STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 3

MILTON CHRISTENSEN, et al.,

Plaintiffs,

v.

Case No. 96CV1835
Hon. Clare L. Fiorenza

MICHAEL J. SULLIVAN, et al.,

Defendants.

NOTICE OF MOTION AND MOTION FOR NON-MONETARY RELIEF FOR DEFENDANTS' VIOLATION OF THE CONSENT DECREE

TO: John Schapekahm
Milwaukee County Corp. Counsel
901 N. 9th Street, Room 303
Milwaukee, WI 53233

Charles Bohl
Nathan Fishbach
Andrew Jones
Whyte Hirschboeck Dudek
555 E Wells St # 1900
Milwaukee, WI 53202-3819

Attorneys for Milwaukee County Defendants

PLEASE TAKE NOTICE:

Pursuant to Part I, section III A of the Consent Decree and upon the other papers and proceedings in this case, the Plaintiffs, by their attorneys will move this Court, Hon. Clare L. Fiorenza presiding, at the following place and time, or as soon thereafter as counsel may be heard:

Date: March 3, 2006 Time: 10:30 a.m.

Milwaukee County Courthouse, Room 402
901 N. 9th Street
Milwaukee, WI 53233

for an order:

(1) requiring the Milwaukee County Defendants to operate the Milwaukee County Criminal Justice Facility with a population limit of 960 persons to ensure that sufficient bed space is available so that prisoners need not remain in the booking room in excess of 24 hours;

(2) requiring the Milwaukee County Defendants to continue reporting monthly to Plaintiffs' counsel any instances of prisoners held in the booking/open waiting area in excess of 24 hours, and to report to Plaintiffs' counsel and the Court any instances of prisoners held in the booking/open waiting area in excess of 30 hours;

(3) declaring that the Milwaukee County Defendants must demonstrate substantial compliance with the population provisions of Part I of the Consent Decree for a two year period beginning January 4, 2006, prior to being released from Court supervision;

(4) declaring that future violations of Part I, Sections II C and II D will result in assessment of liquidated damages of $10 per person, per hour for persons held in the booking room in excess of 30 hours; and

(5) granting such other relief as the Court may deem reasonable and appropriate.

MOTION

The Consent Decree in this case provides:

> The Court shall retain jurisdiction for purposes of enforcing this consent decree until it determines that there is substantial compliance. Nothing stated herein shall prevent the plaintiffs from moving the Court for enforcement or contempt upon a claim of non-compliance.

Decree - Part I, section III A.

By Decision and Order dated and filed January 4, 2006, this Court found that the County

Defendants intentionally violated Part I, Sections II C and II D of the Consent Decree, and that the violations constituted both contempt of court (Decision & Order at 8) and breach of the Consent Decree (*Id.* at 11). However, the Court denied the Plaintiffs' motion for monetary damages as relief for the contempt and breach. *Id.* at 14. The Court concluded that monetary damages were not available under the contempt statute, on the grounds that such relief is expressly authorized only to terminate a continuing contempt and that the Defendants' contemptuous conduct was not "continuing" within the meaning of the statute. *Id.* at 8-9. The Court concluded that monetary relief was not available for breach, because the Consent Decree did not expressly contemplate such relief. *Id.* at 11-13.

Whether or not retrospective monetary relief is available for the County's violations, the Consent Decree manifestly did contemplate *some* effective means of enforcement of its population provisions by this Court "upon a claim of non-compliance." Consent Decree Pt I, Section III A. The Decision and Order of this Court demonstrates that the Plaintiffs have claimed and proven intentional non-compliance. There must now be some adequate remedy available under the terms of the Decree. As Judge Kremers stated at the November 2004 hearing in this case:

> I'm being asked what to do about past violations that are not on-going or at least there's no evidence that they're on-going before this Court. So what's the – what's the solution to that. I don't think it can be, hey, we stopped doing it. So, okay, now we just keep going. Because where would be the incentive to stop it completely if every time you got caught you just said, whoop, we won't do it anymore. Sorry, Judge. That I don't think is appropriate. ... (Tr. of Hearing, Nov. 15, 2004, at 10).

In order to ensure that the County does not relapse into its pattern of violations of the Consent Decree, this Court should order that the County defendants continue to operate the Milwaukee County Criminal Justice Facility at a population cap of 960, rather than the 1100 cap

set forth in the decree. While the Defendants have managed to suspend the pattern of keeping inmates in booking for more than 30 hours by voluntarily lowering the cap for the time being, they have not instituted any legally binding systemic changes to prevent relapse. Defendants have conceded that populations approaching the cap left them with insufficient bed space in the housing units to move inmates out of booking in a timely fashion. "[I]n retrospect," they stated in their brief opposing monetary relief, the "Decree, as it was drafted, inevitably created pressures on the population of the BKOW even when the CJF was under the total facility population of 1,100. . . . [The voluntary cap] of 960 gives the Sheriff the flexibility to keep moving prisoners out of the BKOW before they reach even twenty-four hours in the jail." Def. Br. in Opp. to Mot. for Relief at 3; *see also id.* at 13, 19-21.

As Defendants have admitted, their primary mechanism for keeping the CJF population below the cap is the transfer of pretrial detainees from the CJF to the House of Correction (which was designed to house sentenced prisoners, not pretrial detainees) in Franklin. Def. Br. in Opp. to Mot. for Relief at 23-24. This mechanism imposes the additional cost of frequent transportation of pretrial detainees from the HOC to court appearances. It also imposes the costs of staffing, heating and otherwise maintaining an extra dorm at the House. These costs and the severe budgetary constraints faced by the County provide an incentive for Defendants to return the cap to 1100 to maximize less-expensive placement of pretrial detainees at the jail.

In order to ensure that the Defendants have a sufficient countervailing incentive to avoid relapsing into a pattern of 30-hour violations, this Court should also order that such future violations will carry an obligation to pay liquidated damages. Such relief appears to be contemplated by the contempt statutes, Wis. Stat. § 785.04(1)(c), and is plainly within the Court's authority to enforce the decree pursuant to Part I, section III A.

In addition, the Court should extend the sunset of the population provisions of the decree because the litigation surrounding the massive violations of the 30-hour rule demonstrate that there continues to be "a need for the court's involvement to prevent future overcrowding." Decree Pt. I, Section II.B. Discovery has revealed – and this Court's decision and order recognized – Defendants' pattern of ignoring, minimizing and obscuring manifest signs of problems in the booking room. Decision & Order at 5-7, 10. Defendants did not discover and address the booking length of stay problem on their own, despite ample warning signs that things were seriously amiss. Indeed, Defendants failed to seriously investigate complaints about booking room crowding from the Deputy Sheriffs' Association (Decision & Order at 5-6), failed to address the inconsistency of a 72-hour booking room shower policy with the decree's 30-hour booking limit (*id.* at 6-7), and even vehemently denied that prisoners were sleeping on the floor when Plaintiffs' counsel sought information in the spring of 2003 on the number of people who may have been held in booking for more than 30 hours. *See* Exhibit J to Koneazny Aff. (July 29, 2005). It was only because of an anonymous tip and Plaintiffs' subsequent investigation and insistence on discovery that the 30-hour violations – and their severe consequences for prisoners – came to light. Even after Plaintiffs' counsel reported the tip about the shower list to Defendants in November 2003, Defendants continued to deny that prisoners were routinely held in the booking room for more than 30 hours. Koneazny Aff. ¶¶ 7-8 (Sept. 13, 2004). Over 2,400 additional violations of the 30-hour rule occurred from the beginning of December 2003. Koneazny Aff. ¶ 14.

Defendants' tendency to look for innocuous explanations for clear signs of trouble is illustrated by their response to the December 2002 complaints of the Deputy Sheriffs' Association. Before this Court, Defendants acknowledged that the deputies had complained to

the County Board of booking room crowding, but sought to explain large booking-room numbers as "false positives" resulting from the fact that prisoners might be nominally assigned to the booking room, but actually be in court or elsewhere:

> What happened there was that deputies were taking spot-checks of populations in booking open waiting at maybe 10:00 or 11:00 o'clock in the morning or 2:00 oOL 61 \f "WP TypographicSymbols" \s 11clock, 3:00 o'clock in the afternoon and they were coming up with huge numbers, maybe 150, 200, 250. But the reason, quite frankly, for that was that all inmates are not YMBOL 66 \f "WP TypographicSymbols" \s 11 that all inmates that are in the custody of the sheriff have to be assigned somewhere. And inmates that are in court for their hearings are assigned to booking open waiting....
>
> The shots that were being taken during the day were providing false positives. So we worked our way through that with the committee. And our understanding of the issue, that that particular issue went away.

Transcript of Hearing at 14-16 (April 6, 2003) (Exhibit 12 to Koneazny Aff. (Sept. 13, 2004)).

However, documents disclosed in discovery show that the deputies' complaints reflected real crowding problems in the booking room during the day. The Defendants' own booking room "log books" show that the "false positives" explanation was untrue and that actual booking population often exceeded 110. The booking logs contain a person-by-person running count of those physically in booking, not simply "assigned" to booking; the count goes down by one if a detainee leaves booking – for court or anywhere else – and it goes up if he is brought back. *See* Exhibit 7 to Koneazny Aff. (Sept. 13, 2004). The Defendants' recent compliance with the 30-hour rule has occurred only because of the intense scrutiny during the contempt litigation and the strong financial incentive to prove that their contemptuous conduct was not "continuing" during that time. Given the incentives noted above to house pretrial detainees at the CJF rather than the House, this Court should extend its supervision of the decree until the Defendants can demonstrate that they are capable of running the CJF responsibly when the spotlight is not upon them.

Given its history of failure to comply with the population provisions of the decree, the County simply cannot be trusted to run the jail at safely without the additional safeguards and continued judicial supervision requested in this motion.

CONCLUSION

For the reasons set forth above, Plaintiffs request that this court grant its motion for relief.

Dated this ________ day of _______________, 2006.

Attorneys for Plaintiffs

BY: _____________________________________

Peter M. Koneazny, SBN1016206
LEGAL AID SOCIETY OF MILWAUKEE
229 E Wisconsin Ave # 200
Milwaukee, WI 53202-4204
414-727-5300

Laurence J. Dupuis, SBN 1029261
AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN, FOUNDATION
207 E. Buffalo Street, # 325
Milwaukee, WI 53202
414-272-4032

Curry First, SBN 1012139
Cooperating Counsel for Legal Aid Society and ACLU Foundation of Wisconsin
158 N. Broadway, Suite 600
Milwaukee, WI 53202
(414) 271-1972

Patrick O. Patterson, SBN 1014157
Cooperating Counsel for Legal Aid Society and ACLU Foundation of Wisconsin
Law Office of Patrick O. Patterson, S.C.

7481 N. Beach Drive
Fox Point, WI 53217
(414) 351-4497