IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

LAWRENCE CARTY, et al.,	:	
	:	Civil No. 94-78
Plaintiffs,	:	
v.	:	
JOHN DEJONGH, et al.,	:	
Defendants.	:	

PLAINTIFFS' MOTION FOR THE APPOINTMENT OF JAMES AUSTIN AS THE COURT'S POPULATION MANAGEMENT AND CLASSIFICIATION EXPERT

Plaintiffs respectfully ask this Court to appoint James Austin, Ph.D., as an expert pursuant to Fed. R. Civ. P. 706 and its inherent powers, and order that Mr. Austin (1) conduct an analysis of the territory's criminal justice processes and policies that affect the population level at the Criminal Justice Complex (CJC) and CJC Annex [collectively, "the Jail"], (2) develop strategies and remedies to address those processes and policies so that the population level at the Jail can be reduced without significantly affecting public safety, (3) develop a baseline population forecast that would advise the territory on the impact of current criminal justice trends, (4) identify realistic options that have been successfully implemented in other jurisdictions that will reduce the need for future beds, and (5) assess the existing classification and disciplinary systems at the Jail and provide technical assistance to Defendants so they can make the best use of existing bed space to safely and appropriately house the prisoner population. The grounds for this motion are set forth below.

Background

This Court has entered a number of orders setting population caps, requiring Defendants to seek pretrial detention alternatives to reduce the prisoner population, or otherwise remedy conditions at the Jail that are caused or exacerbated by overcrowding. *See, e.g.*, Settlement Agreement, Section I (Population) (instituting a population cap and requiring security checks and special housing for segregation and protective custody prisoners). The Agreement specifically requires Defendants to reduce the number of newly admitted prisoners, and the lengths of stay of its current population by "seek[ing] pretrial detention alternatives, reduc[ing] bails, and . . . offer[ing] sentences of time served for prisoners charged with misdemeanors and non-violent offenses." *See id.* ¶I.8. The Court has also ordered remedies to ensure that prisoners are safely and appropriately housed, and that there is sufficient staff to supervise them adequately. *See, e.g. id.* ¶VI.A.2. (requiring implementation of an objective classification system consistent with National Institute of Corrections (NIC) Guidelines), Jan 31, 2001 Order (dkt. 325), ¶ (ordering Defendants to hire and retain sufficient custody staff to provide for the health, security and safety of all prisoners; to respond to emergencies; to appropriately monitor prisoners; and to permit for foreseeable illness, vacation, attrition, and training).

This Court has twice found Defendants in contempt of these remedial provisions. In 1997, the Court held that the officers' failure to monitor the housing units through on-site rounds, the severe overcrowding at the CJC, and the Defendants' failure to implement an objective classification system had resulted in numerous violent assaults at the jail. *See Carty v. Farrelly*, 957 F. Supp. 727, 743 (D.V.I. 1997) 740. In 2003, the Court again found Defendants in contempt of the Agreement's supervision provision and of its 2001 staffing order, finding that "the jail remains dangerously under-

staffed, despite this Court's Order." *Carty v. Turnbull*, Civil No. 94-78 (D.V.I. May 28, 2003) (Findings of Fact and Conclusions of Law on Contempt Motion), slip op. at 44.

Corrections expert Steve Martin conduced two inspections of the Jail in November 2008 and June 2009 and found that it remained seriously understaffed. Mr. Martin observed a number of clusters with no assigned officer present either in the unit or the control office, leaving the prisoners in these units unsupervised. June 2, 2009 hearing tr. 35:1-13 (Martin). This extremely dangerous security breach puts the lives and safety of prisoners at risk. Because there are too few officers to provide utility support (escorting prisoners, supervising visitation, etc.), cluster officers often perform tasks other than cellblock supervision, which take them away from their assigned posts, leaving prisoners in those clusters unsupervised. Report of Plaintiffs' Expert Steve J. Martin (Hereinafter "Martin Report"), admitted as Pl. Ex. 2, June 2, 2009 hearing tr 15:16, at 12. Also, two officers are routinely assigned to manage four clusters (3&4 and 5&6). *Id.* This also creates an unacceptable security risk, particularly when the cluster officer must leave the control office unattended. *Id.*

The dangers of leaving mentally ill prisoners unattended are particularly acute, yet both Mr. Martin and mental health expert Jeffrey Metzner, M.D. documented serious security breaches that occurred in the Jail's mental health unit due in part to a lack of adequate officer supervision, as well as overcrowding and triple-celling in the mental health unit. *See, e.g.,* Plaintiffs' Findings of Fact and Conclusions of Law ["Findings"] (dkt.) ¶¶41-44.

