender there. His lawyer at his side to give informed consent. And [staff can] proceed and . . . medicate them.") *with* Metzner IV at 39 – 40 ("It is my recommendation that the policy be revised to be consistent with the state statute that does address the involuntary medication of mentally ill persons committed to a state forensic facility. As stated in February 24, 2006 report written by plaintiffs' attorneys, the statute provides that involuntary treatment may be administered where the treatment is "deemed necessary by the client's multidisciplinary treatment team . . . for the appropriate care of the client."). Plaintiffs agree, and believe that with the Court's oversight, a period of implementation and progress reporting can lead to fundamental changes in the area of involuntary medication administration.

Inadequate Suicide and Self-Harm Policies and Practices

Suicide prevention efforts, identified by Dr. Metzner as "need[ing] to be expanded," remain inadequate as recent suicide rates demonstrate. Metzner III at 23; *see also Cook v. Sheriff of Monroe County*, 402 F.3d 1092, 1115 (11th Cir. 2005) (Defendants' deliberate indifference to inmate suicidal behavior, particularly their disregard of a "strong likelihood" that self-injurious behavior will occur at the Jail, violates the Constitution); *Edwards v. Gilbert*, 867 F.2d 1271, 1274-75 (11th Cir. 1989) (clearly established right to be protected from self-inflicted injuries).

In 2014, a total of four inmates committed suicide in the North Broward Bureau, Main Jail, and Conte facilities. *See* Autopsy of J.V., Broward County Medical Examiner, March 9, 2014 ("Autopsy of J.V."); Autopsy of W.P., Broward County Medical Examiner, July 9, 2014 ("Autopsy of W.P."); Autopsy of R.L., Broward County Medical Examiner, August 28, 2014 ("Autopsy of R.L."); Autopsy of N.W., Broward County Medical Examiner, September 8, 2014 ("Autopsy of N.W.")(available to Defendants upon request). On March 8, 2014, a 48-year old

male committed suicide in the Main facility. Autopsy of J.V. at 8. Although he was initially placed at the North Broward facility due to the need for mental health treatment, and although he described suicidal ideations to another inmate when he was moved to the Main facility, he was still housed alone without being placed on suicide watch. *Id.* at 9. This inmate was found in a seated position, suspended from a bed sheet that had been looped over a rung on the top bunk bed with the other end tied in a noose around his neck. *Id.* On July 7, 2014, a 53-year old male, who had a history of multiple suicidal ideations and attempts and had been hospitalized via the Baker Act several times in the past, was found hanging by a bed sheet from his cell's top bed bunk in the Conte facility. Autopsy of W.P. at 9 – 10. Since entering the facility, the inmate had state he wanted to kill himself and he had been on suicide watch, however, at the time he committed suicide he was "no longer being monitored" and instead was in a regular cell with five other inmates. *Id.* On August 27, 2014, a 44-year old male was found hanging with a bed sheet around his neck in his shared cell in the Conte facility. Autopsy of R.L. at 8. Prior to his suicide, he had complained of depression and anger, and had described two prior suicidal ideations. *Id.* at 10. On September 7, 2014, a 19-year old female, with a history of bipolar disorder, was found hanging in her administrative confinement cell, where she was housed alone. Autopsy of N.W. at 9 - 10. These four individuals had histories of mental health issues, suicide ideations, and suicidal attempts, however, in each case suicide precautions were nonexistent.

Four suicides in one year is a shocking and abysmal number, even for a facility with a documented history of suicide attempts and completions. *See* Metzner III at 17 ("From January through October 2003, it was reported that there were 30 suicide attempts and one suicide . . . ."); Metzner II at 11 ("There were two suicides during 2001."). This means that the 2014 average

annual suicide rate is 88.8 per 100,000.[3] This annual suicide rate is almost double the average annual suicide rate in America's jails (46 per 100,000 in 2013). *See* BJS Jail Mortality Report at 1. It is also striking to note that in 2014 there were a total of eight suicides in *all* of the facilities under the custody and control of the Florida Department of Corrections, around 49 major correctional institutions and numerous satellite facilities across the state[EB3] holding around 101,000 inmates. *See* Florida Department of Corrections, *Inmate Mortality*, *available at* http://www.dc.state.fl.us/pub/mortality/.

