UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONSENT DECREE MOTIONS

----------X

JAMES BENJAMIN, et al.,
Plaintiffs,

-against-

75 Civ. 3073 (MEL)

BENJAMIN J. MALCOLM, et al.,
Defendants.

----------X

BRIEF BANK

ERNESTO MALDONADO, et al.,
Plaintiffs,

-against-

76 Civ. 2854 (MEL)

WILLIAM CIUROS, JR., et al.,
Defendants.

----------X

IOLA FORTS, et al.,
Plaintiffs,

-against-

76 Civ. 101 (MEL)

BENJAMIN J. MALCOLM, et al.,
Defendants.

----------X

GUY ZEPTH AMBROSE, et al.,
Plaintiffs,

-against-

76 Civ. 190 (MEL)

BENJAMIN J. MALCOLM, et al.,
Defendants.

----------X

DETAINEES OF THE BROOKLYN HOUSE
OF DETENTION FOR MEN,
Plaintiffs,

-against-

79 Civ. 4913 (MEL)

BENJAMIN J. MALCOLM, et al.,
Defendants.

----------X

DETAINEES OF THE QUEENS HOUSE
OF DETENTION FOR MEN,
Plaintiffs,

-against-

79 Civ. 4914 (MEL)

BENJAMIN J. MALCOLM, et al.,
Defendants.

----------X

PLAINTIFFS' MEMORANDUM CONCERNING
CONSENT JUDGMENT SUPERVISION

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From the desk of:

TED KATZ

TO:

Ed-

This is the brief that we submitted to Judge Lasker on "disengagement."

Ted

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PLAINTIFFS' MEMORANDUM CONCERNING
CONSENT JUDGMENT SUPERVISION

INTRODUCTION

At the last conference with the Court, attended by Kenneth Schoen, the staff of the Office of Compliance Consultants ("OCC"), plaintiffs' and defendants' counsel and officials of the Department of Correction ("DOC"), the subject of disengagement of the monitoring process over the Partial Final Judgments By Consent (hereinafter "Consent Judgments") was raised. Among the questions posed by defendants, OCC and the Court were what standards should apply for recognizing or judging "compliance" with the Consent Judgments and what are the appropriate circumstances and methods for disengagement, winding down or terminating the monitoring and court enforcement mechanisms. This memorandum is submitted by plaintiffs in response to the Court's request for submissions by the parties setting forth their respective views on these issues.

STATEMENT OF FACTS

On several occasions in the past year, either in Court or at meetings of the parties with OCC, defendants have expressed impatience with the ongoing monitoring process and their interest in "closure" of OCC's and/or the Court's role over all or parts of the Consent Judgments. Plaintiffs do

not take issue with the understandable desire of all involved to develop and clarify a general approach for OCC and the Court in dealing with compliance, particularly as the process of enforcement progresses.*

Nevertheless, plaintiffs believe that the value of this exercise will be realized only in the distant future; that is, it should lead to a better understanding of the Court's views about circumstances that have yet to occur. Notwithstanding the defendants' inclination to be relieved of outside oversight, plaintiffs strongly believe that any action on closure in the near term would be totally premature. Our perspective on the issue of closure is dictated by the scope and complexity of the consent decrees, the still existing substantial compliance problems, the sheer size of the Department of Correction and the record of defendants' compliance efforts since the Consent Judgments were entered, both before and after OCC came into existence.

Pre-OCC History

The Consent Judgments came about following years of piecemeal litigation challenging unconstitutional conditions

*As set forth, infra, we believe that OCC's, versus the Court's, role are distinct issues.

in the City jails on an institution by institution basis. That litigation began in 1970, with the case of Rhem v. Malcolm, 70 Civ. 3962 (S.D.N.Y.). Indeed, in three of these cases -- Rhem, Detainees of the Queens House of Detention v. Malcolm, 73 C 1364 (E.D.N.Y.) and Benjamin v. Malcolm, 73 Civ. 3073 (S.D.N.Y.) -- plenary trials were held which documented vividly the dismal conditions that characterized New York City's jails.* See Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y. 1974), aff'd, 507 F.2d 333 (2d Cir. 1974), and plaintiffs' Post Trial Memoranda in Queens and Benjamin, passim.

In January, 1978, before the Benjamin and Queens cases were decided, the new Koch administration indicated its willingness to negotiate a settlement of the many issues raised in the litigation about the City's pre-trial detention system. The administration thus recognized, at least in principle, the practicality and basic fairness of providing uniformly to all detainees in the City the rights

*In Rhem, the Court determined a plethora of conditions to be unconstitutional. In the other cases, preliminary relief was granted on many issues that were severed and tried separately.

to which they are entitled under law. With this premise in mind, the parties agreed to suspend litigation and requested that the courts defer any action in the pending cases.

Following almost a year of complex negotiations, a broad settlement was reached in November, 1978, addressing numerous issues in all of the existing lawsuits. The agreements were approved and entered as Partial Final Judgments By Consent by this Court in Benjamin v. Malcolm and Ambrose v. Malcolm, and by other courts in the remaining four cases in March through April, 1979. Thereafter, in the interests of uniformity and judicial economy, the Consent Judgments entered by other courts were transferred to this Court for enforcement purposes. See Orders by Consent for Severance and Transfer, Forts v. Malcolm, 76 Civ. 101, July 16, 1979; Maldonado v. Ciuros, 76 Civ. 2854, September, 1979; Detainees of the Queens House of Detention for Men v. Malcolm, 73 C 1364, 79 Civ. 4913, July, 1979; Detainees of the Brooklyn House of Detention for Men v. Malcolm, 73 C 261, 79 Civ. 4914, July, 1979.

Since their entry, defendants have consistently maintained that they are able and willing to comply with the provisions of the Consent Judgments and there have been only a few issues on which modification was sought. Indeed, upon the parties' request to enter the Maldonado Consent Judgment, Judge Pierce (then a district court judge) inquired as to whether the Supreme Court's decision in Bell v. Wolfish, 440 U.S. 521 (1979), undermined the legal basis for the agreements. Defendants, in a memorandum submitted jointly with plaintiffs, not only urged entry of the agreements as a court order, but expressly stated:

> Defendants are offering no defenses to the challenged practices which have been resolved by the [consent agreements]. The judgment of the City's correctional officials, to which as the Supreme Court advised in Wolfish, courts should ordinarily defer (citation omitted), is that they are able and willing to accomodate plaintiffs' constitutional interest without sacrificing their own legitimate objectives . . . . The competing considerations of plaintiffs' constitutional rights and the needs to preserve order and security have been accomodated by negotiation rather than litigation.
>
> Maldonado v. Ciuros, 76 Civ. 2854, Joint Memorandum of Law in Support of the

Parties' Request for Entry of the Consent Judgment, at 10, 12 (emphasis supplied).

Notwithstanding defendants' professed commitment to execute the provisions of the Consent Judgments, little progress was made toward fulfilling their objectives in the years following their entry. In the period between the spring of 1979 and summer of 1982, plaintiffs assumed primary responsibility for monitoring defendants' compliance with the Consent Decrees. Our efforts disclosed substantial, systemic compliance failures in numerous areas that were attributable to defendants and their employees at all levels of the City and Department of Correction bureaucracies.

Throughout 1979 and 1980, many informal attempts were made to resolve compliance problems, to no avail. See Affidavit of Michael Ciaffa in Support of Motion to Hold Defendants In Contempt and For Further Relief ("Ciaffa Affidavit"), dated June 21, 1981, ¶¶ 5-11, and Exhibit 1 attached thereto (letter to the Court from Michael Ciaffa, dated June 6, 1980). Following more intense, up-to-date monitoring efforts by plaintiffs in the summer of 1980, a

detailed Notice of Violations of Consent Judgments (Exhibit 5 to Ciaffa Affidavit), which set forth 65 violations of provisions of the Consent Judgments, was served on defendants in September, 1980. Subsequently, a series of formal meetings was held with Department of Correction officials and Board of Correction representatives in a further attempt to secure a meaningful remedy for defendants' non-compliance. These meetings failed to produce a comprehensive solution to the widespread decree violations. See Ciaffa Affidavit, ¶¶ 11-14.

For the next eight months plaintiffs again engaged in a massive effort to monitor defendants' compliance with the decrees. In June, 1981, supported by expert reports on food service and environmental health, defendants' own documents and admissions, and more than 600 inmate declarations and complaints, plaintiffs filed a motion seeking to hold defendants in contempt as well as the imposition of conditional fines and appointment of an independent monitor. See Ciaffa Affidavit and accompanying affidavits, exhibits, and Memorandum of Law In Support of Plaintiffs' Motion for A Judgment of Civil Contempt and Further Relief, dated July 1, 1981.

The violations addressed in the motion for contempt were pervasive and related to Consent Decree requirements that defendants: (1) maintain environmental health conditions in a safe and sanitary manner; (2) provide food which is nutritious, and properly prepared and served; (3) treat detainees' personal property with respect during cell searches; (4) classify detainees and allow some detainees unescorted movement; (5) provide two hours of meaningful law library access per day; (6) cease conducting routine body cavity inspections without cause; (7) provide basic personal hygiene items; (8) supply clean, undamaged linens and bedding; (9) institute a laundry service for detainees' personal clothing; (10) limit daytime lock-in to two hours; (11) follow certain due process procedures when property is seized or when an inmate is classified as a security risk; (12) undertake noise reducing measures including the installation of radio outlets in inmates' cells; (13) provide detainees in punitive segregation with daily showers, medical care and law library access under the same terms as provided to detainees in general population; (14) provide sufficient numbers of telephones with sound and

privacy shields; and (15) distribute notices to new inmates and post booklets in housing areas and other common areas, apprising detainees of their rights.

The violations addressed in the motion not only post-dated the signing of the Consent Judgments by more than two years; many of them had been documented at the Benjamin and Queens trials in 1975 and 1976. Indeed, the Court found that there was a need to develop a rational classification system and provide a safe and healthful environment in its 1974 Rhem decision. 371 F. Supp. at 607-10, 617-20, 624-25, 627-28.

In responding to the contempt motion, defendants did not deny the vast majority of violations documented by plaintiffs. Rather, they chose to rely on claims of good faith, proposed future measures and made vague, unresponsive assertions as to what actually was occurring with respect to certain specific issues. See Affidavit In Opposition of Benjamin Ward, dated October 2, 1981. Of some relevance to the instant submission was Commissioner Ward's

acknowledgement that

> reform of a large organization such as the Department of Correction takes time.... Our experience over the last three years in implementing the consent judgments has shown that some items which appeared to be relatively simple to implement have in fact turned out otherwise. Id., ¶ 7.

Despite the self-acknowledged difficulty in achieving compliance, defendants opposed the court appointment of a master as a remedial measure. See Defendants' Memorandum of Law With Respect To Appointment of A Master, dated December 4, 1981, and plaintiffs' response (Letter of Michael Ciaffa to the Court, dated December 16, 1981). However, as a result of informal negotiations between plaintiffs and defendants, an agreement was reached on the appointment of a "neutral compliance consultant," a mechanism which defendants perceived to be less intrusive than a formal mastership. This agreement led to the creation of the Office of Compliance Consultants ("OCC"), headed by Kenneth Schoen but staffed in part by employees of the Department of Correction. See Stipulation and Order, dated June 18, 1982.

In agreeing to the creation of OCC, plaintiffs also agreed to adjourn their contempt motion which held out the possibility of the imposition of substantial sanctions against defendants, including conditional fines. Id., ¶ 9.

Post-OCC History

The Stipulation and Order that established OCC gave it the authority to inspect Department facilities and records, interview Department staff and members of the plaintiff class and to meet with the parties either jointly or apart. The purpose of this authority was to allow OCC to monitor and assess defendants' compliance with the decrees, respond to allegations of non-compliance, make recommendations as to appropriate remedial action, including modification of the decrees, and to resolve informally disputes between the parties. In general, OCC was to play an advisory, mediating role rather than one which was supervisory or quasi-judicial.

The first OCC Stipulation and Order contemplated a minimum term of eighteen months. Since the initial eighteen-month term, the Stipulation has been twice renewed for terms of eighteen and twelve months, respectively. See

Stipulations and Orders of February 3, 1984, and June 29, 1985. OCC has submitted nine progress reports to the Court since its inception almost three and one-half years ago.

There is no question that the OCC staff has worked diligently and proved to be invaluable to the compliance/enforcement process. Nevertheless, even OCC has observed in virtually all of its reports that progress towards resolving issues and achieving compliance has been slower than hoped for. Every issue OCC has addressed has turned out to have compliance problems, to a greater or lesser degree.* The process by which the parties and OCC collectively respond to OCC's findings and attempt to reach a consensus on solutions has been constructive but time-consuming and slow.

Of the contempt issues thus far addressed by OCC, none has been completely resolved. The law library and lock-in/lock-out issues are on the verge of resolution, but these were the first major issues that OCC monitored, beginning

*The Court itself witnessed and documented serious compliance problems at HDM and AMKC in the 1983 proceeding in which defendants sought to increase the court-established population caps at those facilities. Among the subjects where substantial compliance problems existed were sanitation, fire safety, laundry service, personal hygiene items, food service and law library access. See Benjamin v. Malcolm, 564 F. Supp. 668 (S.D.N.Y. 1983).

in August, 1982. Law library was a complex issue due to both the compliance violations that existed and the defendants' desire to modify the order to provide services on a five rather than seven-day basis. Nevertheless, even with OCC and the parties' attention intensely focused on this issue, it took approximately two years for OCC to be able to report general compliance by the defendants and to recommend a revision of the order. Revising the order required the consideration of numerous operational issues and has consumed nearly one year.

OCC's preliminary report on Movement and Classification was issued in April, 1983. While, in recent months, there has been real progress in this area, numerous issues remain to be resolved and official implementation and monitoring have yet to commence. Similarly, in the past few months there has been progress in the area of due process -- an area on which OCC issued its preliminary report in May, 1984. However, as reflected in OCC's Ninth Progress Report, unresolved issues remain and monitoring is just beginning.

Other issues on which OCC has issued preliminary reports include telephones, communal religious services, noise, confiscation of property and cell searches. With the

exception of communal religious services (a non-contempt issue), there has been only superficial discussion of OCC's reports and no real agreement on remedial measures.

Among the contempt items yet to be addressed in a systemic manner are environmental health, food service, linens and bedding, personal hygiene, punitive segregation conditions and laundry facilities. The environmental and food service issues are mammoth and were the focus of considerable attention in the initial contempt papers and in the 1983 hearing on defendants' motion to modify the population caps.

At the time that the parties initiated the OCC mechanism, it was agreed that once the contempt issues had been addressed it would be beneficial to employ OCC's expertise on other Consent Decree issues as well as unresolved issues in the litigation. To some extent, OCC has already devoted some attention to non-contempt issues, either because it has been requested to do so by the Court or parties in response to inmate complaints, or because of the overlap of these issues with provisions addressed in the contempt motion. For example, as a result of defendants' request to modify the lock-in/lock-out provisions of the.

decrees, OCC undertook a rather extensive survey of the related recreation issue. Formal agreement on its findings and recommendations was never achieved. Other non-contempt issues that have required OCC attention include significant family events, access to services and programs for special housing inmates and, as noted earlier, communal religious services.

In sum, based upon the record to date one cannot conclude that defendants are, or in the near future will be, in substantial compliance with the overall provisions of the Consent Decrees. Further, although there is some reason to believe that higher Department officials are now committed to achieving compliance and developing an internal means of maintaining it, it is impossible to conclude that this aspiration has become a reality.

APPLICABLE LEGAL PRINCIPLES

In considering the Court's future role in this litigation, it is important to distinguish the substantive requirements of the Consent Decrees, which constitute permanent injunctions intended to secure humane conditions of confinement, from the administrative or supervisory requirement of "continuing jurisdiction." The Court's and OCC's supervision is intended to assist defendants in their efforts to bring the system into compliance. While the duration of this supervision -- which in the literature and in many cases is often (and erroneously) defined as "continuing jurisdiction" -- is contingent upon a finding of substantial compliance and the probability of future compliance, see this Memorandum, Part (A), infra, the substantive orders themselves will remain in effect unless modified or vacated pursuant to Rule 60(b), F.R.Civ.P. See this Memorandum, Part (B), infra.

A. THE COURT SHOULD CONTINUE ITS SUPERVISION OF THE COMPLIANCE PROCESS UNTIL THERE IS NOT ONLY SUSTAINED, SUBSTANTIAL COMPLIANCE WITH THE DECREES, BUT ALSO SUFFICIENT GUARANTEES THAT COMPLIANCE WILL ENDURE.

Inherent in the judicial power to issue orders is the power to enforce them. Root v. Woolworth, 150 U.S. 401, 410-411 (1893) ("It is well settled that a court of equity

has jurisdiction to carry into effect its own orders, decrees and judgments...."); Central of Georgia Railroad Co. v. United States, 410 F. Supp. 354, 358 (D.D.C.), aff'd sub. nom. I.C.C. v. Central of Georgia Railroad Co., 429 U.S. 968 (1976). In supervising compliance in a class action, the district court has a duty to class members "to see that any settlement it approves is completed...." In Re Corrugated Container Corp, 752 F.2d 137, 141 (5th Cir. 1985).

Court supervision over compliance with, or implementation of, injunctive orders in institutional reform litigation, described most often in terms of "retention of jurisdiction,"* is intended to ensure that

> the court's further role is not dependent on initiation of a new action or remand from an appellate court and that the same judge stays in charge of the case. While the need for such retention varies from case to case, judicial willingness to undertake it is essential to the successful implementation of many remedies.
>
> A variety of specific objectives underlie retaining jurisdiction: revision of the remedy, consideration of the adequacy of plans and reports required of the defendant, entry of

*Because "retention of jurisdiction" in this context can be easily confused with the related question, discussed in Part (B), infra, of the viability of the court's injunctive orders, we will refer as often as possible to "continuing supervision" to refer to this procedural device.

> additional orders, and clarification of the "meaning, scope or application of any term" of the order. Retention of jurisdiction also facilitates enforcement of the order by establishing the court's readiness to use more drastic methods if necessary to achieve its ends. It allows the court to react to noncompliance without a party making a contempt motion. More importantly, it allows the court to anticipate non-compliance and to reduce its likelihood by threatening a response to it.
>
> Special Project: The Remedial Process in Institutional Reform Litigation, 78 Colum. L. Rev. 783, 816 (1978) (footnotes omitted).

See also Finney v. Arkansas Board of Correction, 505 F.2d 194, 199-200 (8th Cir. 1974), rev'g in part Holt v. Hutto, 363 F. Supp. 194 (E.D. Ark. 1973) (continuation of unconstitutional conditions requires retention of jurisdiction); Battle v. Anderson, 708 F.2d 1523 (10th Cir. 1983), cert. dismissed, ____U.S.____, 104 S. Ct. 1019 (1984).

The Supreme Court has required district courts to "retain jurisdiction" to oversee compliance with school desegregation orders, Green v. County School Board, 391 U.S. 430, 439, (1968) ("until it is clear that state-imposed segregation has been completely removed"); Brown v. Board of Ed., 349 U.S. 294, 301 (1954) (district court to retain

jurisdiction during "period of transition" to integrated schools).*

Unlike those cases where a single governmental action or the achievement of a fixed percentage of minority workers is the benchmark against which compliance can be measured,** institutional reform cases require "substantial and perhaps indeterminate periods" of court supervision over compliance. Benjamin v. Malcolm, 564 F. Supp. 668, 686 (S.D.N.Y. 1983), citing Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1284 (1976). To achieve compliance, thorough reform of institutional operations is frequently required so that the causes and consequences of the initial wrong can be eliminated. Thus, a district court may be required to eliminate segregation "root and branch," Green v. County School Board, 391 U.S. at 438; to secure

*Brown is still an open case, and in the most recent reported decision, 84 F.R.D. 383 (D.Kan. 1979), the District Court granted Linda Brown's children intervenor status.

**For example, in reapportionment and employment discrimination cases, a court will withdraw its supervision over compliance when the goal of the remedial order has been accomplished. See, e.g., Moss v. Burkhart, 207 F. Supp. 885, 899 (W.D. Okla. 1962), appeal dism. sub. nom. Price v. Moss, 374 U.S. 103 (1963) (reapportionment case; jurisdiction retained for 11 months until legislature acts in conformity with decree); U.S.A. v. Bricklayers Local No. 1, 5 EPD 7305 (W.D. Tenn. 1972) (order in effect for 3 years by which time increase in number of minorities in trade to be accomplished).

compliance with a comprehensive detailed consent decree providing protection from harm for hundreds of mentally retarded persons, New York State Ass'n for Retarded Children v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975); or to oversee establishment of sufficient safeguards to ensure maintenance of safe, clean and humane conditions of confinement in a massive metropolitan detention system, as in this case. In these situations, it is impossible to state with any specificity in advance when, if ever, the job of the district court is done.*

The Supreme Court has not yet articulated a specific standard by which a district court can evaluate when its active supervision over implementation of a complex remedial order should end, Keyes v. School District No. 1, Denver, Colo., 609 F. Supp. 1491, 1516 (D. Col. 1985); however, there is evolving in the lower courts a small body of case law which provides for maintaining court involvement in a manner that accomodates the legitimate needs of local

*Moreover, in cases involving the totality of prison conditions and the desegregation of school systems, court supervision over compliance is rarely, if ever, withdrawn on an issue-by-issue basis. By contrast, a master or compliance monitor may cease or suspend activity with respect to a single discrete issue when the question of compliance in that area is no longer in dispute. See, e.g., Duran v. Anaya, C.A. No. 77-721-JB (D.N.M. June 3, 1983) (order of reference, ¶ E) [attached hereto as Exhibit 1].

government entities for a restoration of their bureaucratic autonomy with the plaintiff class' need to protect its hard-fought gains. See, e.g, Morgan v. McDonough, 554 F. Supp. 169 (D. Mass. 1982) (Boston school case).

Eleven years after litigation was commenced challenging the conditions of confinement in the Oklahoma prison system, and after affirming a finding that present conditions comported with constitutional requirements, the 10th Circuit Court of Appeals held, in reversing the district court, that it "must exercise supervisory power over the matter until it can say with assurance that the unconstitutional practices have been discontinued and that there is no reasonable expectation that [they] will recur." Battle v. Anderson, 708 F.2d at 1538.* The Court of Appeals observed that, in litigation where reform of governmental systems is necessary to remove the "threat to constitutional values posed by the manner of operation of the institution, ... the court's remedies must be designed to achieve lasting institutional change [and] typically take the form of prospective injunctions supported by continuing oversight to assure

*For a discussion of events in this case subsequent to the decision of the Court of Appeals, see this Memorandum, infra, at 40.

compliance.... 'The court's jurisdiction will last as long as the threat persists.'" Id., citing Fiss, Foreward: The Forms of Justice, 93 Harv.L.Rev. 1 (1979).* See also Burks v. Teasdale, 603 F.2d 59, 62 (8th Cir. 1979) ("jurisdiction should be retained until the district court is satisfied that unconstitutionalities in the Penitentiary have been eliminated or until their elimination within a relatively short future period is assured"); Jones v. Wittenberg, 330 F. Supp. 707, 721 (N.D. Ohio 1971) aff'd sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) (court pledges to supervise implementation and to continue "for a sufficient length of time thereafter to make it reasonably certain that the changes of methods and practices required will not be

*In so characterizing structural reform litigation, the Court of Appeals cited the growing body of commentary in which these kinds of cases are discussed. In addition to Prof. Fiss' article, see Resnik, Managerial Judges, 96 Harv. L. Rev. 376 (1982); Chayes, Foreward, Public Interest Law Litigation and the Burger Court, 96 Harv. L. Rev. 4 (1982); Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Special Project, The Remedial Process in Institutional Reform Litigation, 78 Colum. L. Rev. 784 (1978); Note, Complex Enforcement: Unconstitutional Prison Conditions, 94 Harv. L. Rev. 626 (1981); Note, Implementation Problems in Institutional Reform Litigation, 91 Harv. L. Rev. 428 (1977); Note, The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change, 84 Yale L.J. 1338 (1975).

abandoned, forgotten or neglected but have become permanently established"); Finney v. Mabry, 546 F. Supp. 628, 630, 641 (E.D. Ark. 1982) (thirteen years after filing of complaint, Arkansas system found in compliance with existing orders and court dismisses case after plaintiffs agree that defendants have been in compliance during monitoring period "long enough that continued policing by the Court is not necessary"; defendants' internal monitoring reports to be prepared periodically and made public);* Collins v. Schoonfield** (court supervision over compliance with orders governing conditions of confinement in Baltimore jails terminated at joint suggestion of plaintiffs' and defendants' counsel based on their agreement that defendants were in compliance and defendants' commitment to adhere to orders as a matter of jail policy).

*The dismissal of the Finney case occurred eight years after the Eighth Circuit reversed an earlier, premature termination of supervision. See 505 F.2d 194 (8th Cir. 1974). From conversations with plaintiffs' counsel, it appears that the 1983 decision of the district court may also have been premature since new litigation has been commenced challenging conditions in the Arkansas system alleging, inter alia, numerous violations of the orders entered in the Finney case.

**The conclusion of the Collins case is unreported. A description of the events leading to termination of court supervision is found in Harris and Spiller, After Decision: Implementation of Judicial Decrees in Correctional Settings (1977).

The few prison cases terminating court supervision are the exception to the rule. Most complex prison litigation that has resulted in injunctive relief (either litigated or by consent) is still under court supervision. See, e.g., Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), aff'd in part and rev'd in part, 679 F.2d 1115 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983) (litigation about Texas prison system initiated in 1972 which resulted in a judgment in 1980 and which is still under active supervision); Palmigiano v. Garrahy, C.A. No. 74-172, (D.R.I. order of January 25, 1984) [Order attached hereto as Exhibit 2], 443 F. Supp. 956 (D.R.I. 1977) (in January 1984 court refused to terminate jurisdiction to supervise implementation of 1977 order); Morales v. Turman, 569 F. Supp. 332 (E.D. Tex. 1983) (litigation which resulted in preliminary injunction in 1973 still under court supervision); Inmates of the Allegheny County Jail v. Wecht, 565 F. Supp. 1278 (W.D. Pa.) 573 F. Supp. 454 (W.D. Pa. 1983), aff'd in part and vacated in part, 754 F.2d 120 (3d Cir. 1985) (court still actively enforcing its 1978 order and subsequent remedies); Powell v. Ward, 540 F. Supp. 515 (S.D.N.Y. 1982), 392 F. Supp. 628 (S.D.N.Y. 1975) (court and master still monitoring

prison due process system after preliminary injunction in 1975 and permanent injunction in 1980); Jones v. Wittenberg, 509 F. Supp. 653 (N.D. Ohio 1980) (court and master still monitoring relief initially ordered in 1971).

To assist the court and the parties in implementing and monitoring compliance with court ordered remedies in these cases, "special masters" or "monitors" have often been appointed by the court or agreed to by the parties. Frequently these masters have remained active in the litigation for extended periods of time while the correctional systems have struggled to reach compliance. See, e.g., Ruiz v. Estelle, 679 F.2d at 1159-63, 1168-72 (special master appointed in 1981 and still very active in monitoring compliance); Powell v. Ward, 487 F. Supp. 917 (S.D.N.Y. 1980), aff'd as modified, 643 F.2d 924 (2d Cir. 1981), 540 F. Supp. 515, 518 (S.D.N.Y. 1982) (master appointed in 1980 is still active in monitoring court ordered injunction); Palmigiano v. Garrahy, 443 F. Supp. at 989, Exhibit 2 at 10 (master was active in litigation 1977-84 and was removed after substantial compliance was reached; however, the court recently has restored the

master);* Taylor v. Perini, 413 F. Supp. 189, 193-94, 198 (N.D. Ohio 1976), 477 F. Supp. 1289, 1291, 1334-35 (N.D. Ohio 1979) (master active 1975-79 in monitoring 1972 order; master dismissed after parties agreed to master's removal following a determination of "continued substantial compliance"); Jones v. Wittenberg, 73 F.R.D. 82, 87 (N.D. Ohio 1976) (master appointed in 1977 is still active in litigation).

Generally these masters have been dismissed or their jurisdiction terminated only when the court is assured that defendants are in substantial compliance. See, e.g., Palmigiano v. Garrahy, C.A. # 74-172, (D.R.I. January 25, 1984) Exhibit 2 at p. 9-10 (after master's report of substantial compliance and his recommendation that monitoring efforts were no longer required, court suspended operation of master but did not vacate order of reference; master has been restored in response to new evidence of non-

* In a recent conversation with plaintiffs' counsel in Palmigiano, we learned that since the court's order of January, 1984, the court has twice restored the master based upon new evidence of non-compliance. At the present time, the master is actively monitoring compliance and a hearing is scheduled in the near future concerning problems the master identified in his July, 1985 report.

compliance); Union County Jail Inmates v. Scanlon, 537 F. Supp. 993, 1014 (D.N.J. 1982), vacated in part, 713 F.2d 984 (3d Cir. 1983), cert. denied, 104 S. Ct. 1600 (1984) (Special Master shall continue until defendants have fully complied with court's order and "that such compliance has continued for a sufficient length of time to make a lapse into noncompliance improbable"); Taylor v. Perini, 477 F. Supp. at 1291, 1334-35 (master and parties agree to finding of "continued substantial compliance" and dismissal of master); Jones v. Wittenberg, 73 F.R.D. at 87 (Master ordered to continue duties until he finds that court's order "is being fully complied with in every respect, and that such compliance has been continuing for a sufficient length of time to make a lapse into noncompliance improbable").

In those few institutional reform cases where district courts have elected to reduce or terminate supervision of compliance, the fact that the defendants established, maintained, and assured the court and plaintiffs that it would continue, internal monitoring mechanisms with auditing and reporting functions, appears critical to the decision. See, e.g., Finney v. Mabrey, 546 F. Supp. at 641-2 ("...

[A]greed internal monitoring by the Department for a period of time will help insure that the programs will be maintained at the present level and will underscore the importance of continued vigilance."); Morgan v. McDonough, 554 F. Supp. 169, 174 (D. Mass. 1982) (assigning responsibility for monitoring to "Department of Implementation" in "Order of Disengagement"). Cf. Taylor v. Perini, 455 F. Supp. 1241, 1250-1255 (N.D. Ohio 1978), 477 F. Supp. at 1335-1337 (parties agreed to detailed internal monitoring and dispute-resolution system, including reports to public, to establish "a mechanism for the resolution of all future disputes concerning the defendants' compliance with the Court's mandate in a way which is designed to minimize the Court's further involvement in the affairs of the prison").

Even after defendants have achieved substantial compliance, courts have continued to exercise supervision and have delayed entry of a final order or judgment. In the Fifth Circuit, where school desegregation cases have been litigated most frequently, the Court of Appeals has consistently required that no final order in a school case

may be entered until defendants have filed detailed semi-annual progress reports for three years after a finding that the schools have been desegregated; during this period, the case is to remain open, on the inactive docket. After the three years have elapsed, the district court can consider termination of supervision after providing plaintiffs with an opportunity to show why dismissal should be delayed. This method of continuing supervision is intended to provide a "uniform rule upon which school authorities and District Courts might rely for insuring proper local and judicial administration of the school system." United States v. State of Texas, 509 F.2d 192, 194 (5th Cir. 1975). See also Calhoun v. Cook, 451 F.2d 583 (5th Cir. 1971); Youngblood v. Bd. of Public Instruction, 448 F.2d 770 (5th Cir. 1971).*

The Fifth Circuit has likewise approved the practice, now becoming more common in other jurisdictions, see Swann v. Charlotte-Mecklenburg Bd. of Ed., 67 F.R.D. 648 (W.D.N.C. 1975); Morgan v. McDonough, 554 F. Supp. 169 (D.Mass. 1982)

*Court supervision over desegregation in the Fifth Circuit is long-term. See, e.g. Davis v. East Baton Rouge Parish School Board, 570 F.2d 1260 (5th Cir. 1978) (reversing district court dismissal of 22 year old case).

(discussed infra at 35), of deferring the entry of a final judgment, even after compliance is achieved and remains in place, in order to preserve or maintain the status quo. While it is true that once compliance with its orders is achieved a court may then terminate supervision and close the docket, it need not do so. In Pate v. Dodd County School Board, 588 F.2d 501, 504 (5th Cir. 1979), the court upheld the district court's continuing jurisdiction eight years after a unitary school system had been achieved: "the district court has a continuing responsibility to appraise the system in the light of actual conditions and experience and make required changes to assure the maintenance of a unitary system."

A finding of compliance -- even of continuing compliance -- should not lead a district court to terminate its supervision over the defendants' continuing activities in cases where, as here, the order in question is detailed and when external pressures continue to jeopardize defendants' compliance efforts. Battle v. Anderson, supra. For example, a finding that defendants have desegregated their schools need not require a district court to enter a

final judgment or to dismiss a school desegregation case. Assuming the case is removed from the court's active docket, "the District Court retains jurisdiction to hear claims of interference with the maintenance of a unitary system as well as to receive reports on the system's progress...." Pickens v. Okolona Municipal Separate School District, 594 F.2d 433, 436-7 (5th Cir. 1979) (citations omitted).

It is clear, then, that a district court should continue its supervision over the process of compliance with comprehensive injunctive orders until the defendants have achieved substantial compliance and have in place sufficient internal mechanisms to ensure future compliance.

B. NOTWITHSTANDING ANY CHANGES IN THE DEGREE OF THE COURT'S SUPERVISION, THE COURT'S SUBSTANTIVE ORDERS--THE CONSENT JUDGMENTS--REMAIN IN EFFECT AND ARE ENFORCEABLE UNLESS THEY ARE DISSOLVED OR MODIFIED ON MOTION, UNDER RULE 60(B), F.R.CIV.P.

At whatever time the parties can agree, or the Court may order, that its active supervision of defendants' compliance efforts should terminate, the requirements of the Consent Decrees, which are not limited in time, will remain in force and will be enforceable. Although the Court may choose to disengage itself from such active supervision,

either by removing the case from the active docket or even by dismissing it, the obligations set out in the Consent Decrees, which were entered as orders of the Court, will remain in place. Indeed, a court's power to enforce its orders, including settlement agreements entered into by parties before the court and approved by it, is inherent in its jurisdiction, independent of any formal "retention of jurisdiction" in the "final" order or decree and notwithstanding the dismissal of the case. United States v. New York Telephone, 632 U.S. 159, 188 (Stevens, J. dissenting) (citing Root v. Woolworth, supra); Dankese v. Defense Logistics Agency, 693 F.2d 13 (1st Cir. 1982); Meetings & Expositions, Inc. v. Tandy Corp., 490 F.2d 714, 717 (2d Cir. 1974); Kelly v. Greer, 365 F.2d 669, 671 (3d. Cir. 1966), cert. denied, 385 U.S. 1035 (1967); Fairfax Countywide Citizens v. Fairfax County, 571 F.2d 1299 (4th Cir.), cert. denied, 439 U.S. 1047 (1978); In Re Corrugated Container Antitrust Litigation, 752 F.2d 137, 141 (5th Cir. 1985); Sarabia v. Toledo Police Patrolman's Assoc., 601 F.2d 914, 917-918 (6th Cir. 1979); Gardiner v. A.H. Robins Co., Inc., 747 F.2d 1180, 1190 (8th Cir. 1984); Dacanay v. Mendoza, 573 F.2d 1075, 1078 (9th Cir. 1978);

Central of Georgia Railroad Co. v. U.S., 410 F. Supp. 354, 358 (D.D.C. 1975), aff'd, 429 U.S. 968 (1976); South v. Rowe, 102 F.R.D. 152, 155-6 (N.D. Ill. 1984) (prison case).

Modification or dissolution of the substantive requirements of the decrees, pursuant to Rule 60(b), may only be granted on a "clear showing of grievous wrong evoked by new and unforeseen conditions" and a finding that the dangers which gave rise to the injunction "once substantial, have become attenuated to a shadow."* United States v. Swift, 286 U.S. 106, 119 (1932); Spangler v. Pasadena City Bd. of Ed., 427 U.S. 424, 438 (1976).**

*Modification can, of course, be effected on consent, as the parties have already done on several occasions with respect to body cavity searches (Stipulation and Order of August 19, 1982), law libraries (stipulation to be submitted shortly) and dayroom access (temporary modification in effect at ARDC since September 8, 1985).

**To be sure, if defendants sought to modify or vacate certain requirements of the decrees in order to better advance the orders' objectives, relief should be more freely granted. Benjamin v. Malcolm, 564 F. Supp. at 686 (S.D.N.Y. 1983), citing New York State Assoc. for Retarded Children, v. Carey, 706 F.2d 956 (2d Cir. 1983), cert. denied, 104 S. Ct. 277 (1983) ["Willowbrook"]. But "Willowbrook does not sanction the use of modification proceedings to abrogate the primary objective of the decree.... The principle stated in United States v. Swift... that '[we] are not at liberty to reverse under the guise of readjusting,' has not been repealed by the Willowbrook decision." Id. at 686.

The fact that defendants may in the future achieve substantial compliance, while clearly relevant to the question of the Court's (and OCC's) supervision and monitoring, see this Memorandum, supra, Part A, is not a basis on which to modify or vacate the substance of the decrees themselves. Palmigiano v. Garrahy, C.A. No. 74-172 (D.R.I. January 25, 1984) Exhibit 2 at 7 (order in prison conditions case denying defendants' motion for "satisfaction of judgment" and to terminate injunction based on compliance with the order; "neither duration nor completeness of compliance provides assurance that the dangers addressed by an injunctive order have dissipated"); Walling v. Harnischfeger Corp., 242 F.2d 712, 713 (7th Cir. 1957) ("We would not approve trading Harnischfeger's sustained obediance for dissolution of the injunction. Compliance is just what the law expects...."). Nor is the "burden" of operating its jails in compliance with injunctive orders the sort of "grievous wrong" which would entitle the City to Rule 60(b) relief. "To be told to do what the law requires is no hardship." S.E.C. v. Bausch & Lomb, 82 F.R.D. 50, 53 (S.D.N.Y. 1979).

Further, the mere passage of time, is not a basis on which a court can rely in modifying or vacating a decree. See United States v. Armour and Co., 402 U.S. 673 (1971) (construing decree 51 years after issuance); Standard Oil Co. v. Standard Oil Co. (New Jersey), 239 F. Supp. 97 (E.D.Mo. 1965) (enforcing decree 28 years after issuance).

In complex institutional reform cases, upon a finding that the district court's continuing supervision over compliance is no longer necessary, the existing remedial injunction will therefore be left in place, but responsibility for its enforcement returned to the defendant municipality. This was the approach taken by Judge McMillan in his "Swann Song," terminating Swann v. Charlotte-Mecklenburg Bd. of Ed., 67 F.R.D. 648, 649 (W.D.N.C. 1975), "as an active matter of litigation." Finding that the defendants were "actively and intelligently" addressing remaining compliance problems without court intervention, Judge McMillen held that:

> Dismissal is neither usual nor correct in a case like this where continuing injunctive or mandatory relief has been required. Facts and issues once decided

> on their merits ought, generally, to remain decided. This case contains many orders of continuing effect, and could be re-opened upon proper showing that those orders are not being observed. The court does not anticipate any action by the defendants to justify a re-opening; does not anticipate any motion by plaintiffs to re-open; and does not intend lightly to grant any such motion if made. This order intends therefore to close the file; and to leave the constitutional operation of the schools to the Board....
>
> 67 F.R.D. at 649

The case was not dismissed, but was removed from the active docket and the file "closed." 67 F.R.D. at 650.

Prior to this Swann decision, several district courts in unreported decisions had similarly refused to dismiss school desegregation cases after compliance had been achieved. In these matters, the case was transferred to the inactive docket "subject to being reactivated on proper application by any party or on the court's motion, should it appear that further proceedings are necessary." Lee v. Macon County Bd. of Ed., Civil Action 71-251-5 (N.D. Ala. 1975). See also United States v. County School Board, Civil Action 224-69-R, (E.D.Va. 1973); United States v. Georgia, Civil Action 12972, (N.D. Ga. 1973) (orders set out and noted in Retention of Jurisdiction in Desegregation Cases: A

Causal and Attitudinal Analysis, 52 So.Cal.L.Rev. 195, 228-9) (1978). In these school cases, the district court entered a final remedial injunction, addressed to the various elements of relief previously ordered, e.g., transfers, construction and staff assignments.

Two recent cases illustrate the growing acceptance of the Swann approach to disengagement in complex institutional reform cases, which leaves the case pending but inactive, and re-affirms the continuing obligation of the defendants to adhere to the remedial order. In Morgan v. McDonough, the Boston school desegregation case, Judge Garrity formulated a two-stage process for the "transitional course of disengagement," 554 F. Supp. at 171, culminating in a final order discontinuing court supervision of compliance but leaving in place the underlying injunctive orders. At the first stage, in 1982, he assigned to the State Board of Education the responsibility for administering compliance, a task which for eight years had been the court's responsibility:

> By lodging these functions [monitoring compliance and facilitating dispute resolution under outstanding orders] in the State Board the court seeks to create a transitional supervisory structure which can enable the court to determine whether the school system will operate according to the substantive

> elements of a constitutionally required remedy. A clear indication that the system will be so administered is a prerequisite for further judicial withdrawal.
>
> Id.

During this period, all substantive orders entered during the pendency of the case "which, if fully complied with can yield an adequate remedy for the constitutional violation ... must remain in place" and the court remained available to resolve any matter which the parties themselves could not. Id. at 171, 172.*

*During this transitional stage, Judge Garrity required that modification of an outstanding order could be sought only after nearly every party to the case agreed to the proposed change.

> The procedures governing modification of outstanding orders reflect the two fundamental principles underlying the orders issued today viz. that all prior substantive orders are to remain in place and that the basis for judicial disengagement is consensual compliance with constitutional requirements. By requiring substantial, if not unanimous, agreement among the parties with any proposed modification, the court assumes that existing orders, so long the "law of the case," and indeed, continuously modified and refined throughout the years, provide an optimal remedy for the constitutional violation. At the same time, however, the court recognizes that a proposed modification, if supported by a significant coalescence of the parties, could well promote the goal of consensual compliance, and therefore merits judicial consideration.
>
> Id. at 172 (emphasis supplied).

At the concluding step in the disengagement process, a final order* was entered on September 3, 1985, following a hearing and consideration of comments on a draft final judgment issued on July 5, 1985. Morgan v. Nucci, C.A. No. 72-911-G (D. Mass. September 3, 1985) [attached hereto as Exhibit 3]. Six specific and "permanent" orders were included in the "final order," all of which, presumably, are enforceable on motion. The city school defendants were, in addition, ordered to "carry out all existing orders imposing a duty on [them] previously entered in areas in which the court has not terminated its jurisdiction...." Exhibit 3 at 2. In the final order, the school defendants were granted authority to modify existing orders after notice to and negotiation with a number of interested parties, so long as the modification was consistent with the six permanent orders and did not result in a breach of the duties imposed by any of the earlier orders. Exhibit 3 at 4.

*The court used "final order" instead of "final judgment" and in so doing noted that it "follow[ed] the precedent and adopt[ed] the reasoning of Judge McMillan in removing the cause from the active docket and closing the file in Swann." Exhibit 3 at 1.

A similar result was reached in the ongoing Oklahoma prison litigation, Battle v. Anderson,* where the district court's order of dismissal provided that "all of this court's orders and injunctions as modified heretofore remain in full force and effect." Battle v. Anderson, No. 72-98-C (E.D. Okla. December 30, 1983) at 10 [attached hereto as Exhibit 4]. Plaintiffs have appealed the dismissal.

In the Court of Appeals, arguing in defense of the dismissal, the United States ("plaintiff-intervenor-appellee") characterized the District Court's order as one "inconsistent with a total relinquishment of jurisdiction" but which "in effect transfers the case from its active

*Following the decision of the Court of Appeals, affirming the denial of defendants' first motion to dismiss the case and discontinue jurisdiction, see this Memorandum, supra, at 21, the District Court judge who had been on the case since its inception recused himself. Three weeks later, the new judge granted defendants' renewed motion to dismiss. Although the court agreed with plaintiffs that the defendants were not yet in compliance with existing orders, it nevertheless found that conditions in the Oklahoma prisons warranted dismissal of the case and termination of the court's supervision. The district court relied upon the State's "plan of measures to be taken to assure continued constitutionality of Oklahoma's Prisons" as an adequate safeguard against the dangers cited by the Court of Appeals when it ordered jurisdiction to be continued. Exhibit 4 at 2-3.

docket to its inactive docket." The Court of Appeals has not yet decided the appeal.*

* * * *

Underlying all of the decisions which have grappled with the problem of how to return responsibility for compliance to the defendants themselves is a commitment to the continuing viability of the remedial order. Unless modified or terminated under the Rule 60(b) standard, these orders remain enforceable.

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*These developments in the Battle litigation were related in a phone conversation between plaintiffs' counsel and counsel for the Oklahoma plaintiff class.

ANALYSIS OF OCC'S AND THE COURT'S FUTURE ROLES IN IMPLEMENTATION AND MONITORING COMPLIANCE

There can be no doubt that defendants have been and will continue to be bound by the obligations contained in the decrees. The Court's power to enforce its orders (i.e., its jurisdiction) is not in issue. See Memorandum, supra at 31-33. Rather, the questions presented relate to the level of court supervision (direct or through OCC) over the process of bringing defendants' policies and practices into compliance with the decrees.

First, defendants have expressed some concern with how they are to know when they are in compliance, i.e., how is compliance to be measured? This question can be answered easily by looking to the work OCC has performed over the past three years and the standard it has consistently applied in reviewing the Department's activities: substantial compliance will be achieved when DOC conforms its policies and procedures to the provisions of the decrees.

A second and more complex question is how and when it is appropriate to end outside oversight of defendants' conduct in implementing the decrees. Plaintiffs begin with

the assumption that the ultimate goal of the supervision/monitoring process is to have defendants develop and maintain a system which assures present and continuing compliance both voluntarily and as a matter of course. See Morgan v. McDonough, 554 F.Supp. at 171-72. Indeed, it was defendants' failure in these areas which led to the contempt motion and the creation of a compliance consultant office.

Relevant to the question of "when" supervision should be phased out is consideration of the degree to which defendants have been determined to be in compliance and are likely to remain so, and the extent to which defendants have demonstrated themselves capable of self-monitoring and correction. Of secondary importance, but of some relevance, is the extent to which defendants have been burdened by the supervisory mechanism.

Plaintiffs submit that the present level of outside supervision of defendants' conduct is benign and relatively non-intrusive. Although the Court clearly had the authority to appoint a master when the decrees were first entered, see Ruiz v. Estelle, 679 F.2d at 1159-63; Miller v. Carson, 563 F.2d 741, 752-53 (5th Cir. 1977); Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d

12, 25 (2d Cir. 1971); Lightfoot v. Walker, 486 F. Supp. 504, 526 (S.D. Ill. 1980); Knight v. Board of Education, 48 F.R.D. 115, 117-18 (E.D.N.Y. 1969), it waited over two years while allowing defendants to reform their own practices.

Unlike what has occurred in other institutional reform cases, the City correctional system has not been placed in receivership or subject to the day-to-day supervision of the Court; nor has OCC been given or exercised powers as far-reaching as masters possess in other cases, such as the authority to issue orders requiring defendants to act or refrain from acting, or to participate in ex parte meetings with the Court. See, e.g., Morgan v. McDonough, 540 F.2d 527, 530-33 (1st Cir. 1976), cert. denied, 429 U.S. 1042 (1977) (Court of Appeals affirms appointment of receiver); Newman v. Alabama, 466 F. Supp. 628, 635-36 (M.D. Ala. 1979) (Court appointed Governor James receiver for Alabama prison system); Palmigiano v. Garrahy, 443 F. Supp. at 989 (Master can recommend to court that staff be terminated, transferred or hired to obtain compliance with court orders); Jones v. Wittenberg, 440 F. Supp. at 63 (Special Master has authority to order staff to take action to

effectuate full compliance); Taylor v. Perini, 413 F. Supp. at 193 (Special Master can order actions by staff). Moreover, OCC does not have the authority to hold formal fact-finding hearings; its findings are not presumed binding or subject to limited court review under the clearly erroneous standard; and it does not have the authority to seek from the court a finding of contempt. See, e.g., Ruiz v. Estelle, 679 F.2d at 1165, 1168-72 (Master can hold hearing, make findings of fact which cannot be reversed unless clearly erroneous); Duran v. Anaya, C.A. No. 77-721-JB, (D.N.M. June 3, 1983) Exhibit 1 at ¶¶ A(7), C(3) (Special Master can hold hearings and his findings shall be accepted by the court unless clearly erroneous); Union County Jail Inmates v. Scanlon, 537 F. Supp. at 1013-14 (Special Master's findings accepted unless clearly erroneous and he may seek order from court to show cause why defendants should not be held in contempt for failing to comply with his instructions and orders); Jones v. Wittenberg, supra, (Master can seek contempt order); Taylor v. Perini, supra, (Master has authority to seek contempt order).

By contrast, OCC has managed, through a process of informal advice, assistance and consensus building among the parties, to mediate disputes and resolve compliance problems with no need for the exercise of the Court's authority or the time-consuming formalities that such exercise would entail. In effect, through its expertise and skill, OCC has provided invaluable assistance to the defendants while shielding them from direct Court scrutiny of their conduct and the array of court sanctions that their non-compliance and lack of diligence would justify.

That OCC has been and will continue to be invaluable is beyond dispute. As the history of this litigation demonstrates, in the six years since the Consent Decrees were entered, defendants, with their enormous resources and staff, were unable to make any significant progress in reaching compliance until OCC became involved. See Statement of Facts, supra. It is difficult to conceive of either plaintiffs or the Court being able to devote the sustained and expert attention to departmental operations that OCC has brought to its issue-by-issue evaluation of compliance and remedial recommendations. While plaintiffs would be among the first to point out the necessity for

litigation in bringing about institutional reform, OCC has clearly demonstrated the value of a non-litigation model, under appropriate circumstances, at the implementation and enforcement stage.

This is not to say that the compliance process has been flawless. To the extent that speed is any measure of success, OCC has, at times, found itself mired in the same bureaucratic lethargy that has characterized defendants' conduct in this litigation since its inception. OCC's progress reports document, in a most generous way, a history of unmet deadlines, incidents of failed claims of reform and slow and, at times, erratic progress towards compliance.

Even when defendants' commitment to achieving compliance has been genuine and their actions well-intentioned, a host of factors that have presented obstacles to reform throughout this litigation have continued to recur. Ever-present population pressures have resulted in greater strains on available resources and required the use of acknowledged substandard housing in areas such as the old North Facility. The addition of new institutions and new

housing wings dependent on existing service facilities, personnel changes and budgetary pressures have all resulted, and will no doubt continue to result, in compliance back-sliding or delays, and have certainly diverted the parties' attention from compliance-oriented efforts. For instance, enormous time was consumed by defendants' failed attempt in 1983 to increase the population of HDM. Similarly, in the major area of food service, OCC deferred monitoring in reliance on the Department's representation that substantial reform would be accomplished by contracting out the provision of food service to a private concern. Despite the Department's apparent best intentions, the Mayor disapproved its request for an outside contractor, with the result that approximately two years passed with little or no progress in this critical area.*

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* If anything, the external factors that are beyond the Department's control lend support to the argument in favor of continued Court involvement in supervising the decrees. Indeed, this litigation has demonstrated time and again how the Court's presence inures not just to the benefit of plaintiffs, but serves the interests of efficient, rational and humane correctional administration as well. Cf. Benjamin v. Malcolm, 564 F. Supp. 668 (denial of motion to increase HDM population cap), 528 F. Supp. 925 (S.D.N.Y. 1981) (state-ready decision), 495 F. Supp. 1357, 1365 (S.D.N.Y. 1980) (imposition of 1200 cap on HDM).

Thus, despite plaintiffs' view of the value of OCC, all of these factors have contributed to the present situation where, after three years of OCC monitoring, significant compliance work remains to be done. As set forth in the Statement of Facts, supra, only two contempt issues, law library and lock-in/lock-out, appear to be on the verge of full resolution, with the parties in agreement as to substantial compliance.*

On two other contempt issues which OCC surveyed -- confiscation of property and cell searches -- preliminary reports were issued in December, 1984, which identified certain problems but noted substantial improvement in the Department's performance compared to the facts alleged in the contempt motion. Plaintiffs have registered disagreement with some of OCC's conclusions. In any case, there has not yet been follow-up discussion between the parties and OCC as to the scope of the problems or implementation of the remedies proposed by OCC.

*This is not to say that it has yet been demonstrated sufficiently that compliance can be maintained through defendants' own internal monitoring and reporting mechanism -- a condition that must precede any withdrawal of OCC or judicial supervision. See this Memorandum, infra, at 52-53.

On a third category of contempt issues, which includes movement and classification and due process for high security detainees, OCC surveyed the issues and concluded, with no disagreement from the parties, that there was non-compliance. Since then a great deal of time has been spent negotiating remedial measures.* Although subtantial progress has been made toward achieving agreement on solutions, some issues require further discussion and implementation of certain remedial measures has only recently begun or has yet to occur.

A fourth category of contempt issues, covering noise and telephones, has been surveyed by OCC, with preliminary reports identifying compliance problems issued in December, 1984 and February, 1985, respectively. While there was some initial discussion of the noise report between the parties, DOC has yet to submit a response on telephones and both subjects require substantial discussion before any remedial steps can be agreed upon and implemented.

*The parties agreed to extend the discussion and solutions on the due process issue to the area of disciplinary due process as well -- a closely related issue not contained directly in the Consent Decrees but present and unresolved in the litigation.

Finally, OCC's attention to the two massive and complex issues of food service and environmental health, as well as laundry service, linens and bedding, personal hygiene items and conditions in disciplinary segregation, is just at an incipient stage or has not yet begun. The environmental health issue involves the subjects of sanitation, pest control, fire safety, heat and ventilation, plumbing and general institutional maintenance. Given the scope of the problems documented in the contempt motion and the size of the Department and number of institutions involved, it is not realistic that these issues can be comprehensively surveyed, no less resolved, in the near future.

In sum, we would anticipate that OCC's basic work will require several more years.* Against this background, defendants' suggestion -- that it is they who, over many years, have been burdened undeservedly by the obligations of the Consent Judgments and the enforcement mechanism -- is

*When the agreement to implement OCC was entered into, it was understood that once OCC addressed the contempt issues, it would survey for compliance problems other consent decree, non-contempt issues and provide assistance in resolving unsettled issues in the litigation.

inappropriate, to say the least. It is the plaintiff classes in these cases who, for at least seven years (and in some cases substantially longer) have been burdened by the deprivation of their constitutional, court-ordered entitlements.

In the final analysis, the manner and time in which OCC and the Court disengage from supervision of the Consent Decrees must be determined by defendants' conduct and events in the future. We do not believe that an order of the Court at this time, which details a plan for the Court's disengagement from supervision in the future, is either practical, useful or appropriate; defendants are not yet close to achieving substantial compliance with the terms of the Consent Decrees. However, to the extent that the parties can agree or the Court is interested in outlining a preferred course of action for OCC's gradual disengagement, plaintiffs would propose the following, based upon the history of the instant cases and models used in other litigation.

Because OCC has been so effective and has spared the Court extensive involvement in the details of defendants' compliance problems and efforts, we believe that OCC must maintain an active role in these cases at least until it can

represent that defendants have achieved substantial compliance with all provisions of the Consent Decrees and there is reasonable certainty that such compliance will be maintained.*

In order to satisfy the second half of that standard we would assume that two requirements need be met. First, defendants should have sustained compliance with the terms of the decrees for a sufficiently long period of time during which their performance is free from intense scrutiny by OCC; there is an obvious distinction between matter-of-course compliance and short-term compliance when under the eye of OCC. And second, defendants should have in place a demonstrably reliable mechanism for self-monitoring so that it is reasonable to conclude that the decree obligations are viewed as, and have become, a routine and accepted part of departmental operations, and that plaintiffs have an effective means of redress when they experience compliance problems. See Duran v. Anaya, C.A. No. 77-721-JB (D.N.M. June 3, 1983) Exhibit 1 at ¶ E (6), (Court directed that the master should continue to monitor an issue "for a

* This is consistent with the approach taken in other prison cases where masters have been appointed. See cases cited at pages 26-28, supra.

reasonable period of time and [until he] finds that there is continued substantial compliance in that area, and that the defendants have established and implemented an effective, monitoring mechanism to ensure continued compliance in that area..."). Cf. Powell v. Ward, 540 F. Supp. at 518 (master directed to assist defendants in developing "an effective internal monitoring system").

It cannot seriously be argued that either prong of the above standard has yet to be satisfied. There has been some suggestion, however, that OCC might withdraw its oversight on an issue-by-issue basis, rather than when full compliance has been achieved. Plaintiffs are at some loss to understand why, if OCC is continuing its work on some issues, it should have no authority to monitor others. The whole nature of OCC's role is one of assistance and informal feedback, and it is difficult to conceive of why this would be regarded as anything but helpful. We certainly can foresee, however, a scenario where once substantial compliance on a particular issue has been achieved, OCC will be considerably less involved in the Department's activities in that area.

The following process, which has some support in the monitoring models of other cases as a means of "transitional disengagement," should assuage defendants' concerns yet provide sufficient protection to plaintiffs. Plaintiffs propose that on issues that OCC and the parties have resolved*, a period of two years of reduced monitoring be observed. During that time defendants would have primary responsibility for compliance, monitoring and reporting. OCC, while still actively involved in addressing other issues would, twice a year, resurvey defendants' performance with respect to the resolved issue. It would continue to receive and investigate any allegations of non-compliance. Assuming, after two years, that OCC has concluded that the Department has maintained and is likely to continue to maintain substantial compliance, and the Court adopts that finding after hearing from the parties, OCC's authority over the issue would be suspended. Cf. Duran v. Anaya, C.A. No. 77-721-JB (D.N.M. June 3, 1983) Exhibit 1 at ¶ E;

*Law library is likely to be the first major issue to be addressed by OCC and resolved to the parties' satisfaction. Resolution of the issue involved a complete rewriting of the Consent Decree terms and substantial changes in departmental operations.

Powell v. Ward, 540 F. Supp. at 518 (in extending period of master's responsibilities, court directed master's attention primarily to non-compliance areas).

Defendants' own monitoring mechanism would continue to operate and they would submit compliance reports to the Court and plaintiffs on an agreed upon basis. Plaintiffs' counsel would retain the right, now contained in the decrees, to tour facilities and review relevant documents. OCC would not readdress the issue unless plaintiffs were determined to have alleged substantial non-compliance and informal negotiations between the parties were unsuccessful.

The next point at which some further disengagement would be appropriate is when OCC has determined, and the Court accepted, that on all issues substantial compliance has been achieved and its continuance is probable. Assuming that there are no other issues on which OCC's assistance is required or requested, the order establishing OCC could be suspended or terminated. Cf. Palmigiano v. Garrahy, C.A. No. 74-172 (D.R.I. January 25, 1984) Exhibit 2 at 9-10 (order continuing court jurisdiction but suspending operation of master after concluding that there was substantial compliance with court orders; master subsequently reinstated upon new evidence of non-compliance).

Naturally, OCC's and the Court's authority are not coextensive. The Court's jurisdiction over the orders, as do the orders themselves, continues indefinitely. However, its supervision of compliance would eventually become de minimis.

Finally, after a two-year period of defendants' self-monitoring after OCC has ceased operations, if the Court determines that there has been and it is reasonably likely that there will continue to be substantial compliance, its own supervision of the case would cease. This stage of court disengagement could take one of several forms. The Court might place the case on its inactive docket. See Memorandum supra, at 28-31, 35-37. Alternatively, the Court might declare, what has been rather imprecisely termed, that it is "terminating jurisdiction and dismissing the case," but ordering that all existing prospective orders will remain in force. In effect, this would mean that while the orders continue, as they should, the Court's active supervision would end. A final order would be issued that

sets forth required mechanisms for self-monitoring and mediation of compliance complaints. See Memorandum, supra, at 37-41. The parties would be free, if they could meet a rather stringent standard, to reopen the cases in order to seek modification or sanctions for newly arisen violations of the orders. Prior to doing so, informal attempts at resolution would have to have been attempted as is now contemplated in the enforcement provisions of the decrees. See, e.g., Benjamin v. Malcolm, Partial Final Judgment By Consent, March 30, 1979, at page 50.*

Plaintiffs are reluctant, if not unable, to precisely detail what this final stage or a final court order might look like. We believe they must be defined by the experience that precedes them and that it is far too early to project a script for this closing scene. However, we believe that the most efficacious and fair means of addressing remaining areas of non-compliance would be a continuation of the present good faith process of informal negotiation and consensus building, with the able

*A process for informal dispute resolution, prior to renewed court intervention, was established in the Boston school case. Morgan v. McDonough, 554 F. Supp. at 171-72, 175-77. See Memorandum, supra at 39.

assistance of OCC. With the Court's presence to oversee and maintain this process, we are confident that it will eventually result in a just resolution of this litigation that accomodates defendants' interest in operational autonomy while ensuring plaintiffs' rights to humane, constitutional conditions of confinement.

Dated: New York, New York
September 30, 1985

Respectfully submitted,

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"a"

EXHIBIT 1

FILED
AT ALBUQUERQUE
JUN 3 1983
JESSE CASAUS
CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

DWIGHT DURAN, et al.,

Plaintiffs,

v.

TONEY ANAYA, et al.,

Defendants.

ENTERED ON DOCKET
6-3-83

Civil Action No. 77-721-JB

COPY

ORDER OF REFERENCE

By joint motion the parties in this cause have requested the appointment of a special master to monitor compliance with earlier remedial orders that have been entered herein and have nominated VINCENT NATHAN to serve as master. The Court, having recently inherited this protracted and complicated litigation, agrees that the appointment of a special master is both necessary and desirable and that such an appointment is in full accordance with Rule 53 of the Federal Rules of Civil Procedure. In addition to the authority conferred by that rule, the Court relies upon its inherent power "to appoint persons unconnected with the court to aid...in the performance of specific judicial duties, as they may arise in the progress of a cause." Ex Parte Peterson, 253 U.S. at 312-13 (1920), Ruiz v. Estelle, 679 F.2d 1115, 1159 (5th Cir. 1982). Therefore, the Court being fully advised in the premises, and for good cause shown, it is hereby

ORDERED that VINCENT NATHAN shall serve as special master for the Court to monitor the state of the defendants' compliance with all remedial orders that have been entered or that may be entered in this cause.

A. The duties of the special master shall be to observe, monitor, find facts, report or testify as to his findings, and make recommendations to the Court concerning steps that should be taken to achieve compliance. The special master may and should assist the

defendants in every possible way, and to this end he may and should confer informally with them, their subordinates and all counsel on matters affecting compliance. In order to accomplish these objectives, the special master shall have only the following powers:

1. The special master shall have unlimited access to any maximum, close or medium security facilities, buildings, or premises, under the jurisdiction or control of the New Mexico Department of Corrections (hereinafter "Department of Corrections") as necessary to achieve compliance with the orders in this cause, and no advance notice of any visit of inspection shall be required. In the event of an emergency as defined in the consent decree, the Special Master and members of his staff may be excluded from all or a portion of an institution if their presence would exacerbate or complicate the emergency or if their safety would be endangered by their presence.

JG BS

2. The special master shall have unlimited access to the records, files and papers maintained by the Department of Corrections to the extent that such access is related to the performance of the special masters's duties of monitoring compliance except as to matters covered by the attorney-client privilege and the work product doctrine. Such access shall include all departmental, institutional and inmate records, including but not limited to medical records. The special master may obtain copies of all such relevant records, files and papers; provided that the special master or his staff shall not be permitted to testify as to an inmate's medical or mental health record in unrelated litigation, and further, that any report by the special master shall not identify by name any specific inmate in regard to his medical or mental health condition. The defendants shall not be liable for release of any records to the special master pursuant to the terms of this Order.

3. The special master may conduct confidential interviews with all staff members and employees of the Department of Corrections. In addition, he may engage in informal conferences with such staff members and employees, and such persons shall cooperate with the special master and respond to all inquiries and requests related to compliance with the Court's orders in this case. The special master may require compilation and communication of oral or written information relevant to such compliance. If such requests are deemed by defendants to be unreasonable or unduly burdensome, defendants may seek a protective order from the Court.

4. The special master may conduct confidential interviews and meetings at the institution to which they are confined with any prisoners or group of prisoners under the jurisdiction of the Department of Corrections.

5. The special master may attend any institutional meetings or proceedings at any institution under the jurisdiction of the Department of Corrections.

6. The special master may require written reports from any staff member or employee of the Department of Corrections with respect to compliance

with this Court's orders.

7. The special master shall have the full power to order and conduct hearings with respect to the defendants' compliance with this Court's orders. To this end he shall have the power to require the attendance of witnesses, including both prisoners and employees of the Department of Corrections, and he shall exercise all other powers described in subsection (c) of Rule 53 of the Federal Rules of Civil Procedure.

8. The special master may select and employ necessary professional, administrative, clerical, and support staff. All such persons as well as the nature of their compensation, duties and authority shall be approved by the Court in advance of their employment after notice to the parties and opportunity for objection by them. In addition, with advance permission of the Court, the special master may hire independent specialists and experts to assist him in fulfilling the responsibilities assigned to him by this Order.

B. All actions of the special master and his staff shall be under the direct control and supervision of the Court. In particular, the special master and other persons operating on his behalf shall not intervene in the administrative management of the Department of Corrections or any of its institutions. In addition, the special master and his staff shall not be empowered to direct the defendants or any of their subordinates to take or to refrain from taking any specific action to achieve compliance, nor shall the special master be empowered to resolve inmate grievances. The sole power to direct compliance and to punish non-compliance remains with this Court.

C. The special master shall, as he deems necessary or as required by the Court, at least every six months, file reports with the Court in which he shall make findings concerning the defendants' compliance with the provisions of the Court's remedial orders in this cause and the need if any for supplemental remedial relief. If the special master's report is based upon a hearing held by him pursuant to Rule 53 of the Federal RUles of Civil Procedure, either upon his own motion or upon the request of a party, the master shall file his findings and recommendations with the Court, and copies shall be served on all parties. Any report based upon such a hearing may be challenged only in accordance with the following provisions:

1. If any party objects to any or all of the findings contained in the speci master's report, that party shall file written objections within fifteen (1 days of the receipt of the report. The objecting party shall note ea particular finding to which objection is raised, shall provide propos alternative findings, and may request a hearing or oral argument befo the Court.

2. Any request for a hearing before the Court must include a list witnesses and documents to be presented to the Court A copy of t objections, proposed findings, and any request for a hearing before t Court shall be served on all parties.

3. The special master's findings shall be accepted by the Court unless sho to be clearly erroneous. Any evidence not previously presented to t special master will be admitted at a hearing before the Court only upon showing that the party offering it lacked a reasonable opportunity present the evidence to the special master.

D. When a report submitted by the special master is not preceded by a form hearing pursuant to Rule 53 of the Federal Rules of Civil Procedure, the special mast shall submit his report to the parties and to the Court. All such reports shall first submitted to the parties in draft form pursuant to Rule 53(e)(5) and the master sh provide the parties a reasonable time up to thirty (30) days within which to submit the suggestions. Reports of the special master that are not based on formal hearing may challenged only in accordance with the following provisions:

1. Any party may file written objections to any or all the findings recommendations of the special master within ten (10) days of receipt the special master's report. The objecting party may request a de no hearing before the special master. A copy of the objections and reque for hearing shall be served on opposing counsel.

2. If no party files written objections within the requisite time period, t special master's findings to which no objection has been made shall accepted by the Court unless they appear to be clearly erroneous.

3. If a de novo hearing is held before the special master, he shall prepare report of his findings and recommendations based upon the evider presented in the course of that hearing. That report shall be treated li any other report of the special master that is preceded by formal heari pursuant to Rule 53 of the Federal Rules of Civl Procedure.

4. If any party files written objections to the special master's report b fails to request a de novo hearing before the special master, the

objections will be resolved by the Court. Unless a request for a de novo hearing before the special master has been made, however, the objecting party shall be precluded from requesting a hearing before the Court absent a showing of exceptional circumstances, except as the Court may otherwise order upon application of any party in the interest of justice.

E. In order to utilize the office of the special master in the most efficient manner, focusing the master's efforts on those areas where compliance reporting is most needed, and in order to narrow the field of the master's activities as various areas of the Court's orders are brought into substantial and sustained compliance, the following procedures shall be used:

1. The special master shall at such times as he determines appropriate, issue reports in accordance with the procedures set forth in this Order of Reference, which shall indicate for each of the substantive areas of the Order (e.g., Classification, Food Services, etc.) whether that area is or is not in substantial compliance with the Court Order and the basis and reasons for such finding in each area. If an area is not found to be in substantial compliance it will be assigned to "Level 1". If an area is found to be in substantial compliance it will be assigned to "Level 2".

2. In keeping with the concept of focusing the master's attention on those areas of the decree where the need for monitoring appears to be the greatest, the parties have agreed that the areas of Visitation, Attorney Visitation, and Correspondence (except for paragraph 9 in that section) may be placed initially in "Level 2" since it appears that the level of compliance is presently higher in those areas than in other areas of the decree.

3. The reports and findings of the special master, and the designation of an area as "Level 1" or "Level 2" may be challenged in accordance with the procedures contained in this Order of Reference.

4. (a) For those areas assigned to "Level 1" the master shall continue to monitor, investigate and issue periodic written reports as described in the Order of Reference.
(b) For those areas assigned to "Level 2", the master may monitor and investigate allegations of non-compliance but he shall not be required to file the periodic written reports otherwise required by the Order of Reference. He may, however, at his discretion file a written report and in the event he finds or is presented with prima facie evidence of non-compliance he shall investigate and report the results of his investigation.

5. An area designated as "Level 2" shall remain so designated unless the master finds that there is a pattern or policy of non-compliance in the area. In determining whether non-compliance exists and whether the area should be redesignated in "Level 1", the master shall take into account

among other factors, the seriousness and frequency of non-compliance, a well as defendants' remedial efforts and the time necessary to achiev compliance.

6. If an area of the Order has been retained in "Level 2" for a reasonabl perod of time and the master finds that there is continued substantia compliance in that area, and that the defendants have established an implemented an effective monitoring mechanism to ensure continue compliance in that area, the master shall so report to the parties and t the court. Unless the plaintiffs challenge the report of the maste pursuant to the procedures set out in this Order of Reference, that are will then be removed from the scope of this Order of Reference. Once a area is removed from the Order of Reference, plaintiffs may seek fror the Court, or the special master, if the Court so directs, re-inclusion c that area in the Order of Reference upon a showing of substantia evidence of non-compliance. As to those areas removed from the Orde of Reference the master shall bring to the parties' attention evidence an allegations of non-compliance which are received by him.

F. In the event defendants seek to modify the Orders entered in this case, th parties will follow the provisions set forth in paragraph 6 of the Agreement between th parties dated July 14, 1980, (hereafter "Agreement"). If informal efforts between th parties do not resolve the matter the special master will attempt to mediate the dispute If that effort does not succeed, the special master will hold hearings on the matter an make a report to the parties and to the Court containing his recommendations as to th proposed modification pursuant to the standards contained in paragraph 6 of th Agreement. If the matter is still unresolved, the defendants may submit the dispute to th Court for a de novo hearing pursuant to the standards and procedures set forth in paragrap 6 of the Agreement. At such hearing, the report and the recommendations of the maste will be admitted into evidence, pursuant to Rule 706 of the Federal Rules of Evidence, an give appropriate consideration by the Court.

G. The special master shall not make statements to the press or media unles approved by the Court or in accordance with the Code of Judicial Conduct.

H. The special master shall be compensated at the rate of $85 dollars per hour fc services performed in accordance with this Order of Reference outside the State of Ne

Mexico and $600 per day for services performed in the State of New Mexico. Within six (60) days following entry of this Order the special master shall submit to the Court proposed budget covering the first year of the mastership after notice to all parties. A appropriate budget for the office of the special master and compensation for the membe of the special master's staff shall be established by the Court upon application of th special master and after notice to all parties. All reasonable expenses incurred by th special master in the course of the performance of his duties, including but not limited salaries of staff, long distance telephone calls, photocopying, printing, travel, da processing and postage shall be reimbursed; however, the special master shall not inc expenses in excess of $185,000 without prior approval of the Court and notice to t parties.

I. Paragraphs Two and Four of the Agreement entered on July 14, 1980, as part the consent decree are incorporated into this Order and made applicable to the use herec Specifically, such paragraphs apply to reports, findings, conclusions and all other activiti of the Special Master, his employees or agents, on the same basis as applicable to t policy statement and partial consent decrees entered in accordance with the Agreement.

The costs of the mastership shall be borne by the defendants as costs in this actio The special master shall submit to the Court periodic statements of his time and expens for review and approval by the Court.

IT IS FURTHER ORDERED that the defendants shall deposit the sum of $100,0 with the Clerk of this Court as interim payment of costs and payments to the speci master shall be made by order of the Court out of such funds. As payments are made the Clerk, the defendants shall deposit additional sums with the Clerk to maintain t aforementioned balance of funds.

The special master may cause copies of this Order of Reference or portions there to be posted in any facility under the jurisdiction of the Department of Corrections.

SO ORDERED this 3rd day of June, 1983.

JUAN G. BURCIAGA
UNITED STATES DISTRICT JUDGE

EXHIBIT 2

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

NICHOLAS A. PALMIGIANO	)	
	)	
v.	)	C. A. No. 74-172
	)	
J. JOSEPH GARRAHY, et al.	)	
THOMAS R. ROSS	)	
	)	
v.	)	C. A. No. 75-032
	)	
J. JOSEPH GARRAHY, et al.	)	

ORDER

Based largely on the late October, 1983 report of the Special Master, which described significant improvements in virtually all aspects of conditions and operations at the Rhode Island Adult Correctional Institutions (ACI) since 1977, the defendants have requested an order affirming their satisfaction of the Court's broad remedial decree of August 10, 1977 in this case. At the same time, echoing the recommendation of the Special Master, the defendants seek additionally an end to the mastership and final removal of the "shackles of direct judicial supervision."

The defendants' request is understandable. After six long years of effort on their part to transform a diseased correctional system into a reasonably healthy one, the ACI has been given a generally clean bill of health by the attending physician. Like most established patients, who have been hounded, prodded and lectured regularly throughout their illness, the

defendants want finally to be rid of their institutional "physicians" from the federal court.

To accomplish this, the defendants rely on Rule 60(b) of the Federal Rules of Civil Procedure which permits a court to grant relief to a party from a final decree in certain specified circumstances. Citing changed, i.e., much-improved, conditions at the ACI accomplished through their arduous, good-faith efforts, the defendants urge the applicability of those provisions of FRCP 60(b) which allow a court to grant relief when:

> ...(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Nowhere in their pleadings do the defendants explain which of the three separate grounds for relief contained in 60(b)(5) they believe applicable to their cause; nowhere do they explicate their reliance on 60(b)(6). Presumably the latter reflects little more than the principle of redundant advocacy, since 60(b)(6) is inapplicable in the absence of a showing of exceptional circumstances falling outside the ambit of paragraphs 60(b)(1-5). 7 Moore's Federal Practice, 60.27/2/7 (2nd Ed., 1982); Ackermann v. United States, 340 U.S. 1983, 199 (1950); DeFilippis v. United States, 567 F.2d 341, 343 (7th Cir. 1977); Lubben v. Selective Service System Local Board No. 27, 453 F.2d 645, 651 (1st Cir. 1972).

Instead, the defendants cite the Special Master's favorable report as evidence of "changed circumstances" at the ACI and argue that, in light of those changed circumstances, it is no longer "equitable" that those provisions of the August 10, 1977 Order with which the defendants have complied should still apply. By way of explanation of their motion, the defendants cite Imprisoned Citizens' Union v. Shapp, 46. F. Supp. 522 (E.D.Pa. 1978), involving an injunction banning the use of so-called "Glass Cage" observation cells in a maximum security facility that violated the eighth amendment's proscription against cruel and unusual punishment. When the defendants later sought expungement of the ban in a pleading construed as a FRCP 60(b)(5) motion, the court found the refurbished cells to be constitutionally tolerable and concluded that ". . . it is no longer equitable that our injunction against their use have prospective application." Supra at 528.

Ironically, it is the very principle of finality that frustrates the defendants' search for a way to finalize judicial interference in their correctional system. Not unnaturally, all successful litigants look to final judicial decrees, especially injunctive ones, to stabilize and protect firmly their victories; they expect courts willingly to supervise and apply their powers and processes on behalf of continuing injunctive remedies: ". . . neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided." System Federation No. 91, Railway Emp. Dept. v. Wright, 364 U.S. 642, 647 (1961).

Despite the traditional commitment to finality of judgments, both the rules of equity and the Federal Rules of Civil Procedure recognize that justice occasionally requires a measure of flexibility. Thus, in very limited instances, a trial court may, in its discretion, grant relief from a final judgment. Such grants, however, are exceptional and must be guided by sound legal and equitable principles. Humble Oil and Refining Co. v. American Oil Co., 405 F.2d 803, 812-14 (8th Cir. 1969), cert. den., 395 U.S. 905.

FRCP 60(b)5 specifies three grounds for relief from injunctive decrees, the first of which incorporates the term used loosely here by the defendants ("satisfaction of judgment") to characterize their entire motion. In practice, this first ground has rarely been resorted to and never to dissolve continuing, prospective injunctions. Wright & Miller, Federal Practice and Procedure: Civil § 2863, at p. 202 (1973).

The August 10, 1977 Order in this case, however, did contain some specific mandates that were not intended to be permanent and continuing, such as scheduled reporting requirements (paragraph 4(c) of the August 10, 1977 Order), the reclassification of prisoners (paragraph 5(a) and the hiring of a consultant to help design a new classification process (paragraph 5(b)). These mandates have been fulfilled; they have no continuing validity and the Court, pursuant to 60(b)(5), accordingly grants relief from judgment with regard to these

provisions of the remedial decree.[1/]

The second ground for relief contained in 60(b)(5), the reversal or vacating of a prior judgment that is the basis for the final judgment complained of, is simply inapplicable in this case.

Although they do not so specify, the defendants clearly must rely on the third ground, that is, the discretionary power of courts to provide relief from injunctions, the continuing application of which are no longer equitable. But such relief is not to be granted lightly, as the parameters for inquiry identified by Justice Cardozo in United States v. Swift and Co., 286 U.S. 106, 119 (1932) indicate:

> There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting.
>
> . . .
>
> The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

Relief, then depends on 1) "whether the changes are so important that dangers, once substantial, have become attenuated to a shadow"; 2) whether the movants are suffering "extreme and unexpected" hardships; and 3) whether there has been "a clear showing of grievous wrong evoked by new and unforeseen circumstances."

The defendants' application for relief meets none of these three standards. While the Special Master reported compliance with many of the provisions of the August 10, 1977 Order, he also cautioned that "the overcrowding of facilities at the ACI jeopardizes such compliance so severely that the Court should continue to monitor the defendants' efforts to address the conditions and services involved." In this report the Special Master repeatedly cited the tenuous nature of compliance in areas such as housing, mental health, medical services and programming due to the increasing number of prisoners and static resources. In view of the substantial work that yet remains to be done to bring the defendants into full compliance with the original remedial order and the precarious nature of current compliance with many of the provisions of the order, it is not at all clear that "the dangers which the decree was meant to foreclose . . . almost have disappeared." Humble Oil and Refining Co. v. American Oil Co., supra at 813.

Even in those cases where there has been full, or relatively full, compliance with injunctive orders, courts have been reluctant to grant relief pursuant to 60(b)(5). In Brooks v. County

School Board of Arlington County, Virginia, 324 F.2d 303, 307 (1963) the U.S. Court of Appeals for the Fourth Circuit observed:

> Even as of now, it could not possibly be claimed that the record of compliance is more than two years in duration, Obedience to the injunction for so short a time is not sufficient to warrant its termination, even if we were to assume that there has been complete compliance . . .

Neither duration nor completeness of compliance provides inherent assurance that the dangers addressed by an injunctive order have dissipated. Sullivan v. Houston Independent School District, 475 F. 2d 1071, 1078 (5th Cir. 1973) (denial of relief from an order establishing school disciplinary procedures); Goldberg v. Ross, 300 F.2d 151 (1st Cir. 1962) (reversal of a grant of relief after eight years of compliance); Walling v. Harnischfeger Corporation, 242 F.2d 712, 713 (7th Cir. 1957) (defendant's request for relief rejected after 12 years of compliance).

The defendants here, moreover, have made absolutely no showing of any "extreme and unexpected" hardship or "grievous wrong" encountered by them as a result of the injunctions they seek to dissolve. The burden for such a showing rests squarely on the defendants:

> A continuing injunction directed to events to come is subject always to adaptation as events may shape the need. (Citations omitted.) ...In either event (after litigation or by consent), a court does not abdicate its power to revoke or modify its mandate, if satisfied that what it

> has been doing has been turned through changing circumstances into an instrument of wrong. (Emphasis added). United States v. Swift & Co., supra at 114.

In the absence of any demonstration by the defendants of the hardship or wrong inflicted by application of the August 10, 1977 Order, this court is obligated to deny the defendants' motion for relief from the provisions of that order with prospective application. In a recent review of a similarly complex prison suit, the United States Court of Appeals for the Tenth Circuit dealt thoughtfully and at length with the difficulties of implementing institutional, correctional remedies and affirmed unequivocally the need for the continued involvement of courts extending beyond the point of compliance:

> We believe that the court, in exercising continuing jurisdiction to achieve structural reform, cannot terminate its jurisdiction until it has eliminated the constitutional violation "root and branch" See Green v. County School Board, 391 U.S. 430, 438, 88 S.Ct. 1689, 1694, 20 L.Ed. 2d 716 (1968). The court must exercise supervisory power over the matter until it can say with assurance that the unconstitutional practices have been discontinued and that there is no reasonable expectation that unconstitutional practices will recur.
>
> Battle v. Anderson, 708 F.2d 1523, 538 (10th Cir. 1983). [2]

The Court, then, denies the defendants' motion for satisfaction of judgment except in those limited areas noted earlier and listed in the order below. The effect of this denial is to

continue the Court's jurisdiction over all of those prospective remedial provisions of the August 10, 1977 Order with which the Special Master has found the defendants to be in compliance. In addition, the Court shall adopt the recommendations of the Special Master and direct the defendants to carry out a list of as yet unfinished tasks.

This does not, however, resolve all of the issues raised in the defendants' motion, which also sought a dissolution of the mastership, as recommended by the Special Master in his October report. This Court concurs with the plaintiffs' reaction to the suggestion of the Special Master's departure: "He has counseled all of us wisely and has enabled the parties to move from confrontation to negotiation on many occasions and the plaintiffs are reluctant to see his mastership terminated." Plaintiffs' Objections to the Special Master's Final Report, at p. 6.

During the past six years the Court has come to rely absolutely on the Special Master's expertise and mediating skills. His quiet competence and ready ability to defuse conflicts have prevented innumerable confrontations between parties and between the Court and parties. Repeatedly he has rescued all of us from the rash effects of actions prompted alternately by despair, frustration and anger with his calm and patient ability to generate mutually acceptable solutions to apparent impasse. His assistance has been invaluable and, I believe, one of the chief and critical components in the defendants' compliance with much of the August 10, 1977 Order.

But the Court is also sensitive to the extraordinary nature -- and cost -- of the mastership as a judicially imposed remedy. The Special Master reports substantial compliance with the Court's order and declares candidly that his monitoring efforts are no longer required. For all of that, the list of tasks yet to be accomplished by the defendants is not insubstantial; the initial actions of the defendants in moving to apply and expend the funds realized as a result of the November, 1983 passage of a bond referendum to renovate the old Maximum Security facility are a source of concern to the Court; and overcrowding and bugetary pressures on the defendants are more likely to increase than dissipate during the next few years. Given these conflicting needs and circumstances, the Court elects to terminate immediately the operations of the Special Master and to suspend, rather than vacate, the order of reference creating the mastership. At six-month intervals until the completion of all unaccomplished tasks enumerated below, the Court will confer with the parties to determine whether there is a need to reactivate the mastership. The Court also reserves the right to reinstitute the mastership should the Court judge it to be so necessary.

It is the order, judgment and decree of this Court that:

1. Defendants' motion for satisfaction of judgment is granted relative to paragraphs 4(c), 5(a) and 5(b) of the August 10, 1977 Order.

2. Defendants' motion for satisfaction of judgment relative to other provisions of the August 10, 1977 Order is denied. The Court will return jurisdiction over all of these other elements of the remedial order at least until such time as the defendants are in full compliance with all of the requirements of the original order and its progeny.

3. The defendants shall be required to carry out the following specific tasks to comply fully with the August 10, 1977 Order;

a. Resolve expeditiously the future of the old Maximum Security facility in accordance with existing deadlines relative to planning for the facility's renovation (see the Court's Order in this regard of November 21, 1983);

b. Provide meaningful programming for pretrial detainees in the Intake Services Center, especially for those whose stay at the detention facility exceeds 45 days;

c. Provide meaningful vocational programming opportunities in each facility of the ACI;

d. Increase industrial programming throughout the ACI, particularly in the High Security Center, Maximum Security and Medium Security;

e. Expand mental health and medical services to keep pace with population increases;

f. Reduce the number of protective custody prisoners in B-Dormitory in Medium Security or develop other protective custody housing and increase the number of jobs available for protective custody prisoners.

g. Reduce the number of prisoners in Medium Security or begin planning to increase the availability of medium-custody bedspace at the ACI through conversion or construction.

4. By April 1, 1984 the defendants shall provide the Court and plaintiffs with detailed plans for the accomplishment of all of these tasks. The defendants' plan shall call for completion of all of these tasks (with the exception of renovation of the old Maximum Security facility, which will proceed on its independent timetable) within 18 months or by July 1, 1985. In addition, the defendants shall provide the Court with a report on their progress in accomplishing these tasks every three months. See the attached Memorandum, which contains a breakdown of all applicable deadlines in this case. This memorandum is incorporated into and made part of this order.

5. The Special Master shall terminate immediately his duties. Further operation of the order of reference appointing the Special Master is suspended. At six-month intervals, the Court shall confer with the parties to determine whether an independent progress report by the Special Master is required.

By Order,

Deputy Clerk

Enter:

Senior Judge

FOOTNOTES

1/ The plaintiffs suggest that paragraph 5(c) of the August 10, 1977 Order, which requires the defendants to establish a classification process that includes interviews with prisoners and based decisions on specific categories of data, might also be declared satisfied. The Court disagrees. The elements defined in paragraph 5(c) as essential for an equitable, efficient classification system were intended to have prospective, continuing application, unlike the one-time hiring of a classification consultant or an immediate reclassification of the whole ACI population.

2/ The procedural context in Battle differs from this case. In Battle, the defendants were appealing an order of the district court retaining jurisdiction and imposing additional planning and reporting requirements even though the system was in compliance with the original remedial order. There was no application there for relief from judgment pursuant to FRCP 60(b)(5) with its own specific and strict standards. Nonetheless, the concerns and fears expressed in the Battle opinion are shared by this Court in this case.

EXHIBIT 3

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

TALLULAH MORGAN ET AL.,
Plaintiffs,

v.

CIVIL ACTION
NO. 72-911-G

JOHN A. NUCCI ET AL.,
Defendants.

FINAL ORDERS

September 3, 1985

DOCKETED

GARRITY, J.

After hearing and consideration of the parties' comments and positions on the draft final judgment[1] issued on July 5, 1985, and on the basis of all orders and memoranda of decisions previously entered in these proceedings, it is ORDERED and ADJUDGED that the school defendants, viz., members of the Boston school committee, Superintendent of Schools, their officers, agents, servants employees, attorneys, and all other persons in active concert or participation with them who have actual notice of these orders:

Unified Facilities Plan

(1) **shall** take all steps reasonably necessary, jointly with the city and state defendants, to whom this paragraph also applies, to implement the Unified Facilities Plan as approved and modified by orders entered contemporaneously herewith.

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[1] In titling these orders "Final Orders" instead of "Final Judgment", as first drafted, we follow the precedent and adopt the reasoning of Judge McMillan in removing the cause from the active docket and closing the file in Swann v. Charlotte-Mecklenburg Board of Education, W.D. N.C. 1975, 67 F.R.D. 648.

Permanent Injunction

(2) be permanently enjoined from discriminating on the basis of race in the operation of the public schools of the City of Boston and from creating, promoting or maintaining racial segregation in any school or other facility in the Boston public school system;

Student Assignments

(3) (a) shall compose enrollments at each school so that its racial/ethnic proportions shall be consistent with current guidelines which shall be derived, with respect to citywide magnet schools and programs, from the citywide public school population and, with respect to district schools, from the public school populations of their current districts or consolidations thereof; and procedures for assigning students shall be objective, written and available to the public.

(b) alternatively, may beginning with the 1986-87 school year or thereafter use a single, citywide guideline for assigning students by composing enrollments at every school (except District 8 schools) so that its racial/ethnic proportions exclusive of entering K-1 students are within a range determined by a factor of .25 times the percent of each racial/ethnic group and are based upon the citywide public school population in K-1 through 12 as of about April 1 of the previous school year, minus (i) students enrolled in bilingual classes, (ii) students with specialneeds who are classified as substantially separate and (iii) students residing in District 8; provided further that,

where necessary, the Department of Implementation may assign no other minority students to selected elementary schools, in which event their absence shall be offset by additional white students; and provided further that procedures for assigning students shall be objective, written and available to the public.

Parent Councils

(4) shall promote the court-established parent councils, and any successor organizations, and assist them in functioning as self-governing organizations capable of meeting their court-ordered responsibilities; and shall fund them for at least three years from this date; and shall appoint to any School Improvement Council formed at any school pursuant to Chapter 188 of the Acts of 1985, parent membership elected by the related School Parent Council or successor organization.

Faculty and Staff

(5) shall achieve and maintain a desegregated faculty and administrative staff which are each comprised of not less than 25% blacks and 10% other minorities, by increasing the proportions of black faculty and administrative staff at a rate of not less than one-half percent annually and the proportion of other minority faculty at the rate of not less than one-quarter percent annually, and of other minority administrative staff in accordance with the parties' agreement for a one out of three hiring ratio, approved and ordered by the court on November 26, 1984 and July 5, 1985.

Department of Implementation

(6) shall maintain the Department of Implementation as a distinct unit, adequately staffed and with full access to computer facilities, capable of meeting its court-ordered responsibilities;

Previous Orders

(7) shall carry out all existing orders imposing a duty on the school defendants previously entered in areas in which the court has not terminated its jurisdiction and, if modified as hereinafter provided, such modified orders.

Modification Procedure

(8) The school defendants may propose modifications to any order previously entered in these proceedings provided (a) that such proposed modification is specific and does not violate the permanent orders stated in the seven preceding paragraphs and (b) that notice and opportunity to be heard is given, as follows: they shall issue a public notice identifying the order to be modified and the proposed modification; and shall mail copies to (a) the State Board of Education, (b) the Attorney General for the Commonwealth, (c) the Mayor, (d) the Citywide Parent Council (e) the Boston chapter of the NAACP and (f) the Council of Administrators of Hispanic Agencies in Boston (CAHA), to all of whom the Department of Implementation shall promptly make available all relevant data reasonably requested. The Board of Education shall within three weeks initiate and moderate negotiations concerning the proposed modification or determine that the proposed modification is insubstantial or an emergency

matter which the School Committee may adopt without negotiation. After agreement has been reached or the Board has determined that further negotiations would not result in agreement, or more than three months have passed since the public notice was given, whichever is earliest, the School Committee may (unless State Board approval is necessary under state law and has not been obtained) adopt or reject such proposed modification either as initially proposed or amended during negotiations.[2]

United States District Judge

[2] A memorandum regarding these final orders will be filed at a later date.

EXHIBIT 4

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

BOBBY BATTLE, et al., Plaintiffs,	)	FILED
UNITED STATES OF AMERICA, Plaintiff-Intervenor,	)	DEC 30 1983
vs.	)	No. 72-95-C
PARK J. ANDERSON, et al., Defendants.	)	

LEWIS L. VAUGHN
CLERK, U. S. DISTRICT COURT
BY _____ DEPUTY CLERK

MEMORANDUM OPINION AND ORDER

GRANTING IN PART DEFENDANTS' MOTION TO VACATE THIS COURT'S ORDER OF NOVEMBER 30, 1983, STAYING FURTHER PROCEEDINGS

In its order of November 30, 1983, this court stayed action in this case on three motions for the reason that application for Certiorari to the United States Supreme Court had been applied for by defendants. Action was stayed on: (1) Defendants' motion to dismiss the court's Fact Finder, which motion was joined in by the United States of America; (2) The plaintiffs' emergency motion enjoining further population increases and seeking a return to single celling; and (3) Defendants' motion to dismiss this action, which motion was substantially joined in by the United States of America.

The filing of a notice of appeal has the effect of immediately transferring jurisdiction from the district court to the court of appeals with respect to any matters involved in the appeal. It divests the district court of authority to proceed further with respect to such matters. See, e.g., International Paper Co. v. Whitson, 595 F.2d 559, 561-62 (10th Cir. 1979); Petuskey v. Rampton, 431 F.2d 378, 381 (10th Cir. 1970), cert. denied, 401 U.S. 913 (1971).

Upon reconsideration, and after a review of the issues presented to this court, the opinion of the United States Court of Appeals for the Tenth Circuit, Battle v. Anderson, 708 F.2d 1523 (10th Cir. 1983), and defendants' petition for Writ of Certiorari in the Supreme Court of the United States, the court finds that these motions, as well as the others ruled on herein, do not involve matters or issues presently pending appeal, that is, (1) discretion to "refuse to permanently allow double celling," and (2) discretion to "threaten to require a return to single celling".

Accordingly, this court's order of November 30, 1983, staying further proceedings is vacated and set aside. Furthermore, the court finds it has jurisdiction to enter this and the following orders.

ORDER ACKNOWLEDGING COMPLIANCE WITH THIS COURT'S ORDER OF OCTOBER 12, 1982, REQUIRING DEFENDANTS TO FILE AN OFFICIAL STATEMENT OF PENAL POLICY AND PLAN TO AVOID UNCONSTITUTIONAL COMPLIANCE, AND ACCEPTING AND ADOPTING THE PLAN

On June 17, 1983, the defendants filed "Defendants' Plan of Measures To Be Taken To Assure Continued Constitutionality of Oklahoma's Prisons", and on July 13, 1983, defendants filed a supplement to the plan. (Hereinafter referred to as Defendants' Plan)

As Judge McKay points out in his majority opinion concerning the issue of exercising continuing jurisdiction, the district court's order requiring this plan is "targeted to assure compliance" and "prevent a recurrence of unconstitutional conditions". Battle v. Anderson, supra at page 1540 (10th Cir. 1983). Likewise, Defendants' Plan is evidence of future intention by the State of Oklahoma that the constitutional conditions of Oklahoma's prisons will continue. Defendants' Plan will aid the court, as no other assurance

could, in determining if, in its discretion, the court is satisfied that unconstitutional conditions will not recur. It is a welcomed and added factor in the "totality of circumstances" determination of satisfied constitutional compliance. Battle v. Anderson, supra at pages 1538 to 1540.

The court finds these plans in compliance with its previous order of October 12, 1982, and it is satisfied with and adopts the plans, policies, and intent therein to permanently continue compliance with constitutional conditions in Oklahoma's prisons.

DENYING DEFENDANTS' REQUEST FOR AN ADVISORY JURY

Prior to the court's hearing on September 19, 1983, on the outstanding motions, defendants requested an advisory jury pursuant to Rule 39(c), Federal Rules of Civil Procedure. The trial court took this motion under advisement and proceeded to hear evidence for nine days, obviously feeling no need of an advisory jury. The need for an advisory jury is discretionary with the trial court, and this court cannot find the need or necessity for an advisory jury in this case. Rule 39(c), Federal Rules of Civil Procedure, and defendants' request is denied.

DENYING PLAINTIFFS' EMERGENCY MOTION TO ENJOIN FURTHER POPULATION INCREASES IN THE OKLAHOMA PRISON SYSTEM AND TO RETURN TO COMPLIANCE WITH THE COURT'S SPACE STANDARDS

An emergency motion to enjoin further population increases was previously denied. (Court's Memorandum Opinion and Order, October 12, 1982). There is now an identical motion before the court which was filed on September 2, 1983.

The court finds no evidence to justify reversing its order. The court finds that placing a "cap" on a prison population or enjoining increases in such population would be folly and an unlawful intrusion into the state's police powers

and its citizens' safety. Article X, Constitution of the United States.

Likewise, the court finds no evidence to necessitate a return to the space standards requested by the plaintiffs which the court has previously vacated by its orders of September 28, 1982, and October 12, 1982. However, Director Meachum testified, the policy, goal, and budgeting of the Department of Corrections is single celling and sixty (60) square feet per prisoner in cells and seventy-five (75) square feet per prisoner in dormatories. This court agrees, contrary to Judge Bohanon's previous finding, with Judge Barrett's majority opinion that Rhodes v. Chapman, 452 U.S. 337, 345-347 (1981) is controlling on this issue in this case. Battle v. Anderson, supra at pages 1534-1536. The Rhodes case dealt with overcrowding problems due to unanticipated increases in the prison population. Rhodes v. Chapman, supra, footnote 16 at page 351. In considering this factor in light of Rhodes, and the previously affirmed findings of this court, there can be no doubt that the Oklahoma prison facilities are presently better than those of Ohio as approved in the Rhodes case. Battle v. Anderson, supra at pages 1532-1534.

Accordingly, plaintiff's motion is in all respects denied.

GRANTING DEFENDANTS' MOTION TO DISMISS

In ruling on this motion, the court makes the following findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules of Civil Procedure, and adopts this order and the findings of facts and conclusions of law herein, in lieu of filing separate findings and conclusions. Rule 52(a), Federal Rules of Civil Procedure. With the exception of contrary findings herein, this court adopts its previous findings of fact and conclusions of law. In addition, the court admits and has considered as evidence those facts determined by the fact finder in his Final Compliance Report, dated March 1983, as well as his testimony of September 20-22, 1983.

The court determines that a recapitulation of the history of this case is unnecessary. Although the responsibility of this case is new to this judge, the case is not. The major prison facilities involved are located in this federal district. This court has handled scores of civil rights complaints concerning the parties and the subject matters of this case, and has made continual referral to this litigation in those cases. Further, this court has made an exhaustive study and review of the record herein since assuming this assignment.

This case is a class action for declaratory and injunctive relief for alleged, and previously shown, deprivations of a constitutional right under color of state law: the deprivations being conditions of confinement and the constitutional right being freedom from cruel and unusual punishment.

The questions now before this court are: (1) Whether the totality of circumstances of the conditions of confinement of the Oklahoma prison system violate the mandates of the United States Constitution; and (2) If the system is constitutional, is this court satisfied that constitutional compliance will continue.

At the outset, there were deprivations of constitutional rights. Battle v. Anderson, supra at page 1525. However, through the years and the efforts of Judge Bohanon and the State of Oklahoma, conditions of the Oklahoma prison system have changed. As early as October 1982, Judge Bohanon writing for this court held, "the court does not believe that the evidence presented to date shows a totality of conditions mandating a finding of unconstitutionality". Likewise, the United States Court of Appeals for the Tenth Circuit has affirmed this court's findings of constitutional conditions in the Oklahoma prison system as late as May 1983. Judge Barrett, writing for the majority on that issue stated, "... there do

not now exist any unconstitutional conditions in the Oklahoma prison system. The trial court so found." (emphasis added) Battle v. Anderson, supra at page 1533. Judge McKay, with whom Judge Doyle joined, writing in the same opinion stated, "... we nevertheless agree that present conditions, as described by the district court, appear constitutionally adequate under the standards set forth in Rhodes." Battle v. Anderson, supra at page 1537. This court agrees and so finds.

There have been disturbances, problems, and inadequacies in the Oklahoma prison system since the court's last findings. There are four subjects of previous court orders that are still found to be inadequate and not in compliance: racial integration, access to courts, equal protection guarantees for women, and vacating to human habitation the East and West Cellhouses of the Oklahoma State Penitentiary at McAlester, Oklahoma. However, each area of continued violation has been specifically addressed by the State and is subject to a specifically planned remedy.

Racial integration of the occupants of double cells is found to be almost non-existent in the Oklahoma prison system. Racial integration of cells is strictly by voluntary action only. However, a commitment by defendants to fully integrate is contained in the Defendants' Plan. The court finds the Defendants' Plan to be of sufficient remedial effect and has previously, in this order, approved and ordered its adoption.

The court finds that the mandated minimums of adequate library facilities has not yet been met. Bounds v. Smith, 430 U.S. 817 (1976). However, testimony from Mr. Larry Meachum, Director of the Department of Corrections of Oklahoma, at the September 1983 hearing, indicates and assures this court that libraries will be fully stocked and that plaintiffs have and will be assured continued access to courts.

The court finds that equal protection guarantees for women inmates are inadequate in terms of programs, medical care, and exercise. However, Director Meachum testified there is a $62,000.00 current special appropriation for women's programs and detailed the specific remedies outlined in the Defendants' Plan. The court finds the proposed measures will continue constitutionality.

The court finds that the East and West Cellhouses are still occupied despite their ordered vacation over four years ago. However, the court is satisfied with the assurances from Director Meachum and Governor Nigh that the cellhouses will be vacated as soon as feasible. (Also, Director Meachum's letter dated October 31, 1983, to the court).

Also, the court finds that management problems exist in the Oklahoma system. Problem areas can be determined in food preparation and service, maintenance of equipment and facilities, distribution of clothing and essential supplies, and inmate idleness. These management problems exist despite the extremely professional staff of the Oklahoma prison system. These problems are found to be primarily a direct result of increases in prison population.

Unfortunately, there will always be problems and inadequacies. We are considering a large, confined population of convicted felons, not a nursery school. As noted by Judge Barrett, "The Rhodes majority observed that harsh or restrictive conditions of confinement are part of the punishment criminal offenders justly receive because the Constitution does not mandate comfortable prisons. Justice Powell wrote that 'To the extent that such conditions [of confinement] are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.' 452 U.S. at p. 347." Battle v. Anderson, supra at page 1535.

The court finds, considering the totality of circumstances, these inadequacies, problems, and shortcomings do not constitute cruel and unusual punishment under the test of Rhodes. Rhodes v. Chapman, supra at page 347. The court finds no evidence at this time to show that the plaintiffs' present conditions of confinement in the Oklahoma prison system have changed from one of constitutionality to unconstitutionality. Thus, the court finds that since October 1982 to the present date the conditions of confinement in the Oklahoma prison system are constitutional and are not cruel and unusual punishment.

This court now addresses the issue of retaining jurisdiction or continuing supervisory jurisdiction in this case. Our Circuit Court held that the district court had the authority and obligation to continue supervisory power over this case "until it can say with assurance not only that Eighth Amendment violations do not presently exist but that there is no reasonable expectation that unconstitutional conditions will recur". Battle v. Anderson, supra at page 1537. It is no doubt for that purpose that Judge Bohanon ordered the defendants to file "an official statement of penal policy and detailed plan of action describing measures that will be used to avoid the return of the Oklahoma prison system to unconstitutional conditions". Judge Bohanon's Memorandum Opinion of October 12, 1982, at page 8.

The exercise of this continuing jurisdiction is within the discretion of the trial court, and it may continue until the trial court is satisfied, or finds no reasonable expectation, that unconstitutional conditions will recur. Battle v. Anderson, supra at pages 1538 and 1539; Coker v. Georgia, 433 U.S. 584, 597 (1977).

As previously noted, on June 17, 1983, as supplemented July 13, 1983, the defendants filed "Defendants' Plan of

Measures to be Taken to Assure Continued Constitutionality of Oklahoma's Prisons". This court adopts its previous findings herein in regard to that Plan in lieu of separate findings of fact and conclusions of law. Rule 52(a), Federal Rules of Civil Procedure. Procedure.

In addition to Mr. Meachum's testimony in September 1983, the Honorable George Nigh, Governor of the State of Oklahoma, testified that there have been more appropriations to capital and to operations in corrections than any other area of state government. He stated that for the present year, while full time equivalent employment was being reduced in virtually every area of state government, there was, from November 1982 to August 1983, an increase of 261 in the Corrections' Department. The Governor testified that in the appropriations bill for the fiscal year 1984 budget, an additional increase of 639 full time equivalent employees was authorized and funded for the Department of Corrections, and that the Department of Corrections received almost half of the total capital appropriations for the entire state.

As Judge Bohanon stated during Governor Nigh's testimony, it is the executive and legislative branches of the government who provide the funds that assure continued constitutional compliance. Procunier v. Martinez, 416 U.S. 396, 404-405 (1974).

From the past record of the Department of Corrections, the Governor, and the legislature, and from their expressed awareness and intentions of future constitutional compliance in accordance with the law, this court's orders, and the defendants' plan, this court finds that it is now satisfied that there is no reasonable expectation that unconstitutional practices will recur in the conditions of confinement in the Oklahoma prison system.

This court finds that the Oklahoma State Legislature and its prison officials are aware of and sensitive to the requirements of the Constitution in dealing with the problems of how best to achieve the goals of the penal function in the criminal justice system. Rhodes v. Chapman, supra at page 352. In echoing the concerns of the concurring opinions of Mr. Justices Brennan, Blackmun, and Stevens in Rhodes, this court is ever mindful of its obligation to enforce the constitutional rights of all persons and to remedy constitutional violations. Rhodes v. Chapman, supra at pages 352 and 362; Cruz v. Beto, 405 U.S. 319, 321 (1972).

Accordingly, defendants' motion to dismiss this case in its entirety is granted. All of this court's orders and injunctions as modified heretofore remain in full force and effect.

DENYING PLAINTIFFS' APPLICATION TO EXCUSE PLAINTIFF-INTERVENOR FROM PARTICIPATION

This action having been dismissed, the court finds this application is moot, and it is denied.

GRANTING DEFENDANTS' MOTION TO DISMISS THE FACT FINDER

This action having been dismissed, the court finds there is no longer a need for the fact finder, and defendants' motion to dismiss the fact finder is granted.

DENYING PLAINTIFFS' MOTION TO COMPEL

Plaintiffs' counsel has moved the court, pursuant to Rule 37, Federal Rules of Civil Procedure, to compel defense counsel to make available for deposition and discovery the following items:

1. The attorney time spent on such matters as the escorting of experts, preparation and attendance at depositions, attendance at hearings, and attendance at trial.

2. The expenses incurred by the defendants for lodging, food and transportation of defendants' expert witnesses.

3. Press statements made by the Attorney General's Office concerning plaintiffs' counsel's conduct in this case.

Plaintiffs' counsel alleges said material is needed to establish his entitlement to enhancement of attorney's fees.

Plaintiffs' counsel cites the case of Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983), for the proposition that he is entitled to defense counsel's time records in order to establish the reasonableness of his fees and the efficiency of his work. Plaintiffs' reliance on Ramos v. Lamm is misplaced. That case states that in determining the reasonableness of fees to be awarded, the court may look to how many lawyers the other side utilized in similar situations to determine if the prevailing party is billing for duplicated services. 713 F.2d at 554. Ramos does not allow a prevailing party to rely on opposing counsel's billing records to establish the reasonableness of prevailing counsel's fees or the efficiency of his work. Moreover, in the case at bar, the time and expense records of opposing counsel are entirely irrelevant to the determination of the plaintiffs' counsel's reasonable attorney's fees. The nature of the work performed by defense counsel may have varied significantly from that of plaintiffs' counsel. Additionally, one side may have employed far more experienced counsel than the other. Therefore, the amount of hours needed by one side to prepare adequately may have

differed substantially from that of opposing counsel. See Johnson v. Univ. Col. of Univ. of Ala. in Birmingham, 706 F.2d 1205, 1208-1209 (11th Cir. 1983); Harkless v. Sweeny Ind. School Dist., 608 F.2d 594, 598 (5th Cir. 1979); Mirabal v. General Motors Acceptance Corp., 576 F.2d 729, 731 (7th Cir. 1978). Plaintiffs' counsel has several avenues available to obtain and present evidence of his reasonable fees and expenses without resorting to the records of defense counsel.

Accordingly, plaintiffs' request for defense counsel's time and expense records (including expenses incurred for the employment of expert witnesses) is denied.

Plaintiffs' counsel's request for all statements made by the Attorney General's Office should also be denied. Plaintiffs' counsel may attempt to prove the unpopularity of his case by many methods other than by the opposing counsel's opinion of his case. If the Attorney General's Office issued press releases relating to the case those statements are of public record and can be easily obtained by plaintiffs' counsel.

Accordingly, plaintiffs' motion to compel is denied in its entirety.

DENYING DEFENDANTS' MOTION FOR PROTECTIVE ORDER

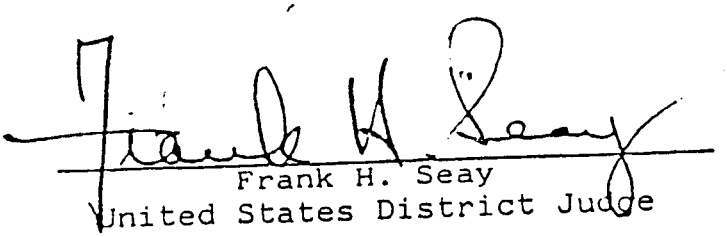
Plaintiffs' motion to compel having been denied, the court finds defendants' motion for protective order is moot and need not be addressed by this court.

ORDER SETTING HEARING ON ATTORNEY'S FEES

Plaintiffs' counsel's application for attorney's fees, and all other matters relating to the awarding of attorney's

fees, is set for hearing at 2:00 p.m., on March 28, 1984, in the United States District Court for the Eastern District of Oklahoma, in Muskogee, Oklahoma.

IT IS ALL SO ORDERED this 30th day of December, 1983.



Frank H. Seay
United States District Judge