IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DENNIS E. JONES 'EL, MICHA'EL JOHNSON, DE'ONDRE CONQUEST, LUIS NIEVES, SCOTT SEAL, ALEX FIGUEROA, ROBERT SALLIE, CHAD GOETSCH, EDWARD PISCITELLO, QUINTIN L'MINGGIO, LORENZO BALLI, DONALD BROWN, CHRISTOPHER SCARVER, BENJAMIN BIESE, LASHAWN LOGAN, JASON PAGLIARINI, and ANDREW COLLETTE, and all others similarly situated,

Plaintiffs,

OPINION and ORDER

00-C-421-C

v.

RICHARD SCHNEITER and MATT FRANK,

Defendants.

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At a hearing held May 12, 2006, I expressed grave concern that the consent decree in this case, which had been designed by the parties and approved by the court to correct alleged constitutional violations at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, had become a potential obstacle to defendants' attempts to ameliorate conditions at the facility. Plaintiffs had not moved for enforcement of any provision of the consent

decree for more than two years and the matters over which the parties were battling (namely, the transfer of general population inmates to the facility and the continued service of the settlement monitor) were not the issues that had given rise to the consent decree. Consequently, on the court's own motion, I asked the parties to brief the question whether the consent decree could and should be terminated at this time.

Now before the court are the parties' briefs, which reveal starkly contrasting views of the conditions at the Wisconsin Secure Program Facility and of the legal standards to be applied by the court in resolving the pending motion. Plaintiffs contend that the court lacks authority to bring the motion at all; not surprisingly, defendants disagree. Because the Prison Litigation Reform Act, 18 U.S.C. § 3626(b)(1)(A)(I), does not bar this court from examining the continuing validity of the consent decree under either Rule 60 of the Federal Rules of Civil Procedure or under the court's inherent authority, I conclude that there is no procedural obstacle to the court's motion. However, because the material facts relevant to the continuation or disintegration of the consent decree are in hot dispute, I will stay a decision whether to terminate the consent decree, provide the parties with time to conduct discovery and schedule an evidentiary hearing to resolve the factual disputes relevant to resolution of the pending motion.

A. Authority to Terminate the Consent Decree

As an agreement between parties, a consent decree is contractual in nature. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (1992); United States v. Krilich, 303 F.3d 784, 789 (7th Cir. 2002). At the same time, it is also "an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." Rufo, 502 U.S. at 378. Therefore, although consent decrees are "final judgments," they are "not the last word of the judicial department." Dougan v. Singletary, 129 F.3d 1424, 1426 (11th Cir. 1997). District courts retain jurisdiction over such decrees not only to insure compliance, but also to amend them as significant changes in law and fact require. O'Sullivan v. City of Chicago, 396 F.3d 843, 860 (7th Cir. 2005) (citing United States v. Swift & Co., 286 U.S. 106, 114 (1932)) ("We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent").

All consent decrees (and, indeed, all judgments), are subject to modification under Fed. R. Civ. P. 60, which provides that

> on motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding [because] judgment has been satisfied, released, or discharged . . . or it is no longer equitable that the judgment should have prospective application or [for] any other reason justifying relief from the operation of the judgment.

See also Rufo, 502 U.S. at 378. The majority of circuits to have considered the question have held that courts may move sua sponte to modify or terminate decrees under Rule 60.

See, e.g., Fort Knox Music, Inc. v. Baptiste, 257 F.3d 108, 111 (2d Cir. 2001) (noting that "nothing forbids the court to grant such [Rule 60(b)] relief sua sponte "); McDowell v. Celebrezze, 310 F.2d 43, 44 (5th Cir. 1962) (recognizing that Rule 60(b) relief can be granted sua sponte); but see United States v. Pauley, 321 F.3d 578, 581 n. 1 (6th Cir. 2003) ("district court may not sua sponte grant relief pursuant to Rule 60(b)").

Plaintiffs assert that the court must apply the tests developed in the school desegregation cases Freeman v. Pitts, 503 U.S. 467 (1992) and Board of Education v. Dowell, 498 U.S. 237 (1991), to determine whether modification or termination of the consent decree is appropriate. However, it was Rufo, 502 U.S. at 384, which announced the standard for modification of decrees involving penal institutions in situations not covered by the PLRA. See also Shima Baradaran-Robison, Comment, "Kaleidoscopic Consent Decrees: School Desegregation and Prison Reform Consent Decrees after the Prison Litigation Reform Act and Freeman-Dowell" 2003 B.Y.U. L. Rev. 1333 (discussing differences and similarities between rules governing consent decree modification in school desegregation and prison reform contexts).

Under Rufo, 502 U.S. at 384, in determining whether modification or termination of a consent decree is appropriate, courts are to consider many factors, including whether factual conditions make compliance with the decree substantially more onerous, a decree proves to be unworkable because of unforeseen obstacles or the decree without modification

would be detrimental to the public interest.

