CONSENT DECREE MOTIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, et al.,	:	CIVIL ACTION
Plaintiffs	:	
	:	NO. 82-1847
v.	:	
THEODORE LEVINE, et al.	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO MODIFY CONSENT DECREES

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TABLE OF CONTENTS

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INTRODUCTION

Treating two federal court judgments and the City of Philadelphia's agreements on which they are based as so much "subject of sport,"[1] the defendant City of Philadelphia and its new Mayor have moved to undo this Court's ten-month old consent decree and its December 1986 forerunner, which together provide short and long-term equitable relief from what the parties stipulated are the "existing conditions of acute [prison] overcrowding." Stipulation and Agreement approved by the Court on March 11, 1991, ¶7 (the "1991 Consent Decree").

Although formally titled a "Motion to Modify," defendants' motion is in reality a motion to vacate the 1991 Consent Decree. The Decree provides in paragraph 32 that the

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1. Although movants use this phrase to describe the disrepute suffered by courts unable to compel the presence of criminal defendants, Defendants' Memorandum In Support of Motion To Modify Consent Decrees ("Defendants' Mem.") at 2, they appear unconcerned with the public disrepute which would befall courts which fail to enforce their judgments or which allow their judgments to be cast off at the whim of a party.

orderly procedures for releasing pretrial detainees which apply when the prescribed population limits are exceeded are not severable from the Decree's long-term relief provisions and, therefore, that the Decree has no force or effect unless the release provisions are implemented.

The non-severability clause was made part of the 1991 Consent Decree in recognition of the fact that the Decree has two basic, coequal purposes: relieving the current inmate population of Philadelphia's jails of oppressive conditions of confinement through alleviation of overcrowding; and creating a structure for permanent relief through a rational prison planning and construction process that views prisons as but one component of the City's criminal justice and penal system. Paragraph 32 is conclusive evidence that without the commitment of the City to the population caps, nonadmission and release provisions, plaintiffs would not have sacrificed their claims for compensatory damages nor relieved the City from contempt of court proceedings and penalties based, inter alia, on the City's default in its obligation to construct a 440-bed detention center by December 31, 1990. Without the provisions for short-term relief, neither of the Consent Decrees under siege would have been entered. Hence, if the caps, release and nonadmission

provisions were to be "modified" out of existence, the Consent Decree as a whole would also cease to exist.[2]

Under the law as recently and definitively explicated by the United States Supreme Court in Rufo v. Inmates of the Suffolk County Jail, 1992 WL 3667 (U.S. January 15, 1992), consent decrees, in common with federal court judgments entered upon an adjudication, are subject to modification, but only upon a showing of a significant change in circumstances, unforseen at the entry of the decree, and then only to the extent necessary to respond to the new factual conditions without subverting the essential purposes of the decree. Defendants here have not even attempted to make the required demonstration -- nor could they succeed if they tried. All of the supposed damaging effects on law enforcement and the administration of criminal justice which defendants attribute to the 1991 Consent Decree -- but which they neglect to document by way of competent evidence -- were argued by the District Attorney in opposition to the entry of the Decree, they were considered by Defendants in entering into the Consent Decree and they were rejected by the Court as insufficient grounds for disapproving the parties' Stipulation and Agreement. That the City, in the person of its new Mayor, has reconsidered the wisdom of its Decree is not a significant

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2. In consequence of which, plaintiffs would have restored to them their cause of action for damages back to April 30, 1980, as well as for injunctive relief.

change of circumstances which warrants modification; were it otherwise, a consent decree would have all the finality and durability of a leaf in a windstorm.

Even if defendants could carry their burden of showing a significant change of circumstances, their failure to demonstrate how modification can be reconciled with the essential objects of the decree would itself be fatal to their application. If, on the basis of a demonstrable increase in the number of habitable cells and commensurate improvements in prison staffing, services and program, defendants were to seek an increase in the capacity of the jails which are subject to the Consent Decrees, a modification to the Decrees might well be appropriate. But defendants propose nothing of the kind. To the contrary, they seek only to be relieved of obligations which they find inconvenient and do so with utter indifference to the hard, cold fact that the consequence of repealing the Decrees will be to aggravate already intolerable conditions.

Defendants' charge that the commitment of the prior administration to establish and maintain the capacity of the City's jails exceeded the limits of its authority, violated state law, and transgressed state court orders is the product of an apparent misunderstanding of the two Consent Decrees. Neither Decree places any limits upon the number of accused persons that the City may detain in default of bail awaiting trial. The Decrees provide merely that the facilities which are the subject

of the litigation may themselves admit only a specified number of inmates -- a number chosen by the City on the basis, presumably, of the City's limited ability, given its "extreme fiscal exigencies," Defendants' Mem. at p. 23 n. 23, to staff and service the institutions. Since the Decrees were entered, the City has enlarged the capacity of its prison system by adding new facilities, a measure which the new administration is free to emulate, just as it is free to repair the damage to public safety wrought by the 25 percent reduction in the manpower of the Philadelphia Police Department during the past administration, a fact somehow overlooked in the new Mayor's denunciation of the Consent Decrees as causes of crime.[3]

If the City is in violation of any state law or state court order for failing to incarcerate persons unable to afford bail -- something we dispute -- the violation is not compelled by any decree in this case. Rather it is the result of the City's

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3. The statistic on police department manpower was recited by Mayor Rendell in a speech at the Union League on or about January 9, 1992. Plaintiffs do not know if a transcript exists, but the speech was recorded.

