IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

HARRY PLYLER, ET AL., (formerly GARY WAYNE NELSON, ET AL.), Plaintiffs, vs. WILLIAM D. LEEKE, COMMISSIONER; SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; and MEMBERS OF THE SOUTH CAROLINA BOARD OF CORRECTIONS, Defendants.	CIVIL ACTION NO. 3:82-0876-2

ORDER

On January 8, 1985, the parties to this case agreed on a settlement, and that settlement was approved by the court in a consent decree signed March 26, 1986.[1] In July 1986, the state defendants sought a modification of said decree to permit certain double and triple-celling of inmates, which was in violation of the decree, to continue until the prisoner early-release program of the Omnibus Crime Act, Act 462 of 1986, became effective and operative in early 1987. The defendants had, by their own admission, been in violation of the settlement decree since at

[1] The defendants, with the advice, counsel and presence of the South Carolina Attorney General, agreed with the plaintiffs to settle this case; also, the South Carolina General Assembly specifically authorized negotiations and approved the settlement. Appropriations Act, Part III, Section IV, 1984 S.C. Acts 2177, 3107.

#1 Cont.

least March 1986. Since the defendants had failed to attain compliance voluntarily, this court proceeded to enforce the settlement decree. On July 22, 1986, the court ordered the South Carolina Department of Corrections (SCDC) to attain complete compliance with the consent decree within sixty days, which was simply requiring the defendants to do what they had agreed to do when they settled the case.

The matter now comes before the court again on defendants' motion for modification of the consent decree[2] and their motion, in the alternative, to approve a new construction variance in space allocations.[3] Defendants explain that they make both motions because the evidence in support of their motion

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[2] Defendants originally requested that section III(A)(3) of the decree be modified by adding a new second paragraph, as follows:

> In new institutions opening on or after June 1, 1986, where the cells are at least 73-square feet in size, general population inmates may be double-celled as necessary to accommodate the number of inmates in custody. Inmates double-celled pursuant to this paragraph shall be entitled to the full range of programs, services, etc. as provided for in this Decree.

In an amended motion for modification filed September 11, 1987, defendants moved to make a "technical correction" in the proposed paragraph to permit double-celling in cells 69-square feet in size instead of 73-square feet. The court considers defendants' motion as amended. As of now, the new correctional institutions that would be affected by defendants' motion include Lieber, McCormick, Broad River, Marlboro, and Allendale.

#2 Ct.

[3] The alternative motion for a "new construction variance" is made pursuant to section III(A)(4) of the decree and only applies to the Broad River, Marlboro, and Allendale Correctional Institutions, which were not already planned or under construction as of the date of the decree.

for modification also supports their motion for a variance for future institutions.[4] Under either motion, defendants seek permission to double-cell inmates in new institutions in cells of 69-square feet when the settlement decree requires that, effective no later than January 8, 1988,[5] inmates in new institutions receive at least 100-square feet when double-celled.

The court scheduled a hearing on this matter in Columbia, South Carolina for August 26, 1987, but was unable to hear the motion because, at the time, the court was still involved in the trial of a large criminal anti-trust case in Charleston, South Carolina. Consequently, the hearing was held before United States Magistrate Charles W. Gambrell, who has submitted a report and recommendation to the court, in accordance with 28 United States Code section 636(b). In addition, the court has received the complete transcript of the hearing and reviewed the matter de novo.

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[4] In determining whether to permit a variance under section III(A)(4) of the decree, the court "shall make a determination as to the reasonableness of or necessity for said variance, in light of but not limited to the requirements of this Decree and the totality of the conditions ..." Defendants submit that the showing required under section III(A)(4) is the same as the showing required to obtain a modification, but if there is any difference, it is probably that a lesser showing is required under section III(A)(4). Defendants' Memorandum In Support of Motion In the Alternative To approve Variance In Space Allocations at 5.

[5] Under section III(E)(2)(c) of the decree, "plaintiffs assigned to medium or maximum security institutions ... shall receive the sleeping space required by this Decree ... no later than within thirty-six (36) months from the signing of this Decree by the parties." Thirty-six months from said signing is January 8, 1988.

#3 Cont.