The Sheriff and Plaintiffs have agreed to share information and to discuss possible remedies (potentially requiring resources from the County) that could be implemented to address the systemic problems in the Jail's mental health care system. The Sheriff and Plaintiffs also agree that completion of Dr. Austin's report, and implementation of his population reduction remedies, could also have a significant impact on the mental health care system at the Jail. Dr. Austin in his draft report found that a huge number of chronically mentally ill prisoners deemed incompetent to proceed (ITP) in their criminal cases remained in the Jail for weeks and months while awaiting transfer to a state hospital. Dr. Austin made recommendations to reduce this significant population (124 prisoners on the date Dr. Austin studied), and to reduce the number of prisoners arrested under the Baker Act as dangerous to self/others and housed at the Jail. A reduction in the mentally ill population, coupled with reforms to the mental health care system that the Sheriff and Plaintiffs

[3] The Bureau of Justice Statistics specifically instructs how to calculate such mortality rates: "The mortality rate in local jails is calculated as the number of deaths per year divided by the average daily jail inmate population (ADP) multiplied by 100,000." BJS Mortality in Jails and Local Jails and State Prisons, 2000-2013, at 31, *available at* http://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf ("BJS Jail Mortality Report"). Expressed as a formula, where R is the mortality rate, d is the number of deaths per year, and p is the average daily population of the jail: R = (d/p) x 100,000. Therefore, with four suicides and an average daily population of 4,503 at the facilities, the suicide rate is 88.8 per 100,000.

can agree to after negotiations, can resolve or significantly reduce the remaining mental health issues in dispute.

D. Substantial Burden Upon Religious Exercise

The Consent Decree requires that Defendants "not substantially burden an inmate's exercise of religion even if the burden results from a rule of general applicability." Consent Decree at pg. 5. The Consent Decree further requires the Jail operate its facilities in a manner consistent with "applicable federal law." *Id.* at 4. Defendants are in violation of the Consent Decree and the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000c (RLUIPA) because they do not timely provide kosher meals to all inmates with a sincere religious belief for keeping kosher. RLUIPA prohibits policies that substantially burden religious exercise except where a policy: "1) is in furtherance of a compelling governmental interest: and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000CC-1(A). Once a plaintiff proves that a challenged practice substantially burdens religious exercise, the burden shifts to the defendants to satisfy RLUIPA's strict scrutiny inquiry. 42 U.S.C. § 2000cc-2(b). Plaintiffs have documented Defendants' practice of orthodoxy testing, a process of interviews and follow-up investigation that focuses on the inmate's knowledge of religious dogma, and the motivation of the Defendants to delay and deny requests for kosher meals in order to save money. While RLUIPA "does not preclude inquiry into the sincerity of a prisoner's professed religiosity, such an inquiry must be "handled with a light touch" and limited "almost exclusively to a credibility assessment." *United States v. Secretary, Florida Department of Corrections, et al*., 2013 WL 6697786 (S.D.Fla. 2013) (citing *Cutter v. Wilkinson, 544 U.S. 709 at* 725 n. 13 (2005)); *Moussazadeh v. Texas Department of Criminal Justice,* 703 F.3d 781 at 792 (5th Cir. 2012). Additionally, as in *Secretary, Florida Department of Corrections, infra,* Plaintiffs have

documented Defendants' practice of impermissibly excluding prisoners from a kosher diet based on clergy interpretations of religious doctrine or on inmates' knowledge of religious laws and doctrine. Commendably, when this issue was brought to the attention of Sheriff's counsel in May of this year, Sheriff's counsel initiated a process of procedure and policy review within the Department of Detention to revise the complained-of practices, which process, as well as impermissible practices, continue. As with the other conditions of confinement issues raised in this Response, Plaintiffs believe that the joint efforts of the parties through a collaborative process can narrow, if not resolve the issues before the Court.

Conclusion

Even without the benefit of formal discovery, and establishing the need for continued oversight, Plaintiffs have presented substantial basis for the Court to address unconstitutional and hazardous conditions at the Broward County Jail regarding mental health care, violence/use of force, and population/crowding. Broward County jail prisoners remain at risk of serious harm and death. Plaintiffs respectfully ask that the Court afford the parties a reasonable period of time to continue their ongoing discussions and collaborations. For areas of agreement between the Parties, Plaintiffs request that a period of implementation and progress reporting be incorporated into the Consent Decree pending final resolution of this case by agreement or trial.

Respectfully submitted this 31st day of August, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, and the foregoing document is being served on this 31st day of August on all counsel of record identified in the attached service list in the manner specified via transmission of Notices or Electronic Filing generated by CM/ECF. Parties may access this filing through the court's CM/ECF System.

Date: August 31, 2015

s/ Christopher C. Cloney
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