Since there is no showing by the defendants of a change in circumstances, we have no occasion to debate the unsupported assertions that the consent decrees have had or will have adverse effects on the administration of criminal justice or on public safety. We note only that of the 20 largest cities in the nation, Philadelphia has the lowest crime rate according to FBI figures, that the overall crime rate in the City is static or slackening, and that criminal case dispositions in the Philadelphia Court of Common Pleas reached their highest point in 1990 after the nonadmission procedures had been in effect for two years. (See the accompanying Appendix ("App.") at Tab 1).

knowing and deliberate failure over a period of at least 20 years to fund the construction of the necessary facilities or to take the other measures which are available to reduce jail overcrowding in Philadelphia. Creating or perpetuating unconstitutional conditions of confinement is not a legally acceptable means of curing an alleged statutory violation.

I. STATEMENT OF FACTS

The conditions of confinement in the Philadelphia prisons have been the subject of extensive litigation and judicial condemnation for over 20 years. In Commonwealth ex rel. Bryant v. Hendrick, 444 Pa. 83, 280 A.2d 110 (1971), the Pennsylvania Supreme Court upheld the finding of a three-judge panel of the Philadelphia Court of Common Pleas that conditions at Holmesburg Prison were "disgusting and degrading" and violated the prohibition against "cruel and unusual punishment" in the Eighth Amendment to the United States Constitution. Id., 444 Pa. at 94, 280 A.2d at 115. The Pennsylvania Supreme Court noted further that the Holmesburg "cells, originally built [between 1896 and 1920] to house one man, were seriously overcrowded." Id.

In February 1971, five prisoners in the Philadelphia prison system -- then consisting of Holmesburg, the House of Correction, and the Detention Center -- brought a class action in equity in the Philadelphia Court of Common Pleas under 42 U.S.C. § 1983 attacking the constitutionality of conditions of

confinement in the Philadelphia prison system as a whole and requesting injunctive relief against the City of Philadelphia and the City officials responsible for the prisons. Jackson v. Hendrick, Court of Common Pleas of Philadelphia County, February Term, 1971, No. 2437 ("Jackson v. Hendrick").

On April 17, 1972, after a lengthy hearing, the three-judge panel in Jackson v. Hendrick rendered an exhaustive 264-page Opinion and Decree Nisi, holding that conditions in the Philadelphia County prisons violated the rights of inmates under, inter alia, the United States and Pennsylvania Constitutions. On June 7, 1972, the court issued a final decree which affirmed the Opinion and Decree Nisi and was upheld on appeal in Jackson v. Hendrick, 457 Pa. 405, 321 A.2d 603 (1974). The post of Prison Master was created to assist the court and the parties in administering the court's decree. At the time the Jackson v. Hendrick panel issued its findings, the total population of Holmesburg, the House of Correction, and the Detention Center was 2,691. Jackson v. Hendrick, No. 71-2437, February Term, 1971 (C.P. Phila.) (Opinion dated April 17, 1972). Despite the entry of a series of remedial decrees and stipulations in Jackson v. Hendrick aimed at alleviating the conditions determined to be unconstitutional in 1972, overcrowding persisted and the conditions of confinement in Philadelphia's jails worsened. In 1978 the City was held in contempt of the Jackson v. Hendrick

court and fined $325,000, but relief from the unconstitutional conditions did not materialize.

On April 30, 1982, ten inmates at Holmesburg Prison frustrated by the City's failure to comply with the orders in Jackson v. Hendrick, initiated this action by filing a pro se complaint on behalf of all inmates at Holmesburg alleging that that prison was unconstitutionally overcrowded and seeking compensatory damages and equitable relief. Court-appointed counsel filed an amended complaint on April 19, 1983. The defendants -- which included the City of Philadelphia, its Mayor, and the several city officials charged with the responsibility of administering the Philadelphia prison system -- moved to dismiss plaintiffs' amended complaint on the ground that it was substantively identical to Jackson v. Hendrick.

On January 3, 1984, the Court granted the defendants' motion and dismissed the case on the grounds of res judicata and the abstention doctrine, and plaintiffs appealed. On February 22, 1985, the United States Court of Appeals for the Third Circuit reversed the Court's decision, Harris v. Pernsley, 755 F.2d 338 (3d Cir. 1985), and subsequently denied the defendants' petition for rehearing en banc on March 21, 1985. Harris v. Pernsley, 758 F.2d 83 (3d Cir. 1985). Defendants' Petition for Writ of Certiorari was denied on November 4, 1985. Pernsley v. Harris, 474 U.S. 965 (1985).