Defendants argue that an unexpected high increase in the inmate population makes compliance with the decree impossible and, further, that said increase constitutes a substantial change in circumstances thereby permitting modification of the decree under Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981) (en banc). Defendants describe the changed circumstances as follows:

> The Defendants, using previously-reliable projections, entered the agreement with an understanding that the number of inmates would increase by 30 to 50 per month. Decree, § III(E)(1)(c). Without these figures to rely on, Defendants never would have consented to the Decree. Defendants undertook a construction schedule which would have accommodated this rate of increase through 1990. During the first nine months of the Decree (January-September, 1985), the rate of increase, 40 per month, was within the anticipated range. In the next nine months, through June, 1986, the average rose to 110 per month, causing substantial noncompliance which led to the issuance of a remedial Order by this Court. In the nine months from July, 1986 through March, 1987, the rate of increase has remained high (83 per month) and would have been 100 per month absent the Court's early release of 149 inmates in August, 1986. However, no noncompliance has occurred (with one very minor exception) since the effective date (September 20, 1986) of this Court's remedial Order. The continuation of the rise in the rate of increase demonstrates that Defendants are still operating under changed circumstances.

Defendants' Memorandum In Support of Motion for Modification at 4-5.

Defendants also argue that double-celling will not unconstitutionally harm the plaintiffs because double-celling in 63-square foot cells has been permitted previously, see Rhodes v. Chapman, 452 U.S. 337 (1981), and the primary objective of the decree is not to provide single cells, but to provide housing that is in accord with the Eighth Amendment. Without the relief

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of modification of the decree to permit double-celling in new cells of 69-square feet, defendants estimate that they will be out of compliance by approximately 979 inmates[6] when the three-year deadline for compliance expires on January 8, 1988.

Plaintiffs respond that defendants make the same argument now as they did in their motion for modification in July 1986; SCDC has known that earlier projections were inaccurate and, in fact, has been projecting an increasing population for three years now, but no attempt has been made to alter construction plans accordingly. Plaintiffs argue that defendants chose to construct 69-square foot cells when they knew that the decree required that each plaintiff be allotted at least 50-square feet of space for double-celling within medium security institutions.

It is the plaintiffs' position that the increased population is directly attributable to actions taken by the State of South Carolina and the failure of the State to take advantage of the release mechanisms available to control inmate population. Specifically, plaintiffs charge that the primary cause for the increase in inmate population has been a series of bills passed by the South Carolina General Assembly subsequent to the settlement.

The consent decree itself provides for its modification by the court upon petition of any party and "under the applicable

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[6] This was the defendants' estimate as of August 21, 1987. See Defendants' Supplemental Memorandum In Support of Defendants' Motion for Modification at 2.

#5 Cont.

law pertaining to modification of Consent Decrees." Decree at § II(T).[7] The applicable law in the Fourth Circuit is Nelson v. Collins, 659 F.2d at 420 which "teaches us that a decree such as this [a continuing decree directed to events to come] is subject to modification under appropriate circumstances." Plyler v. Leeke, No. 86-7654, slip op. at 6 (4th Cir. Nov. 12, 1986). The court in Nelson described appropriate circumstances as where "despite a good faith effort at compliance, circumstances largely beyond the defendants' control and not contemplated by the court or the parties ... put achievement of the ... timetable ... beyond reach." 659 F.2d at 424 quoting Philadelphia Welfare Rights Org'n v. Shapp, 602 F.2d 1114, 1121 (3rd Cir. 1979). The question of whether to allow modification becomes "whether there have been, since the entry of the original Decree ... changes either in operative facts or laws which cast a new light upon the facts or law as originally ruled on." Nelson v. Collins, 659 F.2d at 424. The law now is the same in this case as when the decree was originally entered into by the parties. The contention made by the defendants here is that there has been a change in the operative facts because of the increase in the

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[7] Section II(T) of the decree reads in full:

> This Consent Decree may be modified in the future by mutual and joint petition of the parties or their successors, or upon petition of any party. Said petition shall be made to the Court and approved by the Court, after notice and hearing, by an Order amending the Consent Decree. Any disputed petition for modification shall be reviewed by the Court under the applicable law pertaining to modification of Consent Decrees.

#6 Cont.

prison population.

Clearly, there has been a substantial increase in the number of inmates reporting to SCDC for admission since this settlement decree was signed, and that probably does constitute a "change in the operative facts" as that term is used in Nelson v. Collins, 659 F.2d at 424. Before permitting any modification, however, the court must go further than simply finding that there has been a change in the facts; it must consider the circumstances and the equities of the situation. The court must carefully weigh the interests of the plaintiffs and the need for the decree on the one hand and, on the other hand, the hardships suffered by the defendants and the public if the decree is enforced without modification. "That inquiry is sensitive to specific facts and requires a fresh balancing of interests each time a modification request is made." Plyler v. Leeke, No. 86-7654, slip op. at 8.