The Jail's chronic understaffing has resulted in officers being routinely required to work double shifts. June 2, 2009 hearing tr. 36:18-37:1 (Martin). Mr. Martin, who has 38 years experience in corrections, and has site visited over 500 corrections facilities, characterized the

amount of double-shifting as "staggering." *Id.* 36:22-24 (Martin). As a result of this regular double-shifting, security is obviously compromised through officer fatigue, boredom, and inattentiveness. June 2, 2009 hearing tr. 37:4-9 (Martin). Also, such routine double-shifting evidences chronic staff shortages. *Id.* 37:14-23 (Martin) Moreover, officers who very often work double-shifts are more prone to utilize sick leave, exacerbating staff shortages. *Id.*

Bureau of Corrections Director Julius Wilson told Mr. Martin that the BOC had had problems recruiting qualified candidates for vacant deputy positions. *Id.* 86:3-11 (Martin). Mr. Wilson has attempted to broaden the applicant pool to attract more qualified candidates, and planned to train a group of new officer candidates. *Id.* 86:24-87:2 (Martin). Mr. Wilson's efforts, however, have not resolved the rampant understaffing at the jail. When Mr. Martin toured the jail on June 1, 2009, he continued to find critical security posts unmanned, and prisoners left unsupervised. June 2, 2009 hearing tr. 35:1-13 (Martin).

The Jail's chronic understaffing persists. At the September 29, 2010 hearing, Warden Everette Hansen testified that at the time Defendants were supposed to reach compliance with the Agreement, there were about 77 officers working at the Jail. *See* Sept. 29, 2010 hearing tr. 6:22-7:1 (Hansen). As of last September, there were 44 officers working at the Jail, with four more set to retire shortly. *Id.* 7:4-9 (Hansen). As the evidence showed at the June 2009 hearing, this understaffing compromises basic security and operations throughout the facility, has contributed to the high level of prisoner-on-prisoner assaults, and has led to a litany of security breaches, all of which endanger both prisoners and staff. These problems continue. On several occasions, staff have simply left their posts and the Jail, purportedly because they were understaffed and had been forced to work double shifts: In one incident last year, all staff were ordered to lock down their prisoners

and report off duty because they had worked double shifts, and there were no relief officers—the prisoners were apparently left unattended for at least eight hours. *See* Declaration of Eric Balaban in Support of Motion to Appoint a Court Monitor ["Balaban Decl."] (dkt. 672) ¶3.

Despite this chronic understaffing, Defendants have failed to actively manage their prisoner population to reduce the number of admissions or their lengths of stay. Prisoners have been held longer than their maximum possible sentences while awaiting trial on minor charges, due to Defendants' unwillingness to implement simple population control measures that they are legally required to put in place. *See* Findings ¶68.

The dangers posed by understaffing are exacerbated by the Defendants' failure to implement an objective classification system, which is one of the primary tools to ensure the safe housing of prisoners at the Jail. The uncontroverted evidence at the June 2009 hearing showed that the Jail does not have a working objective classification system; that the decision on where to house a prisoner is as much a function of where the Jail has an empty bed as it is based on a thorough and valid risk assessment as to where a prisoner safely can be housed; and that prisoner-on-prisoner assaults occur frequently and with impunity due to this near-arbitrary housing system for prisoners at the Jail. *See* Findings ¶¶65-67.

Warden Hansen's testimony at the September 2010 hearing shows that Defendants still have not fully implemented an objective classification system consistent with NIC Guidelines. The NIC has identified as a key component of an objective classification system a written housing plan, which must "establish sufficient space at each custody level to accommodate housing the number of inmates assigned to each level." *See* Sept. 29, 2010 hearing tr. 10:9-13 (Hansen); *see also* Ex. A, Balaban Decl. (James Austin, "Objective Classification Systems: A Guide for Jail Administrators,"

National Institute of Corrections, Feb. 1998) at 10. For example, a housing plan should ensure that minimum custody level prisoners are housed together, as are medium custody prisoners, and that maximum security prisoners are housed "in single-cell units." *Id.*

Warden Hansen admitted that it remains the case that prisoners can be housed based on where the Jail has an available bed rather than based on their classification status. *Id.* 11:6-10 (Hansen). He testified that the limited available bed space at the CJC has a dramatic effect on the Jail's capacity to house prisoners according their classification. *See id.* 11:14-16 (Hansen) ("because of space constraints, we're really limited as to how we can move and how we can classify."). He also admitted that the lack of bed space compromised the Jail's ability to implement an objective classification system. *Id.* 11:17-19 (Hansen). The more recent population reports Defendants have submitted confirm that prisoners of different classification levels are mixed together in two-man cell units throughout the Jail. *See* Ex. B, Balaban Decl. Though Defendants asserted in their July 15, 2010 compliance report that they had implemented their computerized SmartJail system, which would "facilitate the existing objective based classification program,"[1] Warden Hansen admitted two months later that the current classification instrument is not being entered into the SmartJail system. *See* Sept. 29, 2010 hearing tr. 7:20-23 (Hansen). The only information currently being entered into the SmartJail system is the offender's charge, admission date, and photograph. *Id.* 7:12-19 (Hansen).

One essential element of an objective classification system is that prisoners are housed according to a validated risk assessment, which must account for prisoner's institutional history as documented through a reliable disciplinary system. A reliable disciplinary system also ensures that the Jail's limited segregation bed space is reserved for those prisoners who pose the most serious

1 July 15, 2010 Status Report (dkt. 642) at 7.

risks to fellow prisoners and staff. As of the June 2009 hearing, the Jail had not implemented a reliable disciplinary system, resulting in prisoners being locked down arbitrarily. *See* Findings ¶¶84-90. Prompted by this evidence, this Court last November ordered Defendants to implement a reliable disciplinary system that ensured that all incidents that resulted in discipline were adequately documented, that prisoners enjoyed basic due process protections, and that punishments were proportional to violations. See Nov. 8, 2010 Order (dkt. 671) ¶14.

I. THIS COURT SHOULD APPOINT JAMES AUSTIN AS ITS POPULATION MANAGEMENT AND CLASSIFICATION EXPERT UNDER FED. R. EVID. 706 AND ITS INHERENT POWERS.

Over forty years ago, the Supreme Court held that "an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *System Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 648 (1961). When faced with particularly obstinate Defendants in an institutional reform case such as this one, one tool courts have used with great success is the appointment of a neutral expert to oversee implementation of remedies, and to report to the Court on compliance efforts. *See, e.g., Ruiz v. Estelle*, 679 F.2d 1115, 1161-62 (5th Cir. 1982) (upholding appointment of a court monitor to oversee implementation of a prison conditions decree under the court's inherent powers); *United States v. Michigan*, 680 F. Supp. 928, 962 (appointing an independent expert pursuant to Fed. R. Evid. 706 to oversee implementation of a prison conditions consent decree); *Morales Feliciano v. Romero Barcelo*, 672 F. Supp. 591, 623 (D.P.R. 1986) (appointing a court monitor to oversee implementation of a consent decree addressing Puerto Rico prison conditions, noting the court's "inherent equitable power to appoint a person . . . to assist in administering in a remedy."); *cf. Halderman v. Pennhurst State School and* Hospital, 612

F. 2d. 84, 11 (3d Cir. 1982) (upholding appointment of a special master to implement a state hospital consent decree which likely would be "a complex and lengthy process, probably involving monitoring, dispute resolution, and the development of detailed enforcement mechanisms.").

It is self-evident that the problems that have endangered prisoners and staff at the Jail over the past sixteen years could be alleviated, if not eliminated, if the Jail held fewer prisoners. The effect of the chronic understaffing would be less severe, since existing staff would have fewer prisoners to manage. Likewise, reducing the number of prisoners would alleviate the problems posed by the Jail's lack of available bed space, one of the most significant barriers Defendants now face to safely house prisoners according to an objective classification system. Reducing the prisoner population will also reduce the burden on the Jail's medical and mental health systems. In particular, reducing the lengths of stay of the seriously mentally ill at the Jail should have profound effect on operations and conditions, as this population requires the most intensive supervision and treatment. \

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 and its inherent powers. Plaintiffs also propose that Dr. Austin assess and provide technical assistance to Defendants on the Jail's classification and disciplinary systems as the Court's expert. Dr. Austin is already familiar with the Jail's classification system, having helped the territory devise the classification instrument over a decade ago. *See* Declaration of James Austin, filed herewith, ¶11.He is also the principal author of the NIC Classification Guidelines that are incorporated by reference into the Agreement. *See* Agreement ¶VI.A.2.; *see also* Sept. 29, 2010 hearing tr. 10:9-13 (Hansen); Ex. A, Balaban Decl. (James Austin, "Objective

Classification Systems: A Guide for Jail Administrators," National Institute of Corrections, Feb. 1998). With Dr. Austin's assistance, Defendants can take the long-overdue steps necessary to institute working classification and disciplinary systems that will result in the safe housing of prisoners at the CJC and Annex.

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) in addressing 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. He currently is serving as the Court's Rule 706 population management expert in *Carruthers v. Lamberti*, No. 76-6086 (S.D. Fla.), appointed to devise a population management plan and a baseline population estimate for the Broward County, Fl. Jail.

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 the Jail, implement objective and evidence-based classification and disciplinary systems, and 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 data files would identify the factors that are producing the current average daily population at the Jail, and from this data how the territory could identify its options for safely reducing that population. 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 territory to identify new criteria to safely divert low-risk individuals to pre-trial release programs.

In short, the appointment of Dr. Austin can reduce the population that exists today at the Jail, and can help keep that population as low as possible consistent with public safety. Dr. Austin can also help ensure that those men and women who must be incarcerated are housed at the Jail based on an objective risk assessment, and that the Jail's limited segregation bed space is reserved for those prisoners who pose the most serious risk to fellow prisoners and staff.

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 (8th 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 (9th Cir.) (district court may apportion all of the Rule 706 expert costs to one party), *vacated on other grounds*, 502 U.S. 903 (1991).

Here, it is Defendants abiding non-compliance that has harmed Plaintiffs and resulted in the ongoing enforcement proceedings in this case. Given that Plaintiffs are prisoners, and do not have the resources of the Virgin Islands government, it is appropriate for Defendants to bear Dr. Austin's costs. *See, e.g., 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); *Carruthers*, Case No. 76-6086, slip op. at 3 (S.D. Fla. Aug. 2, 2001) (apportioning the costs of two Rule 706 experts to Defendants, given that the prisoner plaintiffs were indigent and it was Defendants' "conduct [that] occasioned these proceedings.) Plaintiffs believe that the Dr. Austin's work may result in long-term reductions in the prisoner population at the Jail, 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 and classification expert, pursuant to Fed. R. Civ. P. 706 and the Court's inherent powers.

Respectfully submitted this 4th day of March, 2011.

Respectfully submitted,

/s/ ERIC BALABAN
Eric Balaban
National Prison Project
of the ACLU Foundation
915 15th Street
Seventh Floor
Washington, D.C. 20005
(202) 393-4930

Benjamin Currence
Norre Gade
2nd Floor #12
P.O. Box 6143
St. Thomas, U.S.V.I. 00804-6143
340/775-3434
340/774-1001 (fax)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion, declaration and exhibit, and proposed Order, were served by the Notice of Electronic Filing administered by this Court to the following counsel for Defendants at the following address:

Richard Schrader, Jr.
Assistant Attorney General - Department of Justice
6040 Castle Coakley
Christiansted, St. Croix, U.S.V.I. 00820

/s/ Eric Balaban
Eric Balaban