> Because [consent] decrees often remain in place for extended periods of time, the likelihood of significant changes occurring during the life of the decree is increased . . . The experience of the District Courts of Appeals in implementing and modifying such decrees has demonstrated that a flexible approach is often essential to achieving the goals of reform litigation. The Courts of Appeals have also observed that the public interest is a particularly significant reason for applying a flexible modification standard in institutional reform litigation because such decrees reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.

Id. at 380-381. Under this "flexible modification standard," a party seeking to modify a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance. Id. at 393. When a party seeks termination rather than modification of a consent decree, the court must determine whether "the goals of the consent decree have been achieved and must consider all objections to such dissolution." Youngblood v. Dalzell, 925 F.2d 954, 961 (6th Cir. 1991). In weighing the possibility of dissolving a consent decree, the court may consider the length of time over which the particular decree has been in effect and the continuing efficacy of its enforcement. Id.

Prior to passage of the Prison Litigation Reform Act in 1996, all consent decrees were subject to the "flexible" standards for modification and termination outlined above. Following the passage of the PLRA, consent decrees governing aspects of prison operation

are subject to more rigid standards that lean heavily against continued federal intervention in the administration of state prisons. Under the PLRA, all prospective relief guaranteed by a consent decree must

> extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C.A. §§ 3626(a)(1), 3626(c)(1). On March 28, 2002, this court found that the settlement agreement in this case was "the least intrusive means necessary to correct the alleged violations of plaintiffs' federal rights" and adopted the agreement as a consent decree. Order dated Mar. 28, 2006, dkt. # 210, at 1. Whether the consent decree remains the "least intrusive means" of correcting the alleged violations is not clear.

Normally, under 18 U.S.C. § 3626(b)(1)(A)(I), a party to a consent decree involving prison conditions may move to modify or terminate the decree's provisions two years after the decree is approved by the court. The court is bound to terminate the decree unless it makes written findings that ongoing violations of federal rights require the continuation of the decree. This case presents a unique situation in which the parties inserted into the consent decree a provision in which they agreed "not to seek to modify or terminate or

otherwise challenge th[e] Agreement or any order approving or implementing th[e] agreement, for a period of five years" from the date the court approved the agreement. Dkt. #210, Exh. A, at 11. At the time the decree was entered the provision seemed reasonably necessary in light of the magnitude of the alleged violations and the anticipated timeline for implementing the consent decree. Neither the parties nor the court foresaw the possibility that in less than five years the prison might alleviate the constitutional violations or wish to restructure the facility altogether, as allegedly defendants now wish to do. Under the terms of the agreement, neither party may unilaterally challenge any provision of the decree until March 28, 2007. The question is whether the court may question the propriety of the decree sua sponte.

It is well-established that "the P[rison] L[itigation] R[eform] A[ct] attempts to eliminate unwarranted federal-court interference with the administration of prisons." Woodford v. Ngo, 126 S. Ct. 2378, 2387 (2006). With the PLRA, Congress sought to curtail federal courts' long-term involvement in prison reform and halt federal courts from providing more than the constitutional minimum necessary to remedy federal rights violations. Frazar v. Ladd, ___ F.3d ___, 2006 WL 2023106, *n.19 (5th Cir. Jul. 17, 2006) (citing H.R. Rep. No. 104-21, at 24 n.2 (1995) and H.R. Rep. No. 104-378, at 166 (1995) ("[The PLRA] amends 18 U.S.C. § 3626 to require that prison condition remedies do not go beyond the measures necessary to remedy federal rights violations . . .")). Given that

reality, it would be sophistry to read § 3626(b)(1)(A)(I) as barring a court from terminating a decree when federal rights are no longer violated.

There is no reason to think that the PLRA supplanted all pre-existing rules regarding the modification and termination of consent decrees, including those that arise under Fed. R. Civ. P. 60(e). Although the PLRA abrogates a court's ability to *continue* a consent decree in the absence of ongoing federal violations, it does nothing to restrict the court's ability to terminate or modify the decree to take a less active role in the governance of state prisons when doing so comports with general rules governing the modification of institutional consent decrees. See, e.g, Gilmore v. People of the State of California, 220 F.3d 987, 1007 (9th Cir. 2000) ("[T]he PLRA creates a more exacting standard for federal courts to follow. But the standard does not eviscerate a court's equitable discretion . . ."). In Berwanger v. Cottey, 178 F.3d 834, 839 (7th Cir. 1999), the Court of Appeals for the Seventh Circuit emphasized that the PLRA's provisions regarding termination of prospective relief upon motion of a party or intervenor, "reinforce[] the requirement, *which exists independently of the plra*, that courts permit state and local governments to regain control of their institutions once the injunction has achieved its purpose of correcting violations of federal law." It is well-established that

> [i]n institutional reform litigation, injunctions should not operate inviolate in perpetuity. This must mean that, notwithstanding the parties' silence or inertia, the district court is not doomed to some Sisyphean fate, bound forever

> to enforce and interpret a preexisting decree without occasionally pausing to question whether changing circumstances have rendered the decree unnecessary, outmoded, or even harmful to the public interest.

In re Pearson, 990 F.2d 653, 659-660 (1st Cir. 1993); see also United States v. City of Miami, 2 F.3d 1497, 1506 (11th Cir. 1993) ("When the remedy prescribed in the consent decree has been accomplished, a district court does not have to await a party's motion to terminate a decree which requires temporary supervisory jurisdiction of an agreed upon consent decree."); Alberti v. Klevenhagen, 46 F.3d 1347, 1365 (5th Cir. 1995) ("Regardless of whether a decree is entered 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.) Consequently, I conclude that the present motion represents a proper exercise of this court's obligation to insure that the consent decree remains tailored to remedy the wrongs for which it was created. The next question is whether defendants are continuing to violate plaintiffs' constitutional rights, in violation of the consent decree.

B. Evidentiary Hearing

According to plaintiffs and their experts, defendants are in violation of nearly every major provision of the settlement agreement, from the ban on incarcerating inmates who suffer from serious mental illness to the provisions governing out of cell exercise time to the

requirement that all inmates at the facility be in disciplinary or administrative segregation status. What is more, plaintiffs suggest, defendants have attempted to conceal information regarding some violations in order to hasten the demise of the consent decree. Defendants deny these allegations vigorously and contend that even if plaintiffs could show "isolated instances of constitutional violations," those incidents would be insufficient to justify continuation of the consent decree because plaintiffs cannot show that defendants operate a "deficient system" that makes such constitutional violations commonplace. See dkt. #465, at 9.

Although the parties dispute the existence and potential extent of the alleged constitutional violations, plaintiffs have come forward with evidence suggesting that defendants may be engaging in acts that violate inmate rights under the Eighth and Fourteenth Amendments by (1) employing inadequate processes to insure that seriously mentally ill inmates are not confined and do not remain confined in the Wisconsin Secure Program Facility; (2) refusing to provide adequate out of cell exercise opportunities and forcing prisoners to choose between exercise and access to the prison law library; (3) maintaining cell temperatures above 84° F for extended periods of time; and (4) transferring prisoners to the facility without adequate pre-transfer process. Because the facts regarding the nature and extent of these alleged violations are in dispute, I will provide the parties an opportunity to complete discovery on these questions (and these questions only) and will

hold an evidentiary hearing for the purpose of determining the facts relevant to the court's motion.

C. Burden of Proof

In their briefs, the parties dispute the allocation of the burden of proof. Citing Guajardo v. Texas Dept. of Criminal Justice, 363 F.3d 392, 395-96 (5th Cir. 2004) and Hallett v. Morgan, 296 F.3d 732 (9th Cir. 2002), defendants contend that plaintiffs bear the burden of showing that constitutional violations persist. Relying on Gilmore v. People of the State of California, 220 F.3d 987, 1007 (9th Cir. 2000), plaintiffs contend the opposite. I conclude that plaintiffs have the better of this argument.

The general rule is that a party bringing a motion bears the burden of showing that his motion should be granted, seeking as he does some ruling in his favor, usually to the detriment of the opposing party. In this case, because the court has brought the present motion, it is reasonable to allocate the burden of persuasion to defendants, as it is they who argue in favor of changing the status quo in this case. As plaintiffs explain in their brief, allocating the burden of proof to defendants is consistent with the position taken by the courts in both Gilmore and Hallett. (As plaintiffs explain in detail at dkt. #475, at 25, Guajardo rests on a misunderstanding of Hallett. Consequently, I find it unpersuasive.)

Both Gilmore and Hallett involved prison consent decrees entered before enactment

of the PLRA. The consent decree at issue in Hallett, 296 F.3d at 739, contained a specific termination date that was subject to extension under procedures outlined in the decree. Because the plaintiffs in that case sought an extension beyond the presumptive termination date, the court placed on them the burden of showing that an extension was justified. Conversely, because the consent decree at issue in Gilmore, 220 F.3d at 1008, contained no termination provision, the Court of Appeals for the Ninth Circuit held that the defendants should have borne the burden of showing that no ongoing constitutional violations justified continued enforcement of the decree. In this case, absent the court's pending motion, the consent decree would continue in its present form. It is defendants who argue in favor of terminating the decree; therefore, they will bear the burden of convincing this court that they are not engaged in the violations plaintiffs allege.

ORDER

IT IS ORDERED that a decision on the court's motion to terminate the consent decree in this case is STAYED. United States Magistrate Judge Stephen L. Crocker will arrange a telephone conference with the parties to set a date for the evidentiary hearing and

a schedule for discovery.

Entered this 31st day of July, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge