

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

**CASE NO. 76-6086-CIV-HOEVELER**

OLLIE CARRUTHERS, et al.,

Plaintiffs,

v.

AL LAMBERTI, et al.,

Defendants.

---

**PLAINTIFFS' MOTION FOR THE APPOINTMENT OF A  
POPULATION MANAGEMENT EXPERT**

Plaintiffs respectfully ask this Court to appoint James Austin as an expert pursuant to Fed. R. Civ. P. 706, and order that Mr. Austin (1) conduct an analysis of the County's criminal justice processes and policies that affect the population level at the Broward County Jail (BCJ), (2) develop strategies and remedies to address those processes and policies so that the population level at BCJ can be reduced without significantly affecting public safety, (3) develop a baseline ten-year jail population forecast that would advise the County on the impact of current criminal justice trends, and (4) identify realistic options that have been successfully implemented in other jurisdictions that will reduce the need for future beds –especially for the pretrial felon population. Pursuant to Local Rule 7.1.A.3., Plaintiffs have conferred with Defendants through counsel about this motion, and have sent them the appended proposed Order. Defendant Sheriff Al Lamberti does not object to the Court entering the appended Order. Defendant Broward County Commissioners have not taken a position with regard to the Court's entering the proposed Order. The grounds for this motion are set forth

below.

### **Background**

This Court has entered a number of orders setting population caps or otherwise remedying conditions at the Broward County Jail that were caused or exacerbated by overcrowding. *See, e.g., Carruthers v. Navarro*, Case No. 76-6086, slip op. (S.D. Fla. Nov. 25, 1985) (Order Setting Population Cap). In 2006, the Jail's average daily population (ADP) increased dramatically, reaching an historic high of 5,883 prisoners in August 2006. *See* Defendant, Al Lamberti, Sheriff of Broward County, Status Report and Impact Statement ("Sheriff's Status Report"), dkt. 863, at 4. After consulting with Plaintiffs, the Defendants retained the National Institute of Corrections (NIC) to perform a jail and justice system assessment to determine what aspects of the County's criminal justice system could be remedied to reduce the Jail's population. The NIC produced its report in 2007. *See* National Institute of Corrections, Technical Assistance Report NIC TA 07-J1032, Jail and Justice System Assessment for Broward County, Florida, February 13-16, 2007 ("NIC Report"), appended as Exh. A to the Declaration of Eric Balaban, filed herewith. In its report, the NIC acknowledged that there were some methodological limitations to its study, including that some of the criminal justice data on which it relied was prepared in haste, and was therefore not completely reliable. *See id* at 9. The NIC Report also did not include an assessment of data files that would allow for more detailed analysis of admissions, releases and the daily jail population, and more specifically, the court dispositions of the felony cases. *See* Declaration of James Austin, filed herewith, ¶21.

The NIC made 22 separate recommendations to County officials designed to change criminal justice policies and processes that had contributed to the overcrowding at the Jail. According to local

officials, many of these recommendations have been adopted which in turn lowered the jail population for a time. *See id.* ¶19 But there were others that were not adopted or were not considered that could also have a positive impact. *Id.*

In 2009, Defendants closed the Stockade, a 712-bed facility, and one of five facilities that made up Broward County Jail. Since the Stockade was closed, the Jail has experienced a significant uptick in overcrowding. As a result of the overcrowding, jail administrators have had to house prisoners on temporary beds (commonly referred to as “boats”) comprised of mattresses in hard plastic shells, which are placed in housing unit day rooms and other common areas. The overcrowding and use of temporary beds at the Jail has increased dramatically in the past four months. From March-July 2010, the average daily population at the Jail increased by close to 9%. *See Sheriff’s Status Report at 4* During this time, the number of temporary beds in use increased almost ten-fold; as of July 2010, 259 temporary beds were in use. *See id.* As the Sheriff concedes, overcrowding and the use of temporary beds at the Jail negatively affects conditions and operations, and can affect the Jail’s capacity to manage its population safely through its classification system. *See id.* 2-7.

Despite the increase in overcrowding that has plagued the Jail since the Stockade’s closure, the defendant Broward County Board of Commissioners requested that the Sheriff cut his budget by 14% for fiscal year 2011. *See id.* at 3. In response, the Sheriff submitted a proposed budget that included a proposal (since superseded)<sup>1</sup> to close one half of the Jail’s Rein facility, which would have resulted in the loss of an additional 544 beds. *Id.* The proposal was based on the Jail having to

---

<sup>1</sup> Plaintiffs now understand that the County will approve a budget for FY 2011 that will allow the Sheriff to keep open all existing facilities, though the County’s final action on the Sheriff’s budget will not occur until September 2010. *See Declaration of Eric Balaban, filed herewith, ¶2.* Also, there is no guarantee that the Sheriff will have the

accommodate an average daily population (ADP) of 4,260 prisoners, which is almost 10% below the most recent ADP figures. *Id.* Notably, the Sheriff's proposal to close one-half of the Rein facility was not supported by a baseline population assessment that determined both the short-term and long-term bed space needs at BCJ. *See* Balaban Decl. ¶ 2.