On the side of the plaintiffs, the court should first look at the right of the plaintiffs to have the benefits of this settlement. In this instance, plaintiffs agreed to wait three years from the time of settlement for the benefit of having double cells of 100-square feet in new institutions. This space allotment was meant not only to provide the individual plaintiffs with adequate space, but also to limit the number of inmates within an institution so that appropriate levels of services and programs could be maintained.[8] Further, in looking at the need

#7 Cont.

[8] For example, certain inmates can work in prison jobs and acquire earned-work credits that shorten their sentences. The testimony of Deputy Commissioner William D. Catoe was that the number of jobs originally planned for at Lieber, for example, cannot be increased commensurate with the increase in the prison

for the decree, it is obvious that proper management of a prison becomes more difficult as the inmate population increases,[9] particularly when the population increase is beyond the prison's originally designed capacity.[10] Both sides would also agree that

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population there caused by double-celling.

> Q. When Lieber was originally designed, it was designed for a certain number to do certain jobs and that was basically to keep those inmates occupied--
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> A. That's correct. Among other things.
>
> Q. --with a meaningful job?
>
> A. Yes.
>
> Q. If you double the number --There's no way of doubling the number of jobs at Lieber?
>
> A. No, sir.

Transcript of Hearing, at 193, ll.9-17. Elsewhere, Deputy Commissioner Catoe expressed the opinion that SCDC would be able to provide the programs and work required by the decree if Lieber were double-celled. see Transcript of Hearing at 156-57.

[9] Although at the hearing Deputy Commissioner Catoe was uncertain whether the discussion about cell size in the new prisons involved reducing the planned 73-square foot cells to 50-square feet or increasing them to 100-square feet, see Transcript of Hearing at 178, ll.16-22., he did not dispute his deposition testimony regarding prison management, as follows:

> There was a reluctance to substantially increase the numbers of inmates that we have in institutions because of manageability concerns. The fact that as institutions get bigger, they tend to become more difficult to manage -- bigger in terms of inmate population .... [T]here's a generally accepted position on the part of people who run institutions that as an institution gets bigger, as the inmate population increases, the management of that institution becomes more difficult.

#8 Cont.

Deposition of William Douglas Catoe, July 14, 1987, at 47, ll.19-23; 48, ll.8-12.

[10] Lieber, McCormick and Broad River were each designed to house 504 general population inmates in single cells and 96 inmates in "lock-up," for a total of 600 inmates in each institution. The general population cells at Lieber are 73-

prison overcrowding creates the potential for greater violence,"[11] which is another serious consideration in determining whether to impose the strict terms of this settlement.

Turning to the side of the defendants, the primary consideration is public safety. Should the decree not be modified, defendants will have to rely on early-release programs to reduce prison overcrowding; these include the Supervised Furlough program, S.C. Code Ann. §§ 24-13-710, 740 (1976) and the former and present Emergency Powers Act programs [EPA I and EPA II], S.C. Code Ann. § 24-3-1110, et seq. (1976). Defendants argue that the numbers and types of inmates who would need to be released would result in a threat to public safety. Presumably, inmates receiving early releases would commit crimes against the public. The record shows, however, that releases made under the old Emergency Powers Act have been carefully screened, properly supervised, and the mediator, Allen Breed, reports that recidivism rates have been better under that program than for those inmates released through the regular parole process. Mediator's Second Report on Findings of Fact and Recommendations at 17. Of the 6,883 inmates released early since September 1983,

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square feet and at McCormick and Broad River, the cells are 69-square feet. Defendants propose that these general population cells be double-celled to house 1008 general population inmates at each institution, for a total of 1104 inmates in each. The designs for Allendale and Marlboro have been revised to expand the cell size of 208 of the 504 general population cells to 100-square feet to allow for double occupancy.

#9 Cases

[11] Deputy Commissioner Catoe did express the opinion, however, that after six months of double-celling at Lieber, he did not think the statistics showed a "disproportionate increase in violence" at that institution. Transcript of Hearing at 158, ll. 9-15.

only 90 individuals (1.3% of the total) were returned to prison for having committed a violent crime. Stipulation of Facts, ¶3. Further, there is nothing in the record to tell the court why crimes are more likely to be committed if the prisoners are released now than if they remain confined until they would normally be released a few months hence. Consequently, the court is not persuaded that public safety would be substantially lessened by the employment of these early release mechanisms.

