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I. HISTORY OF THE PROCEEDINGS

A. Background

On May 16, 1994, Plaintiffs at Ely State Prison filed a class action law suit, amended on May 20, 1994, alleging that state officials acting under the color of state law had violated Plaintiffs' rights under the United States Constitution. Among other things, Plaintiffs claimed that Defendants deliberately subjected them to injury and risk of injury from a "shoot to injure" policy enforced in non-threatening situations. The suit also challenged the medical and mental health care provided to prisoners. Other issues raised in the complaint included denial of meaningful access to court, lack of proper winter clothing, and visitation hardships. Plaintiffs sought injunctive and declaratory relief from the alleged unconstitutional acts, conditions, and practices described in their complaint. On November 21, 1994, the district court granted Plaintiffs' motion for class certification.

B. Discovery and Depositions

Discovery commenced on September 2, 1994. Discovery disputes between the parties regarding access to documents, began shortly thereafter and continued throughout the discovery period. These disputes led to interventions by the Court on February 15, April 6, June 22, November 20, 1995 and May 14, 1996. As part of the Court's resolution of the conflict on June 22, 1995, the

1 parties agreed that Plaintiffs' counsel would review and
2 copy the documents they sought at Ely State Prison, since
3 the prison did not have the resources to do the copying.
4 This required Plaintiffs counsel to bring staff from
5 Washington, D.C. and to transport copying machines from
6 Las Vegas to ESP, an arrangement that caused the paper
7 discovery to extend into mid 1996.

8 The most protracted discovery disputes concerned non-
9 patient medical data, reports and statistics. The final
10 batch of these documents was not made available to
11 Plaintiffs until October, 1996.

12 Plaintiffs commenced taking depositions at Ely State
13 Prison in July 1995, beginning with the medical staff. The
14 correctional staff was deposed in October and November
15 1995. Depositions of officials of the Nevada Department
16 of Prison continued into February, 1996, with the final
17 set of depositions being concluded in October 1996.

18 On September 27, 1996, the Court ordered that all
19 discovery except the depositions of health care providers
20 and experts was to be completed by October 2, 1996 and
21 that expert disclosure and depositions were to be
22 completed by February 28, 1997. The parties completed the
23 depositions within the time ordered by the Court.

24 C. Joint Stipulation Pursuant to Rule 41(a)(1)

25 At the close of discovery in January and February
26 1997, Plaintiffs' counsel conducted an extensive review
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Dismissed
w/o prejudice

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of their experts' reports, as well as discovery documents and depositions taken in the case. Plaintiffs' counsel concluded from this review that the litigation had led to changes such that conditions at Ely State Prison appeared to meet constitutional minima regarding most of Plaintiffs' claims. The parties filed a joint stipulation, pursuant to Rule 41(a)(1) of the Fed. R. Civ. P., dismissing all claims of Plaintiffs' complaint save those related to mental health care and use of live ammunition at the prison. The Court entered an order on March 11, 1997 approving the stipulation.

D. Mental Health

On June 4 and 5, 1996, Plaintiffs' mental health expert, Dr. Jeffrey Metzner, toured Ely State Prison. On July 8, 1996, he issued a preliminary report, which he revised on December 12, 1996, upon receipt of certain medical statistical and quality assurance reports requested during his tour, but was denied access.

Dr. Metzner's report concluded "that the mental health services at ESP provide inadequate treatment for many inmates who are suffering from serious mental disorders." Dr. Metzner's primary finding was that the mission of the extended care unit (ECU) for mental health patients had "significantly changed during the past year" and "no longer functioned as an intermediate care treatment unit for inmates with serious mental illnesses."

1 (Exhibit A, Report of Dr. Metzner, page 20.) He stated
2 that the lack of adequate care for inmates with serious
3 mental illnesses resulted "in serious disruptions in their
4 lives and significant suffering. Inadequate treatment for
5 these inmates also contribute to the creation of an unsafe
6 environment for other inmates and staff, and often results
7 in an inmate's clinical condition deteriorating." (Exhibit
8 A, Report of Dr. Metzner, page 21.)

9 Dr. Metzner recommended that the ECU change its
10 "mission to focus on treatment of inmates with serious
11 mental illnesses" and "provide an environment that could
12 serve as an intermediate care unit." Dr. Metzner outlined
13 the features of an effective intermediate care program,
14 which he said should include recreational/vocational
15 activities, individual and group programming, and
16 sufficient spacing and staff to conduct these activities.
17 (Exhibit A, Report of Dr. Metzner, page 20.)

18 During Defendants' deposition of Dr. Metzner on
19 February 7, 1997, Dr. Metzner confirmed that the central
20 problem he had identified was the lack of treatment of
21 seriously mentally ill prisoners in an ICU. Defendants'
22 counsel did not inform Plaintiffs' expert or counsel that
23 such a unit had been instituted at Ely State Prison since
24 his June 1996 tour. (Exhibit B, Deposition of Dr. Jeffery
25 Metzner, February 7, 1997, pages 33-34, lines 24-20.)

26 However, when Plaintiffs' deposed Defendants' expert,
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1 Dr. Donald Molde, on February 24, 1997, he indicated that
2 he had been informed in December, 1996 that the prison was
3 to "resume the use of the extended care unit for
4 chronically mentally ill," which is "how it was prior to
5 the time when CMS (Correctional Medical Services, the
6 private health care provider at Ely State Prison) took
7 over the medical management." (Exhibit C, Deposition of
8 Dr. Donald Molde, February 24, 1997, page 9, lines 5-11.)

9 When Dr. Molde was asked if he knew for certain
10 whether an extended care unit was actually in operation,
11 he declined to give an unequivocal response, stating
12 "[o]nly that I have no reason not to believe that it was
13 not in operation...." (Exhibit C, Deposition of Dr. Donald
14 Molde, February 24, 1997, page 10, lines 6-11.) Dr. Molde
15 informed Plaintiffs' counsel in response to a question
16 that he had seen a plan for the extended care unit at Ely
17 State Prison. Counsel requested a copy of the plan and was
18 presented a "handbook" for inmates which did not contain
19 information about the program and activities available in
20 the extended care unit. (Exhibit C, Deposition of Dr.
21 Donald Molde, February 24, 1997, page 42, lines 7- 24.)
22 Defendants did not provide the plan as requested by
23 Plaintiffs' counsel.

24 Although Plaintiffs' interrogatories and requests for
25 production of documents had specifically sought all
26 documents relating to the housing and treatment of the
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1 seriously mentally ill, and had specifically requested
2 that discovery responses be supplemented, as additional
3 information became available, Defendants did not
4 supplement their responses regarding an intermediate care
5 unit. Nor did they respond to the additional informal
6 requests by Plaintiffs' counsel for supplemental
7 information on this subject. It was not until the Joint
8 Pretrial Order, filed June 6, 1997, that Defendants for
9 the first time stated affirmatively that 1996 was the only
10 period when they did not have an intermediate care unit,
11 implying that one was now in place.

12 D. Use of Force

13 Plaintiffs' use of force expert, Charles Montgomery,
14 toured Ely State Prison from September 29 - October 1,
15 1996. Mr. Montgomery concluded in his report dated
16 November 19, 1996, that inmates at Ely State Prison have
17 been subjected to excessive force. (Exhibit D, Report of
18 Charles Montgomery, page 16.) He reported that the prison
19 overly relied on the use of force to control inmates and
20 that prison authorities were predisposed to use deadly
21 force as a first rather than as a last resort. (Exhibit
22 D, Report of Charles Montgomery, page 13.)

23 Plaintiffs' expert noted that "there [had] been a
24 significant reduction in the amount of force that has been
25 used" in the period between the complaint and his tour.
26 He observed however that the prison needed to do "a great
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1 deal more" in this area. (Exhibit D, Report of Charles
2 Montgomery, page 16.) Mr. Montgomery recommended that the
3 prison place use of force in its proper perspective by
4 "de-emphasizing the use of force as a primary response"
5 and "emphasizing the measured/progressive use of force
6 which is clearly stressed by policy." . (Exhibit D, Report
7 of Charles Montgomery, page 17.)

8 As was the case with the mental health discovery,
9 although Plaintiffs' interrogatories and requests for
10 production of documents had specifically sought all
11 documents relating to the use of firearms at Ely State
12 Prison, and had specifically requested that discovery
13 responses be supplemented, as additional information
14 became available, Defendants did not supplement their
15 responses regarding the use of firearms at Ely State
16 Prison.

17 On February 24, 1997, upon the request of Plaintiffs'
18 counsel, defendants did provide the Semi-annual report of
19 Ely State Prison for the period July 1 - December 31,
20 1996. The report showed that the number of incidents of
21 use of force at the prison continued to decrease.
22 (Exhibit E, Semi-annual report of Ely State Prison for the
23 period July 1 - December 31, 1996, pages 3 - 11.)

24 E. Recent Developments

25 On July 7, 1997, Defendants supplied Plaintiffs with
26 information indicating that the two claims to be tried
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1 are, in all likelihood, essentially moot.

2 First, on the mental health claim, Defendants
3 notified Plaintiffs that they have implemented an ECU
4 (Extended Care Unit), and provided a summary description
5 of the Unit. (Exhibit F, July 7, 1997 letter for
6 Defendants' counsel.) According to the summary, the
7 extended care unit at Ely State Prison was implemented in
8 June, 1996, and its objective is to "provide a location
9 and program for severely mentally ill offenders at Ely
10 State prison." The programs offered in the unit are said
11 to include services from mental health professionals and
12 the prison's chaplain, educational videos, reading
13 materials and work sheets. The program's stated goal is
14 to assist mentally ill inmates to adjust to incarceration,
15 develop social and coping skills and to return to general
16 population. The summary indicated that several group
17 therapies and activities are available to the inmates in
18 the unit.

19 On July 11, 1997, at the request of Plaintiffs'
20 counsel that Defendants provide further documentation to
21 substantiate that the ECU was in operations, Defendants
22 counsel furnished Plaintiffs counsel with an Ely State
23 Prison Institution Procedures, with an effective date of
24 May 15, 1996 title "Infirmary-Extended Care Unit" (Exhibit
25 G.) The Procedure set forth in some detail the plan for
26 an extended care unit which, if implemented, would appear
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1 to address Dr. Metzner's concerns. This document had not
2 been made available to Dr. Metzner during his tour, and
3 when it was first made available to Plaintiffs in
4 February, 1997, Defendants were unable to confirm that the
5 ECU was in operation. It was only in the letter of July
6 7, 1997, that Plaintiffs were provided the first
7 affirmative indication that an ECU had been implemented
8 at Ely State Prison.

9 Second, on the excessive force claim, Defendants
10 provided Plaintiffs with a list of all incidents in which
11 live shots were fired in the direction of prisoners, for
12 January through June, 1997. (Exhibit F.) The list shows
13 that in the first six months of 1997, live rounds were
14 fired on only two occasions: an incident on January 30,
15 1997, and an incident on May 2, 1997, in each of which one
16 live round of ammunition was fired. There is no indication
17 on the summary that any inmates were seriously injured in
18 either of these incidents.

19 Because the discovery period closed on October 2,
20 1996, Plaintiffs have not been able to tour the facilities
21 to confirm the accuracy of the information provided
22 concerning the ECU, nor to obtain the actual incident
23 reports of the shooting incident. However, the July 7,
24 1997, summary raises serious questions as to whether
25 proceeding to trial is in the best interests of Plaintiffs
26 at this time.

1 inmates.

2 There is of course no assurance that these recent
3 changes will be lasting, or that Defendants will continue
4 to meet constitutional minima. It is far too soon to tell
5 whether Defendants will actually maintain an effective
6 ECU. It is also too soon to determine whether they will
7 revert to their previous practice of routinely using
8 unnecessary deadly force against prisoners. Furthermore,
9 Plaintiffs strongly believe that the use of live rounds
10 of ammunition against prisoners in situations where such
11 force is unnecessary to prevent a risk of death or serious
12 bodily injury or escape, or to gain or maintain the
13 security of the prison, is never justified, and should
14 be banned as a matter of policy. It is an ineffective
15 method of prisoner control, posing serious risks of deadly
16 injury to staff as well as to prisoners that far outweigh
17 the possible security benefits claimed for it.

18 Nevertheless, the fact remains that Plaintiffs are
19 entitled to relief only for conditions which present an
20 *imminent* risk of injury to their health or safety. See
21 Lewis v. Casey, 116 S.Ct. 2174, 2179. See also Prison
22 Litigation Reform Act, 18 U.S.C § 3626 (a). Under these
23 stringent tests, it appears that Defendants have succeeded
24 in making moot Plaintiffs' claims for relief. The impact
25 of the litigation has already succeeded in bringing about
26 most of the changes which Plaintiffs sought, at least to
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1 the extent that conditions now appear to meet
2 constitutional minima. For this reason, it would serve
3 neither Plaintiffs' interests, nor the public interest,
4 to proceed to trial at this juncture.

5 **CONCLUSION**

6 For the foregoing reasons, Plaintiffs ask this Court
7 to dismiss the case without prejudice, after such
8 notification to the class as the Court may direct pursuant
9 to Rule 23(e), Fed. R. Civ. P.

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11 Respectfully submitted this 14th day of July 1997.

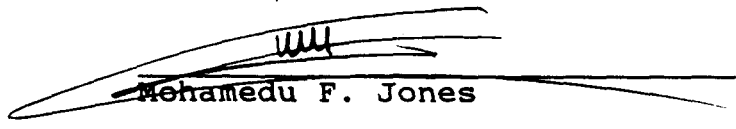
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CERTIFICATE OF SERVICE

I certify that on the July 14, 1997, I served plaintiffs' Motion for Voluntary Dismissal and supporting memorandum of points and authorities, by Federal Express on Harold A. Swafford, Deputy Attorney General, Office of the Attorney General, State of Nevada, Capitol Complex, Carson City, Nevada 89710, by Federal Express.


Mohamedu F. Jones