**I. THIS COURT SHOULD APPOINT JAMES AUSTIN AS THE COURT'S POPULATION MANAGEMENT EXPERT UNDER FED. R. EVID. 706**

In order to devise remedies to reduce the prisoner population at the Jail, and to develop a population plan that provides Defendants with a realistic projection of their future bed space needs, Plaintiffs respectfully ask that the Court appoint James Austin, Ph.D., as a population management expert under Fed. R. Civ. P. 706, authority this Court previously has used to appoint neutral experts in the areas of medical care, mental health care, and corrections/security, and whose appointment has narrowed the issues in this case. *See Carruthers v. Jenne*, Case No. 76-6086, slip op. at 2-3 (S.D. Fla. Aug. 2, 2001).

Dr. Austin has successfully collaborated with local and state correctional officials around the country to help them reduce their prison and jail populations through reliance on community-based alternatives to incarceration, at considerable savings to the taxpayers and without risk to public safety. He has participated in producing major jail master plans and assessments on such major urban jails as Cook County, IL; Bexar County and Harris County, TX; Baltimore City, MD; and Washington, DC. He is currently working in ten jurisdictions to help prison and jail officials reduce crowding and improve correctional facility conditions. He was a principal expert relied on by the three-judge panel in *Coleman v. Schwarzenegger* and *Plata v. Schwarzenegger*, 2009 WL 2430820, (E.D. Cal., September 03, 2009) (NO. C01-1351 THE, CIV S90-0520LKKJFMP) in addressing

---

funds to maintain all of the existing facilities in future years. *Id.*

whether and how California can safely reduce prison overcrowding, at great financial savings to the state. *Id.* at \*24 n.39, \*83, \*89-92, \*94-95, \*100-03, \*110 n.88, \*111-12 & ns. 89-91.

Plaintiffs have submitted with this application Dr. Austin's declaration, outlining his proposed methodology and plan of work to develop a plan to decrease the population at BCJ, and to provide an evidence-based population projection that can inform Defendants of their long-term bed space needs. Dr. Austin estimates that he can produce this work in no more than six months, assuming he receives the cooperation, and access to data, he needs to carry out his work. The fact that Dr. Austin would serve as this Court's expert should speed his access to the files and personnel he needs to carry out his duties, as set forth in the appended proposed Order.

Dr. Austin's declaration describes how an analysis of readily-available data files would identify the factors that are producing the current average daily population at the Broward County Jail, and from this data how the County could identify its options for safely reducing that population. One target group will be pre-trial detainees charged with felonies, who comprise a significant portion of the Jail's population, though Dr. Austin proposes to look at the entire population to determine if there are persons who need not be housed at the Jail. For example, a close analysis might show that court processing, lack of treatment programs, or other factors are preventing a more timely release from custody or prisoners who can safely be released, making it possible for the County to identify new criteria to safely divert low-risk individuals to pre-trial release programs.

The County and Sheriff have both been under obvious budget pressures to reduce the operating costs at BCJ. However, neither the County nor Sheriff has developed a baseline population projection that could be used to determine the long-term bed space needs for BCJ. Dr. Austin proposes developing such a projection, which may result in significant cost-savings for the

County, and will ensure there is an evidence-based approach to any future budget cuts that may affect Jail capacity.

In short, the appointment of Dr. Austin can alleviate the overcrowding that exists today at BCJ, and thereby curb the significant risks to both prisoners and staff that result from that overcrowding, and can also help ensure that overcrowding does not recur.

Finally, Plaintiffs ask that Defendants bear the costs of Dr. Austin's appointment. Rule 706 permits this Court to allocate court-appointed expert costs to one party. The commentary to Rule 706's precursor states:

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

*United States Marshal's Service v. Means*, 741 F.2d 1053, 1057-59 (8<sup>th</sup> Cir. 1984) (en banc) (citing Model Code of Evidence, Rule 410 as the "basis of current Fed. R. Evid. 706," and upholding an order requiring the Government to advance the costs of a court-appointed expert for indigent defendants). *See* Fed. R. Evid. 706 (b) ("the compensation [of a Rule 706 expert] shall be paid by the parties in such proportion and at such time as the court directs."); *see also McKinney v. Anderson*, 924 F.2d 1500, 1511 (9<sup>th</sup> Cir.) (district court may apportion all of the Rule 706 expert costs to one party), *vacated on other grounds*, 502 U.S. 903 (1991); *Nelson v. Dawson*, 2009 WL 453965, at \*9 (D. Idaho Feb. 20, 2009) (allocating all costs of a Rule 706 expert to prison officials, noting that the prisoner plaintiffs are indigent).

This Court ordered the Defendants to pay the Rule 706 experts it appointed in 2001 because Plaintiffs are indigent and it was Defendants' "conduct [that] occasioned these proceedings."

*Carruthers*, Case No. 76-6086, slip op. at 3 (S.D. Fla. Aug. 2, 2001) (citing *McKinney*). Nothing has changed since the Court's decision: Plaintiffs remain indigent, this Court has already entered relief against Defendants, and it is their conduct that occasioned these proceedings. Plaintiffs do note that Dr. Austin has agreed to a cap on his compensation, subject to his seeking additional funds should he find it necessary, and both Dr. Austin and Plaintiffs believe that the Dr. Austin's work may result in long-term reductions in the prisoner population at BCJ, resulting in significant cost-savings for Defendants.

### **Conclusion**

For the foregoing reasons, Plaintiffs ask that the Court grant this Motion and appoint Dr. Austin the Court's population management expert, pursuant to Fed. R. Civ. P. 706.

Respectfully submitted this 3rd day of September, 2010.

/s/Randall Marshall  
Randall Marshall  
Fla. Bar No. 181765  
Legal Director  
ACLU of Florida  
4500 Biscayne Blvd. Suite 340  
Miami, FL 33137  
786-363-2700 (phone)  
[rmarshall@aclufl.org](mailto:rmarshall@aclufl.org)

/s/ Christopher Cloney  
Christopher Cloney  
Fla. Bar No. 179595  
Cloney & Cloney, P.A.  
661 Brevard Avenue  
Cocoa, Florida 32922  
321-631-3336 (phone)  
321-631-3303 (fax)  
[ccc@cloney.com](mailto:ccc@cloney.com)

/s/ Eric Balaban

Eric Balaban

National Prison Project of the ACLU Foundation, Inc.

915 15th Street, N.W., Seventh Floor

Washington, D.C. 20005

202-393-4930 (phone)

202-393-4931 (fax)

[ebalaban@npp-aclu.org](mailto:ebalaban@npp-aclu.org)

Attorneys of Plaintiffs



**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

**CASE NO. 76-6086-CIV-HOEVELER**

OLLIE CARRUTHERS, et al.,

Plaintiffs,

v.

AL LAMBERTI, et al.,

Defendants.

---

**CERTIFICATE OF SERVICE**

I hereby certify that on September 3, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the Service List below in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

Terrence Lynch, Esq.  
2601 W. Broward Blvd.  
Fort Lauderdale, FL 33312

Bruce W. Jolly, Esq.  
2455 E. Sunrise Blvd., Ste. 1216  
Fort Lauderdale, FL 33304

Attorneys for Defendants Lamberti and  
Wimberly  
By U.S. Mail

Hollie Hawn, Esq.  
115 South Andrews Ave., Suite 425  
Fort Lauderdale, FL 33301

Attorney for Broward County  
By U.S. Mail

Professor Howard Messing  
2200 South Ocean Lane, Suite 2510  
Fort Lauderdale, FL 33316  
Special Master  
By U.S. Mail

/s/Randall Marshall

Randall Marshall

Legal Director

ACLU of Florida

4500 Biscayne Blvd. Suite 340

Miami, FL 33137

786-363-2700 (phone)

[rmarshall@aclufl.org](mailto:rmarshall@aclufl.org)

Attorney for Plaintiffs

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

**CASE NO. 76-6086-CIV-HOEVELER**

OLLIE CARRUTHERS, et al.,

Plaintiffs,

v.

AL LAMBERTI, et al.,

Defendants.

---

**CERTIFICATE OF COUNSEL**

Pursuant to S.D. Fla. L.R. 26.11, Plaintiffs, by and through its undersigned co-counsel, hereby certifies that counsel for Plaintiffs has conferred with all parties who may be affected by the relief sought in this motion in a good faith effort to resolve the issues raised.

National Prison Project of the ACLU Foundation, Inc.  
Attorneys for Plaintiffs  
195 15th Street, N.W., Seventh Floor  
Washington, D.C. 20005  
Telephone: (202) 393-4930  
Facsimile: (202) 393-4931  
Email: [ebalaban@npp-aclu.org](mailto:ebalaban@npp-aclu.org)

/s/Eric Balaban  
Eric Balaban