Of course, the public also has an interest in punishing criminals by having them serve their sentences, but the early release mechanisms generally do not greatly abbreviate the time served. For example, in compliance with the court's previous order of July 22, 1986, SCDC released under parole supervision 149 non-violent inmates 26 days before their scheduled release. Further, public interest in preventing prison violence is enhanced by the prevention of prison overcrowding.

Another factor in considering the equities of the situation is whether the change in circumstances about which the defendants complain was "largely beyond the defendants' control." Nelson v. Collins, 659 F.2d at 424. In this instance, the record shows that most,[12] if not all,[13] of the increases in population

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[12] Dr. Lorraine T. Fowler, Director of Resource and Information Management for SCDC, estimated that at least 50% of the increases were a direct result of legislation passed by the South Carolina General Assembly. See Transcript of Hearing at 299-300.

#10 Cuts

[13] Mr. Breed explained the causes for the population increases, as follows:

> One is, that this increase in population was not something that was not within the control of the State of South Carolina.
>
> Now, there will be three things I can think

are attributed to actions by the South Carolina General Assembly or by the South Carolina Probation, Parole and Pardon Board, and that the legislature had been warned[14] that their legislative or policy changes would increase the prison population beyond SCDC's ability to remain in compliance. The mediator summarized his findings and recommendation to the court, as follows:

> I would urge the court, then, to deny the modification on the basis that a contract was entered into and that there have been no uncontrollable events
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> of real quickly that wouldn't be within their control. If one of their prisons burned down and they lost 500 beds, that's not within their control.
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> They can't control the crime rate, and they can't control the arrest rate, and they really can't control what the courts send to them either.
>
> But you look over the period from 1983-'84, whichever period you want, and carry it up to the current date, arrest rates in the state have not increased. Crime rates have not increased.
>
> So, it means that what has occurred have been changes in policy or legislation which was within the basic control of the State of South Carolina.
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> The defendants predicted that admissions would stay constant over the entire period of the consent decree. And, of course, the legislature saw to it that that didn't come out by passing legislation that changed the admission rate level.
>
> Secondly, the parole board began to revoke far more than it had historically which changed the number that are coming in. So, those two things alone changed dramatically the admission rate into the system.
>
> The second area was that, early on, the Department decided that the release rate from prison would also remain constant over this period of the consent decree. That didn't turn out right either as we found that the number of inmates actually released on parole decreased by 27% during this period.
>
> So, what we find then is that both of these events are a policy decision that have been made by various agencies within the State of South Carolina.

#11 Ours.

Transcript of Hearing at 317, 1.25,; 318, 11.1-25; 319, 11.1-9.

[14] Dr. Fowler testified that her department did a population impact analysis for each proposed bill. Transcript of Hearing at 297-98; see also Deposition of Lorraine T. Fowler, July 14, 1987, at 27-28.

> which have affected population, that the population has increased because of direct acts on the part of the legislature and on the part of the parole board, and that both groups were warned on frequent occasions that their action would bring Department of Corrections out of compliance with the consent decree.

Transcript of Hearing at 330, ll.12-20. Consequently, defendants' changed circumstances were not largely beyond their own control.

In balancing the equities of the present situation, the court has considered "the requirements of this Decree and the totality of the conditions," § III(A)(4), and, for the reasons stated above, finds that it would be inequitable for this court to grant either of defendants' motions. The need for the decree far outweighs the harm that will result to the defendants or the public if the decree is not modified. This court remains convinced that the public interest is best served by requiring the State of South Carolina to perform the promises it made to its citizens and others in this matter.

Plaintiffs have also raised an issue for present consideration[15] by the court concerning certain provisions in the decree governing the reception and evaluation (R&E) centers.[16]

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[15] Other issues were originally raised by both parties, but have since been withdrawn and are not presently before the court. Defendants' motion for modification had also moved for permission to double-cell in R&E centers as a suicide-prevention measure, but defendants later abandoned that portion of the motion. Objections of Defendants to Magistrate's Report and Recommendation at 2, n.1. Plaintiffs had also asked that the court consider the mediator's recommendation that SCDC limit its inmate population to 95% capacity, but in light of the overcrowding crisis, decided to wait and possibly renew this request at a later time. Objections of Plaintiff Class to Report of Magistrate at 8.

[16] The specific provision at issue are sections III(S)(1)(d), III(S)(1)(h), and III(S)(1)(i).

Plaintiffs argue that the clear language of the decree requires the defendants to transfer inmates out of the R&E centers after 14 days. Plaintiffs' position is that holding an inmate in R&E longer than 14 days is not only prohibited by the decree, but also, it further exacerbates the overcrowding problem because it tends to extend the time that an inmate will be at SCDC, since an inmate cannot acquire earned-work credits while in R&E.

Defendants respond that they are in compliance regarding the R&E centers. Sections III(S)(1)(d) and III(S)(1)(h) do provide that inmates housed in the old Midlands R&E Center and in the Perry R&E Center shall be confined there no longer than 14 days, but section III(S)(1)(i) makes it clear that those sections are not a complete prohibition. Section III(S)(1)(i) provides that "[a]ny Plaintiff confined in a reception and evaluation center for more than fourteen (14) days shall have the right to the visitation and recreation provided by this Decree." It is not contested that defendants are providing said visitation and recreation privileges to the inmates confined for over 14 days.[17]

The provisions in question here fall under Section III(S) of the decree, entitled "Closing of Institutions." At the time of the decree, the existing R&E centers included Midlands R&E, the Midlands Annex, and the R&E at Perry. There were also two R&E centers that were already planned and included in Appendix F of the decree, New Lieber R&E and an unnamed center

#13 Cox

[17] In the vast majority of cases, inmates are kept in R&E centers longer than 14 days because there is no bed space available for them at their designated institutions. Deposition of William D. Catoe at 17, 11.22-25; 18, 11.1-4.

referred to simply as "new R&E."

Section III(S)(1) required the defendants to close the Midlands Annex within one year from the signing of the decree and to close Midlands R&E within three years. As of this date, both of the facilities are, in fact, closed. Sections III(S)(1)(a) through (c) set the population reduction schedules for said centers prior to their closing. The first provision at issue here is then section III(S)(1)(d), which reads in pertinent part, as follows:

> From the signing of this Decree by the parties and thereafter, no Plaintiffs other than the prisoner-staff shall be confined at the Midlands Reception and Evaluation Center or Annex for longer than fourteen (14) days, except those Plaintiffs confined pursuant to South Carolina Code Section 24-10-50(b) [youthful offenders for observation and evaluation prior to sentencing] and such Plaintiffs shall be housed in singe cells in Midlands Reception and Evaluation Center or may be double-celled at Perry Correctional Institution Reception and Evaluation Center ...

As previously noted, both Midlands R&E and Annex are now closed; the issue which arises is that the new R&E replacing these centers is called the new Midlands R&E or, simply, Midlands R&E. The new Midlands R&E is apparently the center that was planned and referred to in Appendix F as "new R&E." Plaintiffs' position is that section III(S)(1)(d) applies to the new Midlands R&E. In construing this provision within the context of sections III(S)(1)(a) through (d) and Appendix F, however, the unambiguous, plain meaning of the language in section III(S)(1)(d) is that the then-existing Midlands R&E and Annex were not to confine inmates longer than 14 days. It was known at the time of the decree that other R&E centers were planned, but these centers were not addressed or included in section

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III(S)(1)(d).

Similarly, section III(S)(1)(h) speaks only to the Perry R&E Center, as follows, "[f]rom September 1, 1985, and thereafter, no Plaintiffs shall be confined at the Perry Correctional Institution Reception and Evaluation Center for longer than fourteen (14) days." Plainly, this provision also does not include the new R&E centers contained in Appendix F.

Further, in order to give any meaning to the next provision, section III(S)(1)(i), sections III(S)(1)(d) and (h) must be read literally. Section III(S)(1)(i) provides that "[a]ny Plaintiff confined in a reception and evaluation center for more than fourteen (14) days shall have the right to the visitation and recreation provided by this Decree." To make sense, this provision must address R&E centers other than those clearly prohibited by sections III(S)(1)(d) and (h) from keeping inmates longer than 14 days; otherwise, section III(S)(1)(i) is meaningless. Other R&E centers were those listed in Appendix F of the decree.

There are now three R&E centers in SCDC: Perry R&E, New Lieber, and New Midlands. Section III(S)(1)(h) prohibits only Perry R&E from holding inmates longer than 14 days.

Furthermore, for the reasons stated above, the defendants' motions are denied, and defendants are hereby ordered to obtain compliance with the terms of the settlement decree through all of the early-release mechanisms available to them, as well as by any other appropriate means.

#15 Cont.

AND IT IS SO ORDERED.

A TRUE COPY
Attest: Ann A. Birch, Clerk

DATED: Deputy Clerk
At Florence, S.C.
January 7, 1988.

C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE