UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

SCOTT TILLMAN and WILLIAM LENNEAR, etc., et al.,

Plaintiffs,

Case No. 6:83-cv-199-ORL-LRH

vs.

CLAUDE MILLER, etc., et al.,

Defendants.
_____

SCOTT TILLMAN and WILLIAM LENNEAR, etc., et al.,

Plaintiffs,

Case No. 6:83-285-Civ-ORL-22

vs.

CLAUDE MILLER, etc., et al.,

Defendants.
_____

LARRY EUGENE BROWN, JR.,

Plaintiff,

Case No. 6:88-cv-281-ORL-22

vs.

JERRY W. HICKS, et al.,

Defendants.
_____/

DEFENDANTS BREVARD COUNTY AND SHERIFF WAYNE IVEY'S MOTION TO TERMINATE FINAL CONSENT DECREE AND DETERMINATION OF ATTORNEY'S FEES

Defendants Brevard County Board of County Commissioners ("County") and Sheriff Wayne Ivey ("Sheriff"), collectively "Defendants", by and through undersigned counsel, hereby

submit this Motion to Terminate Consent Decree pursuant to § 18 USC § 3626, the Prison Litigation Reform Act (PLRA), and Rule 60(b)(5) and 60(b)(6) of the Federal Rules of Civil Procedure. Defendants move this Court for entry of an order dismissing the Final Consent Decree entered by this Court on December 3, 1993 (Doc. 103-1 at 2-3) and determining attorney's fees as agreed upon by the parties. All references to docket entries in this Response will refer to 6:83-cv-00199-ORL-LRH unless otherwise stated.

PROCEDURAL AND FACTUAL BACKGROUND

As the Plaintiffs indicated in their Motion for Order to Show Cause, these cases began in 1983 with the filing of *pro se* complaints by plaintiffs Tillman and Lennear (83-cv-199 and 83-cv-285). (Doc. 103 at 2). On May 27, 1983, Plaintiffs retained counsel, who filed an amended complaint challenging the constitutionality of the conditions of confinement at the Brevard County Jail. The challenged conditions related to housing, overcrowding, sanitation, plumbing, recreation, ventilation, classification, lack of due process, staffing, medical care, visitation, and law library access. *Id*.

In the years that have followed the entry of the Final Consent Decree, Brevard County has continued to take numerous steps to manage the jail population (see factual background set forth in Doc. 103, Doc. 107 and Doc. 111 at 5,6). In addition, on August 19, 2020, the overall jail capacity was increased to 1849.

All facets of Brevard County government that have an impact on inmate population are communicating and taking steps to address the jail population on a near daily basis. Between October 12, 2011, and January 6, 2020, the Brevard County Jail had not once reported operating in excess of its overall capacity in its average daily population figures**.** (Doc. 103 at 9 and Doc. 107-1, 107-2). Additionally, for the past six months, the Brevard County Jail has maintained

monthly averages that do not exceed 85% of the overall capacity.

MEMORANDUM AND ARGUMENT

A. Legal Standard

The Supreme Court has held that consent decrees "are not intended to operate in perpetuity." *Board of Educ. v. Dowell*, 498 U.S. 237, 248 (1991). "Remedial decrees should not foster prolonged oversight and management by the least representative branch. Federal court supervision of local government has always been intended as a temporary measure and should not extend beyond the time required to remedy the effects of past intentional discrimination." *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1574–75 (11th Cir. 1994) (citing *Board of Educ. v. Dowell*, 498 at 248) (internal citations omitted). A consent decree should be dissolved or amended if the party seeking such relief shows that the basic purposes of the decree have been fully achieved and that there is no significant likelihood of recurring violations of federal law once the decree is dissolved. *See Board of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 246–50, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991); *United States v. City of Miami*, 2 F.3d 1497, 1505–06, 1508 (11th Cir.1993). *See also Inmates of Suffolk County Jail v. Rufo*, 12 F.3d 286, 292 (1st Cir.1993).

In addition to the common law concerns outlined above regarding consent decrees, Congress enacted the PLRA in 1996, three years after the entry of the Final Consent Decree in this case. Pursuant to § 18 U.S.C.A. § 3626 (a)(1), 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." Decrees entered prior to the PLRA are entitled to immediate termination "…if the relief was approved or granted in the absence of a finding by the court that the 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." § 18 U.S.C.A. § 3626 (b)(2). Pursuant to § 18 U.S.C.A. § 3626 (b)(3), prospective relief shall not terminate if the court makes written findings that "…prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." The burden of showing that a consent decree does not comply with the PRLA lies with the party seeking termination of the decree. *Tyler v. Murphy*, 135 F. 3d 594, 597-598 (8th Cir. 1998).

B. Purpose of Consent Decree Has Been Served and Should be Dismissed

The Final Consent Decree has been in place since 1993. This case began ten years earlier in 1983. As the Brevard County Jail is not currently overcrowded, the purpose of the twenty-six-year-old (26) decree has been served. The Final Consent Decree has gone far beyond the purpose of a temporary measure to ensure constitutional compliance. Section V. (C) of the Final Consent Decree stated that "[i]f after eighteen (18) months from the date this Consent Decree is approved, defendants have maintained compliance with this decree, the Court shall terminate jurisdiction." (Doc. 103-1, pg. 4). The Final Consent Decree was intended to be of a temporary nature in compliance with the tenants of *Dowell*. *Supra*. The basic purpose of the Final Consent Decree as to Defendants has been achieved as the jail is not currently overcrowded, and has not exceeded its overall capacity since September 2011. As the Brevard County Jail has not exceeded its capacity since September 2011, the decree meets the common law test for dissolution. The passage of over eight (8) years without exceeding the overall capacity of the Brevard County Jail shows that there is no significant likelihood of a recurring violation.

C. Prison Litigation Reform Act

i. Final Consent Decree No Longer Narrowly Tailored

Since the imposition of the Final Consent Decree, Congress passed the PLRA in 1996 in response to decades of criticism regarding prisoner litigation. Anne K. Heidel, *Due Process Rights and the Termination of Consent Decrees Under the Prison Litigation Reform Act*, 4 U. Pa. J. Const. L. 561 (2002) (available at: https://scholarship.law.upenn.edu/jcl/vol4/iss3/4). Pursuant to § 18 U.S.C.A. § 3626 (a)(1), 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." No such finding was made prior to the entry of the Final Consent Decree in this case. The Final Consent Decree does not address any of the required elements under the PLRA. (Doc. 103-1 at 2-3). As such, the Final Consent Decree is subject to immediate termination pursuant to § 18 U.S.C.A. § 3626 (b)(2).

Since the entry of the Final Consent Decree, the Brevard County Jail has been expanded to a rated capacity of 1,849 inmates. A limitation to housing no more than 732 inmates is no longer narrowly tailored and no longer extends no further than necessary to correct the violation. Similarly, the Florida Department of Corrections no longer approves capacity or provides a cell-by-cell capacity. In 1996 the Florida Legislature made substantive changes to Chapter 951, Florida Statutes, removing most of the regulatory power of the Florida Department of Corrections over local county jails. Chapter 96-312, Laws of Florida. As such, these conditions are no longer narrowly tailored and no longer extend no further than necessary to correct the violation.

In 2008, Judge Charles Edelstein produced a comprehensive report with recommendations to reduce overcrowding. (Doc. 93-1). Although Judge Edelstein issued a lengthy and detailed report, he stated that **"[t]he single most significant factor in jail overcrowding is the failure to**

promptly resolve the cases of those who are detained until final resolution of their case." *Id.* at 2. (emphasis added). Defendants have no control over the length of time a criminal case takes to resolve; no control over bond schedules; no control over who or how long a detention in the county jail will last; and no control over whether an accused is detained or released pending trial or resolution of a criminal case. As such, many of the recommendations in the Edelstein report were geared towards the judiciary, prosecution, and defense. More importantly, Judge Edelstein's report does not recommend the further expansion of jail capacity. A lack of capacity, or the need for further expansion of the jail, is not among the major factors in overcrowding cited in Judge Edelstein's report or in his key recommendations. *Id.* at 2-6. Because the Brevard County Jail has been expanded, the Florida Department of Corrections no longer approves cell-by-cell capacity, and further jail expansion has not been recommended, the Final Consent Decree is no longer narrowly tailored as required by the PLRA.

ii. No Current and Ongoing Violation

Next, the Court must look to determine whether "…prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." § 18 U.S.C.A. § 3626 (b)(3). The unambiguous language of the Final Consent Decree entered December 3, 1993, provides that the various Defendants agreed "…not to operate the Brevard County Jail in an overcrowded condition in excess of its overall capacity of 732 inmates or in excess of the cell-by-cell capacity approved by the Florida Department of Corrections." (Doc. 103-1 at 2-3).

A "current and ongoing" violation of a Federal right, as used in the PLRA describing circumstances under which prospective relief will not terminate, means a presently existing

violation at the time the district court conducts the inquiry, not a potential, or even likely, future violation. *Cason v. Seckinger*, 231 F.3d 777, 783-784 (11th Cir. 2000). Although ruling directly on the issue of double bunking, *Rhodes v. Chapman*, 452 U.S. 337 (1981), is generally seen for the proposition that overcrowding is not per se unconstitutional. *See* Susann Y. Chung, *Prison Overcrowding: Standards in Determining Eight Amendment Violations*, 68 Fordham L. Rev. 2351 (2000). (Available at: https://ir.lawnet.fordham.edu/flr/vol68/iss6/9) (citing Randall B. Pooler, *Prison Overcrowding and the Eighth Amendment: The Rhodes Not Taken*, 9 New Eng. J. on Crim. & Civ. Confinement 1, 2-3 (1983) (stating that *Rhodes* "sounded the death knell" for courts that found prison overcrowding unconstitutional per se)). In *Rhodes*, the Supreme Court found that a prison in Ohio operating at thirty-eight percent (38%) above design capacity was not a constitutional violation. 452 U.S. at 343, 349-350. The Constitution does not mandate comfortable prisons. *Id.* at 349.

In evaluating a claim of overcrowding, the overcrowding alleged must lead to inhumane conditions to rise to a level that violates the Eighth Amendment prohibition against cruel and unusual punishment. *Hamm v. DeKalb Cty*., 774 F. 2d 1567, 1575 (11th Cir. 1985) (citing *Rhodes*, 452 U.S. 337, 347-48 (1981)). A consideration of the impact on necessities such as food, medical care, and sanitation are required when evaluating a claim of alleged overpopulation. *Id.* Prison officials also have a duty to protect inmates from violence and take reasonable measures to ensure safety. *Farmer v. Brennan*, 511 U.S. 825, 844 (1994). "Only those conditions which objectively amount to an 'extreme deprivation' violating contemporary standards of decency are subject to Eighth Amendment scrutiny." *Thomas v. Bryant*, 614 F.3d 1288, 1306–07 (11th Cir. 2010) (citing *Hudson v. McMillian*, 503 U.S. 1, 8-9 (1992)). To establish an Eight Amendment violation a claimant must satisfy "…a two-prong showing: an objective showing of a deprivation or injury

that is 'sufficiently serious' to constitute a denial of the 'minimal civilized measure of life's necessities' and a subjective showing that the official had a 'sufficiently culpable state of mind.'" *Thomas v. Bryant*, 614 at 1304 (citing *Farmer v. Brennan*, 511 at 834).

The data for 2020 indicates that the average monthly population reported to the Florida Department of Corrections is as follows: 1,588 in January 2020; 1581 in February 2020; 1528 in March 2020; 1403 in April 2020; and 1388 in May 2020. Since October 12, 2011, the Brevard County Jail has not exceeded its overall/rated capacity in its average daily population figures and has not exceeded 85% of its overall capacity for the past six months.

The 11th Circuit has held that in order to continue a consent decree, courts must make particularized written finding analyzing each provision in a decree measuring each requirement against the "need-narrowness-intrusive standards" in the PLRA. *Id*. at 785. Given the factors outlined above, dismissal of the Final Consent Decree entered in 1993 is warranted.

ATTORNEY'S FEES

Defendants agree that Plaintiff class is entitled to attorney's fees for monitoring and compliance activities as a prevailing party. The parties have agreed to pay the Florida Justice Institute, Inc. a total of $126,143.09 to resolve all claims as to attorney's fees in this matter.

CONCLUSION

This Final Consent Decree, entered nearly twenty-six (26) years ago and during the terms of entirely different Sheriffs and County Commissioners should not last into perpetuity. Pursuant to the PLRA, the Final Consent Decree should be dismissed as it is no longer narrowly tailored and there are no current, ongoing, or foreseeable violations requiring the continued oversight by this Court. The purpose of the Consent Decree has been served and safeguards are in place in

Brevard County to continue to monitor, address, and correct population issues arising at the Brevard County Jail.

Based upon the foregoing, Defendants respectfully request that the Court enter an order dismissing the Final Consent Decree in its entirety and award Florida Justice Institute, Inc. attorney's fees in the amount of $126,143.09.

Respectfully submitted this ____ day of October 2020.

Melissa H. Powers, Esq.
Assistant County Attorney
Florida Bar No.: 0132284
Office of The Brevard County Attorney
2725 Judge Fran Jamieson Way, Bldg C – Suite 308
Viera, FL 32940
Telephone: (321) 633-2090
Facsimile: (321) 633-2096
Primary email: Melissa.powers@brevardfl.gov
Secondary email: Karen.Lane@brevardfl.gov
Attorney for Defendant: Brevard County Board of County Commissioners

(Signed by Filing Attorney with permission of Non-filing Attorney)

LAURA MOODY, ESQUIRE
Florida Bar No. 0041676
Brevard County Sheriff's Office
340 Gus Hipp Blvd.
Rockledge, FL 32955
Telephone: 321-633-8499
Facsimile: 321-633-8415
Primary e-mail: laura.moody@bcso.us
Secondary e-mail: legalpleading@bcso.us
Attorney for Defendant: Sheriff Wayne Ivey in his official capacity as Sheriff of Brevard County, Florida

Certificate of Counsel

Pursuant to Middle District Rule 3.01(g), the parties have conferred prior to the filing of this Motion. Plaintiffs' counsel has no objection to the relief sought, including the entry of an Order dismissing the Final Consent Decree in its entirety and the award of attorney's fees in the amount set forth above..

Melissa H. Powers
Assistant County Attorney
Florida Bar No.: 0132284
Office of The Brevard County Attorney
2725 Judge Fran Jamieson Way, Bldg C – Suite 308
Viera, FL 32940
Telephone: (321) 633-2090
Facsimile: (321) 633-2096
Primary email: Melissa.powers@brevardfl.gov
Secondary email: Karen.Lane@brevardfl.gov