On January 16, 1986, shortly after the denial of certiorari in the Harris case, the Supreme Court of Pennsylvania vacated a series of 1984 trial court orders in Jackson v. Hendrick banning double and triple celling of inmates, holding the City in contempt for violating such orders, and assessing daily fines for each inmate held in custody in excess of the population caps. Jackson v. Hendrick, 509 Pa. 456, 503 A.2d 400 (1986). The State Supreme Court held that the Common Pleas Court had erred in applying a "one person to a cell" test without considering whether such a population limit was necessary to remedy a violation of the Constitution under all the circumstances, including post-decree improvements in conditions. Id., 509 Pa. at 470-72, 503 A.2d at 407-408. The Supreme Court remanded the case to the three-judge trial court for inquiry into whether existing conditions continued to violate the Eighth Amendment under the totality of circumstances and whether single-celling was necessary to abate such a violation. See id. ("In this matter we limited our review solely to whether a 'one man, one cell' requirement is constitutionally mandated").

Upon remand of this case from the United States Supreme Court, on January 27, 1986, plaintiffs filed a second amended complaint which expanded the definition of the plaintiff class to include all past, present, and future inmates in the Philadelphia prison system, and which expanded the allegations of unconstitutional overcrowding to apply to the Philadelphia prison

system as a whole. After extensive negotiations between plaintiffs and the City defendants, the parties arrived at a Settlement Agreement on November 14, 1986 ("Settlement Agreement"). The Settlement Agreement provided, inter alia, for the construction of a downtown 440-bed detention facility by December 31, 1990, a maximum allowable population ("MAP") of 3750 inmates for the Philadelphia prison system (and MAPs for each of the individual facilities), and mechanisms by which the City defendants would achieve the MAPs including a moratorium on admissions of persons charged with non-violent offenses[4] and a limited release program for persons held pretrial on the lowest bail. The MAPs were set at levels which contemplated that some number of cells (the precise number to depend on the number of habitable cells at any given time) would be occupied by more than one inmate. In other words, the City obtained a relaxation of the more stringent standard to which it had previously been bound under Jackson v. Hendrick. The agreement also relieved the City of the threat of compensatory damages beyond the payment of $20,000.

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4. The admissions moratorium barred admission of persons awaiting trial who would otherwise have been detained in default of bail. The moratorium would continue until the number of inmates housed was within the maximum allowable population. Even with the moratorium in effect, however, persons charged with specified crimes of violence such as murder, forcible rape, or a crime involving the use of a knife or firearm during the commission of an aggravated assault or robbery would still be admitted to jail.

Concurrent with the agreement to reduce the population of the Philadelphia prisons, the City defendants agreed to the entry of an order in Jackson v. Hendrick which would complement the Settlement Agreement entered in Harris by setting standards for prison operations and services that were consonant with the agreed-upon population levels. See Settlement Agreement, ¶ 8 (a copy of the Settlement Agreement is included at App., Tab 2).[5] See also Harris v. Pernsley, 654 F. Supp. 1042, 1047 (E.D. Pa. 1987). Specifically, the proposed order mandated that the City defendants provide adequate numbers of correctional officers and social workers and improve and/or maintain their facilities and programs to provide adequate service in areas such as food preparation and dining, Exhibit B to Settlement Agreement ¶ XI (App., Tab 2); medical, dental and eye treatment, id. ¶¶ XII, XIII; drug treatment, id. ¶ XIV; educational programs and vocational training, id. ¶¶ XXV, XXVI; and inmate discipline, id. ¶ XIX.[6]

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5. The complementary settlement agreement in Jackson v. Hendrick was intended as a consensual substitute for the Common Pleas Court's reassessment of the remedial decree that had been ordered by the Pennsylvania Supreme Court on January 16, 1986.

6. The proposed order, less the provisions dealing directly with overpopulation, ultimately was entered by the Jackson court by means of a consent order in that case on August 1, 1988. See Jackson v. Hendrick, February Term, 1971, No. 2437, Order at ¶ 3 (C.P. Phila., August 4, 1988) and Exhibit A thereto (containing both the settlement agreement and the order on conditions of confinement). The Order and its Exhibits are set forth at App., Tab 3. Because the order actually entered in Jackson deletes

(continued...)

In consideration of the relief to which the City committed itself in the Settlement Agreement, particularly the construction of a new facility by the end of 1990 and implementation of the MAPs and of the qualified admissions moratorium, plaintiffs agreed to the dismissal with prejudice of all of their claims, legal and equitable, against the City defendants. After hearing from the parties and the District Attorney on all aspects of the settlement, the Court approved the Settlement Agreement and entered a Consent Decree consistent with its terms on December 30, 1986 (the "1986 Consent Decree"; see App., Tab 4). See also Harris v. Pernsley, 654 F. Supp. 1042 (E.D. Pa. 1987).

Also on December 30, 1986, the Court denied the District Attorney's first motion to intervene in this litigation, finding, inter alia, that the District Attorney's state law functions were not sufficiently affected by the release and nonadmission provisions of the 1986 Consent Decree to warrant his intervention of right. See Harris v. Pernsley, 113 F.R.D. 615 (E.D. Pa. 1986). The District Attorney immediately appealed the Court's denial of his motion to intervene and its approval of the

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6. (...continued)
provisions in the proposed order dealing directly with overcrowding, the paragraph numbering is changed as follows: 1) food preparation and dining provisions are at ¶ VIII; 2) medical, dental and eye treatment provisions are at ¶¶ IX, X; 3) drug treatment provisions are at ¶ XI; 4) educational and vocational training provisions are at ¶¶ XXII, XXIII; and 5) inmate discipline provisions are at ¶ XVI.

1986 Consent Decree to the Third Circuit. In Harris v. Pernsley, 820 F.2d 592 (3d Cir. 1987), the Court of Appeals affirmed this Court's denial of the motion to intervene and, while not reaching the issue of whether the 1986 Consent Decree was properly approved -- that issue not being before the Court of Appeals because the District Attorney had no standing to appeal on the merits -- the Third Circuit stated nonetheless:

> It is noteworthy that the district court conducted a careful examination of the proposed settlement before it approved the decree. The court toured the prisons, requested statistical information from the City defendants, and considered the written and oral contentions of the parties and the District Attorney. In addition, it filed a thirty-one page memorandum opinion on February 19, 1987, explicating its conclusion that the settlement was fair, reasonable, adequate and in the public interest.

Id. at 604 n. 14.

From the August 1987 date that the 1986 Consent Decree went into effect -- after all judicial stays were vacated -- the City defendants consistently failed to meet the deadlines set for complying with the MAPs. When the City defendants failed to meet the deadline of May 31, 1988, the Court ordered a modified admissions moratorium -- i.e., the moratorium outlined in the Settlement Agreement with certain added exceptions not agreed to by plaintiffs -- to commence on June 7, 1988. (App., Tab 5). At the time that the Court initially implemented the admissions moratorium, the population of the Philadelphia prisons was approximately 3,980 persons. See id.

Thereafter, for a period of roughly three months, from June 7, 1988 to early September, 1988, the population of the Philadelphia prison system fluctuated around the 1986 Consent Decree's maximum allowable population of 3,750. On September 9, 1988, however, the Court, at the urging of the District Attorney, and with the concurrence of the City defendants, amended the admissions moratorium again to except persons who had twice been released after signing their own bail on separate outstanding charges, and persons who twice previously failed to appear for hearings on separate charges. See Order of September 9, 1988, ¶ 3.D (App., Tab 6). In addition, the Court suspended the admissions moratorium for 60 days with respect to persons charged with manufacturing, selling and possessing with intent to deliver far lesser quantities of drugs than were formerly excepted in the Order of June 6, 1988.[7] Id. at ¶ 3.C. Plaintiffs agreed to a 60-day experimental implementation of these exceptions, but only on the condition that the Special Master be permitted to

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7. The new limits for drugs were restated in terms of the Commonwealth's criminal drug penalties set forth in 18 Pa.C.S.A. § 7508(a)(1)-(6) (Purdon Supp. 1988). The new amounts of drugs justifying a person's exception from the admissions moratorium were far lower than the limits set forth in the court's Order of June 6, 1988 which were based on 21 U.S.C. § 841(a)(1)(A). For example, the former exception permitted the admission of a person charged with possessing a substance containing a detectable amount of heroin only if he was carrying at least one kilogram (1000 grams) of the substance; the amended exception permitted admission of a person possessing only 10 grams. Compare 21 U.S.C. § 841(b)(1)(A)(i) with 18 Pa.C.S.A. § 7508(a)(2)(ii).

recommend the compensatory release of pre-trial detainees with no record of violence who had been held for the longest time on the lowest bail, "as such releases may be necessary and advisable." Explanatory Order of September 9, 1988 at ¶ 3 (App., Tab 7). The term "compensatory" signified the parties' intent that sufficient inmates be released to compensate for the number admitted under the new exceptions.

The Philadelphia prison population rose dramatically in the period after September 9, 1988 Order.[8] In April, 1989, when the population had reached approximately 4,700 -- roughly the current population level -- the Court recognized that the overcrowding was intolerable. See Harris v. Reeves, C.A. No. 82-1847, Memorandum Opinion at 2 (April 17, 1989) ("The court can no longer, in good conscience, allow the prison population to remain at this dangerously high level.") (App., Tab 9); Population Report, April 17, 1989 (App., Tab 10).

In the meantime, and not surprisingly, the Jackson v. Hendrick court began to hear renewed complaints about deteriorating conditions of confinement in the prison system, centered on the inability of the various institutions to maintain the basic services required by the Settlement Agreement and related order. At a hearing before the Jackson court on March

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8. See Harris v. Pernsley, C.A. No. 82-1847, Memorandum Opinion at 10 (filed February 27, 1989) ("These exceptions have led to a precipitous increase of the prison population in November, December and January") (App., Tab 8).

20, 1989, Edmund Lyons, then Superintendent of the Philadelphia Prisons, testified that the overcrowded conditions in the prison system were directly to blame for the decline in services and maintenance and for the increase in prison tension and violence. See Jackson v. Hendrick, Transcript of Contempt Hearing, March 20, 1989 (App., Tab 11). Specifically, Mr. Lyons stated that the overcrowding was responsible for deficiencies in providing basic food service and medical treatment to inmates and necessary maintenance to prison facilities. (App., Tab 11 at 32-35). Mr. Lyons testified, for example, that there was an increase in the level of vermin in and around food service areas because the size of the population prevented thorough cleaning of those areas between meals. Id. at 36.

Mr. Lyons also testified that the soaring population prevented effective administration of vocational and recreational programs for the inmates. Id. at 38-39, 43. Finally, Mr. Lyons testified that incidents of violence were becoming more prevalent in the institutions and resulting in increased stress to the staff. Id. at 43-45. Throughout his testimony, Mr. Lyons stressed that the prisons' problems were due to overcrowding. See, e.g., id. at 38-39. When Superintendent Lyons so testified, the combined population of the Philadelphia County Prisons was 4,701. On May 1, 1989, based on the testimony of Mr. Lyons, the Jackson court levied contempt sanctions of $1,000 per day because of the City's continued failure to adhere to the related order.

See Jackson v. Hendrick, Adjudication (C.P. Phila. May 1, 1989) (App., Tab 12). Subsequently, on January 4, 1990, upon finding that conditions had not improved, the Jackson court raised those contempt sanctions to $5,000 per day. See Jackson v. Hendrick, Adjudication (C.P. Phila. January 4, 1990) (App., Tab 13). Ultimately, the City forfeited fine monies of $1,046,700 for its contempt of the Jackson court orders respecting staffing levels and conditions of confinement. See Jackson v. Hendrick, Stipulation and Agreement, ¶ II.A. (App., Tab 14).

Meanwhile, this Court attempted to bring the prison population under control by ordering the release of certain untried persons who fell within prescribed categories and whose release was proposed by the Prison Population Management Unit ("PMU").[9] The release mechanism proved ineffective in that the numbers actually released on a prompt basis lagged behind the numbers admitted under the exceptions to the admissions moratorium. The procedure established by the Court contained several measures aimed at safeguarding against the release of

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9. For example, on April 17, 1989 the Court ordered that certain detainees be considered for release, including inmates being held solely on probation and parole detainers who had not had required violation hearings within a specified period, and pretrial prisoners held in default of the lowest amount of bail necessary to reduce the system population to the maximum allowable populations. See Order of April 17, 1989 at ¶ 4e(ii) (App., Tab 15). These release provisions are located at paragraphs 4 and 5 of the admissions moratorium set forth in the Court's September 21, 1990 Order, (App., Tab 16), and form the basis for the release mechanism of the 1991 Consent Decree which is one of the targets of the defendants' motion to modify.

persons dangerous to the community. It conditioned releases of indigent pretrial detainees on prior review by the PMU, the state court's pretrial services unit and the District Attorney's office. No inmate was released without review by the District Attorney and an opportunity to correct the record on which the release decision was predicated. Nothing in the release procedure hindered the state court's pretrial services unit from monitoring persons who were released or from exerting efforts to secure their appearances in court, but pretrial services took no steps to do either.

In the midst of the continuing prison population crisis, the City defendants suspended indefinitely and unilaterally plans for a new 440-bed downtown detention facility ensuring that such a facility would not be available before December 31, 1990 as required by ¶ 2.e. of the 1986 Consent Decree. The City defendants' failure to provide additional bed space meant, at a minimum, that the overcrowding crisis would continue for the foreseeable future.

Seeking to avoid penalties for contempt of the order to build a 440-bed jail, City defendants entered into negotiations with the plaintiffs. As a result of those negotiations, in the fall of 1989, the City of Philadelphia entered into a stipulation and agreement with the plaintiff class which provided for the planning and construction of new facilities and the upgrading of existing facilities to the standards of the correction industry.

The City also agreed to revisions in the release procedures aimed at making them more efficient and thereby more effective. The stipulation and agreement was submitted to the Court for its approval on November 17, 1989, but the Court took no action upon it.

Frustrated by the Court's failure to act on the 1989 stipulation and agreement, by the exceptions to the admissions moratorium made without plaintiffs' consent and by the disappointing performance of the existing release mechanism, plaintiffs moved to vacate the 1986 Consent Decree on February 14, 1990. The City defendants opposed the motion to vacate, seeking to avoid the cost and risk of a trial on the merits, potentially enormous compensatory damages, and the dismantling of the population reduction mechanism. The Court did not act upon the motion to vacate, which was ultimately withdrawn without prejudice as one term of the 1991 Consent Decree. (App., Tab 18 at ¶ 34).

By August, 1990, the Philadelphia prison population had reached the bursting point. The Superintendent of the Philadelphia prisons recognized that the new level of overcrowding, over 5,000 inmates, threatened the ability of the system to function. Accordingly, on August 31, 1990, plaintiffs moved for emergency relief, asking the Court to release certain sentenced prisoners (those with sixty days remaining on their sentences), to eliminate or increase the amounts on the drug

exceptions to levels in effect prior to September 9, 1988, and to eliminate the bench warrant exception to the admissions moratorium altogether. (App., Tab 17). In response, on September 21, 1990, with the prison population hovering about 5,100, the Court increased the minimum drug amounts necessary for a person to be admitted to the Philadelphia prisons notwithstanding the moratorium. See App., Tab 16. However, the amended minimum drug amounts were not nearly restored to the levels existing when the moratorium was originally implemented and proved only marginally effective in reducing the population.[10]

Confronted with the problem of persistent overcrowding, and still facing contempt of court proceedings and a possible trial on the merits, the City defendants resumed negotiations with class counsel. These negotiations produced a revised Stipulation and Agreement, (App., Tab 18), substantially similar to that agreed upon in 1989, which was formally submitted to the Court for approval on December 21, 1990.

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10. For example, as set forth in footnote 4, supra, the September 9, 1988 Order had lowered the minimum amount of heroin possessed sufficient to warrant admission into the Philadelphia prisons from 1 kilogram (1000 grams) to only 10 grams. (App., Tab 6). The September 21, 1990 Order increased that amount to 50 grams, an overall increase of 40 grams from the previous minimum, but an overall decrease of 950 grams from the initial minimum.

The Stipulation and Agreement had two principal purposes. The first was to provide for a long-term solution to the overcrowding problem through a prison planning process which includes: a plan for construction of Philadelphia prison facilities; a population management plan; a capital projects management plan; an operational management plan; a management information services plan; monitoring and implementing requirements; and sanctions for failure to comply with the timetables for planning, construction and implementation. Id. at ¶¶ 11-16, 20-28.

The second function of the Stipulation and Agreement was to reduce the Philadelphia prison population to the MAPs agreed upon in the 1986 Consent Decree by maintaining the admissions moratorium as set forth in the September 21, 1990 Order and by providing for a more efficient mechanism for the release of indigent detentioners so long as the MAPs are exceeded. Id., ¶¶ 17, 18, 32. Under the procedure crafted by the parties, the names of 35 pretrial detainees would be submitted daily, five days per week, to the Special Master who would order their release so long as they met the criteria embodied in Paragraph 4.E.(i)-(iii) of the September 21, 1990 Order.[11] The Stipulation and Agreement provided the District

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11. Paragraph 4.E.(i)-(iii) of the September 21, 1990 Order, (App., Tab 16), inter alia, authorizes the release of pretrial detainees who are held in default of the lowest amount of

(continued...)

Attorney with an opportunity to object to the release of any person on public safety grounds, with the proviso that the District Attorney designate an eligible substitute for release at the same time. Id. at ¶ 17.d.

By Order dated December 28, 1990, the Court preliminarily approved the Stipulation and Agreement and scheduled a hearing for January 14, 1991 regarding final approval. Notwithstanding its denial of the District Attorney's Second Motion to Intervene in this case of right on January 14, 1991, the Court entertained the District Attorney's objections to the Stipulation and Agreement.

Consistent with the limited scope of his proposed intervention, the District Attorney attacked the pretrial release and nonadmission aspects of the Stipulation and Agreement before the Court. In support of his position, the District Attorney presented the testimony of Joseph DiGuglielmo, Director of the Pretrial Services Division of the Court of Common Pleas of Philadelphia, who testified that the release mechanism would impair the effectiveness of state pretrial release programs and would increase the failure to appear rate in the Philadelphia criminal courts. (App., Tab 19). In addition, the District

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11. (...continued)
percentage bail as is necessary to reduce the population of the system to the maximum allowable, not including persons charged with enumerated violent crimes (as set forth in paragraph 3.A. of that Order) or domestic violence and abuse offenses (as set forth in paragraph 3.B. of that Order).

Attorney submitted over fifteen offers of proof from state court judges, neighborhood advocates, assistant district attorneys, and others, to the effect that nonadmissions and releases of pretrial detainees would have a variety of deleterious effects on public safety, public morale, and the administration of justice. (See App., Tab 20). Through the testimony, offers of proof, and in an opposition brief, the District Attorney continually asserted his position that the release mechanism would "seriously and irrevocably harm criminal prosecutions in Philadelphia," and that the releases would pose a threat to public safety. (See, e.g., Objections of Ronald D. Castille to Proposed Consent Order, App., Tab 20). Moreover, the District Attorney argued that the Stipulation and Agreement, like the 1986 Consent Decree, was improper because "none of the parties to this litigation possesses the power to nullify [] state court orders [of incarceration]." See id. at 15.

On March 11, 1991, the Court approved the Stipulation and Agreement. In a carefully-reasoned opinion, the Court explained its reasons for approving the Stipulation and Agreement over the objections made by the District Attorney to the release mechanism and admissions moratorium. See Harris v. Reeves, 761 F.Supp. 382 (E.D. Pa. 1991). The Court described past efforts under the 1986 Consent Decree to reduce the prison population, none of which proved to be availing, and the history of the City defendants' lack of compliance with the construction obligations

in the 1986 Consent Decree. Id. at 388-90. The Court then evaluated the Stipulation and Agreement in light of the desirability of settlement as opposed to trial, the reaction of the class, the stage of the proceedings, the risk of establishing liability and damages at trial, the ability of the City defendants to withstand a substantial judgment, and the reasonableness of the settlement. Id. at 390-402. In each of these areas, the Court found the Stipulation and Agreement to be fair, adequate and reasonable.

In addition, a significant portion of the Court's opinion was devoted to addressing the District Attorney's objections. The Court indicated that it had carefully examined the evidence and offers of proof submitted by the District Attorney, but found as a matter of fact that the District Attorney's submissions overstated the impact of the releases. Id. at 396-400. Furthermore, the Court concluded that the release program did not pose an unreasonable threat to the public compared with the necessity of the relief, and that the Stipulation and Agreement was otherwise fair, adequate and reasonable in light of the dire need to address the persistent prison overcrowding crisis. Id. at 402. The Court summed up the rationale behind its holding by stating, "[t]he Philadelphia jails cannot hold all those awaiting trial or sentenced without jeopardizing the health and safety of the prisoners and their custodians." Id. The Court found further that compelling the

City defendants to release or refuse to admit persons accused of lesser crimes, as opposed to sentenced persons, would be the least intrusive method for dealing with overcrowding. Id.

On March 13, 1991, the District Attorney filed a Notice of Appeal from the Court's Order approving the Stipulation and Agreement. In her appellate brief, filed on April 30, 1991, the District Attorney objected to the 1991 Consent Decree on the grounds that its provisions were "contrary to state law" requiring the incarceration of persons held pretrial and therefore beyond the City's power of consent, and that the release and nonadmission provisions would have adverse effects on criminal law enforcement and public safety. See Brief for Appellant, Harris v. Reeves, No. 91-1194 (App., Tab 21) at 28. In their appellate brief, the City defendants joined with the plaintiffs in affirming the authority of the City to enter into the 1991 Consent Decree, stating that "the Consent Decree approved by the Court below, and the population limit set forth therein is a valid expression of the City's obligations and duties under state law." See Brief for Defendants' Appellees, Harris v. Reeves, No. 91-1194 (App., Tab 22) at 25.

On October 3, 1991, the Court of Appeals affirmed the decision of this Court rejecting the District Attorney's Motion to Intervene. Harris v. Reeves, 946 F.2d 214 (3d Cir. 1991). After the decision, the District Attorney filed various petitions for rehearing and for a stay of the release and nonadmissions

provisions of the Stipulation and Agreement in both the Third Circuit and in the Supreme Court, all of which were denied. Finally, by order dated November 21, 1991, this Court ordered that paragraphs 17 and 18 of the Stipulation and Agreement were to go into effect on November 25, 1991. See Order of November 21, 1991 (App., Tab 23).

Meanwhile, as the Stipulation and Agreement was being negotiated and its approval litigated in this Court and in the Court of Appeals, both the overcrowding and the oppressive conditions fostered by its presence continued. On November 25, 1991, the day that the Court ordered paragraph 17 of the Stipulation and Agreement to go into effect, the population of the Philadelphia prisons was 4,966. See Population Report, December 13, 1991 (App., Tab 24). As of January 12, 1992, the last date for which we have population reports, the Philadelphia prison population stood at 4,715. See Population Report, January 15, 1992 (App., Tab 25). In January, 1992, the City defendants filed with the Jackson v. Hendrick court documentation of inspections of the Philadelphia Prisons carried out by the Philadelphia Department of Health in November, 1991, and internal management reports for the same period. (See App., Tab 26). Those documents confirm that the physical conditions of the Philadelphia Prisons remain at least as desperate as they were when Mr. Lyons testified in early 1989.

On January 6, 1992, Edward G. Rendell was inaugurated as Mayor of Philadelphia. On January 7, 1992 -- slightly over one year since the revised Stipulation and Agreement was presented to the Court, less than nine months since the Stipulation and Agreement was approved as a consent decree by the Court, and less than six weeks after paragraph 17 had gone into effect -- Mr. Rendell and the City of Philadelphia filed the instant motion seeking a "modification" to eliminate entirely the population caps in the 1986 Consent Decree and the various release and non-admissions provisions in the 1986 and 1991 Consent Decrees.

As grounds for modification, defendants assert that the agreement to population caps and to the release and nonadmission provisions was ultra vires and therefore void justifying relief under Fed.R.Civ.P. 60(b)(4), that the Consent Decrees are inequitable by reason of their allegedly harmful effect on criminal justice and public safety justifying relief under Fed.R.Civ.P. 60(b)(5), and that new circumstances consisting of the election of a mayor who opposes the short-term relief and the Supreme Court's decision in Wilson v. Seiter, ___ U.S. ___, 111 S.Ct. 2321 (1991), concerning the liability standard applicable to prison conditions litigation, also make it inequitable under Fed.R.Civ.P. 60(b)(5) and (6) to continue the enforcement of the short-term relief provisions of the two Decrees. Defendants'

papers do not address the effect on the class of repealing the short-term relief provisions.

II. ARGUMENT

A. DEFENDANTS HAVE FAILED TO SHOW THE SIGNIFICANT CHANGE IN CIRCUMSTANCES REQUIRED FOR MODIFICATION OF A CONSENT DECREE UNDER RUFO V. INMATES OF THE SUFFOLK COUNTY JAIL

1. The Standard For Modification As Set Forth In Rufo

Since defendants filed their motion to modify, the United States Supreme Court decided Rufo v. Inmates of the Suffolk County Jail, and, in so doing, clarified the standards for modifying a consent decree in institutional reform litigation. Rufo involved prison litigation in which a district court had held as far back as 1973 that conditions at the Suffolk County Jail in Boston, Massachusetts -- a holding institution for pretrial detainees -- were unconstitutional. In 1978, during the course of administering a remedy based on its findings, the district court ordered that the existing Suffolk County Jail be closed on October 2, 1978 unless the court was presented with a plan to build a constitutionally-adequate facility for pretrial detainees by that date. See Rufo, 1992 WL 3667 at 4. As a result, the parties negotiated a stipulation that provided for the construction of a new county facility which, inter alia, would contain "single occupancy rooms of 70 square feet." See id. at 4. The district court approved the plan as a consent decree on May 7, 1979. Id. at 5.

In the ensuing years, the district court, with the consent of the parties, modified the consent order to increase the capacity for the new Suffolk County Jail, then under construction, but constantly reiterated that the increase in capacity not be made at the expense of the "single occupancy" requirement. Id. Finally, in July, 1989, the sheriff of Suffolk County moved for a modification of the consent decree to provide for double-celling in 197 cells, thereby raising the capacity of the prison to 610. Id. The sheriff argued that the modification was supported by a change in fact, because an unanticipated increase in the prison population made it burdensome if not impossible for the new jail to house all pretrial detainees without double-celling, and by a change in law, because the Supreme Court's decision in Bell v. Wolfish, 441 U.S. 520 (1979), handed down one week after the consent order was entered, had held that double-celling of pretrial detentioners could be constitutional. Id.

The district court reviewed the proposed modification relying primarily on the language of United States v. Swift & Co., 286 U.S. 106, 119 (1932), that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." See Rufo, 1992 WL 3667 at 6. The court held that the change in law did not "directly overrule any legal interpretation on which the 1979

consent decree was based," that the change in facts (i.e., the increased population) was not unforeseen at the time the consent decree was entered, and that a modification of the consent decree would, regardless of its constitutionality, eliminate a critical requirement of the consent decree, the single-celling of individuals. Id. Based on those findings, the district court denied modification, and the Court of Appeals for the First Circuit affirmed. Inmates of Suffolk County Jail v. Kearney, No. 90-1440 (1st Cir. Sept. 20, 1991), judgment order reported at 915 F.2d 1557.

The United States Supreme Court granted the sheriff's petition for certiorari and held that the district court erred in applying the "grievous wrong" standard of Swift in evaluating the propriety of modification, stating that courts should take a more "flexible approach" when considering motions to modify in institutional reform litigation. Id. at 13. In such cases, a less rigid evaluation is warranted given the fact that institutional litigation affects the public interest as well as the parties. Id at 7-9. Concerned that the district court's application of a "grievous wrong" standard had not given due weight to the considerations contemplated by a flexible approach, the Court vacated the district court's holding and remanded for a new determination of the motion to modify according to the standards articulated in the Court's opinion. Id. at 13.

Under those standards, modification will not be allowed merely upon showing that the institutional defendant has reconsidered the wisdom of its original agreement and now deems it improvident. Consent decrees are final judgments and may not be changed lightly or unilaterally. "Rule 60(b)(5) provides that a party may obtain relief from a court order when 'it is no longer equitable that the judgment should have prospective application,' not when it is no longer convenient to live with the terms of a consent decree." Id. at 9. To the contrary, "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." Id. at 9. If that burden is carried, the court must then consider "whether the proposed modification is suitably tailored to the changed circumstances." Id.

For a change in facts to warrant modification, the new facts must have been unforseen at the time the decree was entered; a fact or result that was anticipated at the time the consent decree was approved would ordinarily not suffice as a "changed circumstance." Id. at 10. Where modification is sought on the basis of a change in the law, the new development must either make legal that which the decree was intended to prevent, id. at 11, or it must upset the understanding on which the parties based their agreement. Id. at 12. The decision in Bell v. Wolfish, 441 U.S. 520 (1979), one week after the entry of the

Suffolk County decree, was not a change of either sort warranting modification even though the decision authorized the double-celling of pretrial detainees forbidden in the Suffolk County decree. As the Supreme Court explained in Rufo, the decision in Bell v. Wolfish did not invalidate single-celling, which Suffolk County authorities were free to agree to, regardless of whether it was constitutionally mandated. Id. at 11. Also, Bell v. Wolfish was pending in the Supreme Court at the time the Suffolk County consent decree was entered and was necessarily within the contemplation of local officials when they agreed to single-celling. Id.

Rufo rejected squarely the contention that state or local officials cannot bind themselves or their governmental unit to do more than achieve the minimum that the constitution requires. In order to "'save themselves the time, expense, and inevitable risk of litigation,'" state and local officials may undertake in a settlement "to do more than the Constitution itself requires...[and] also more than what a court would have ordered absent the settlement." Id. at 11. Hence, a showing that the remedy agreed to in a consent decree exceeds constitutional requirements is no basis for modifying the decree or for ratcheting down the remedy to the level of the constitutional floor. Id. at 12.

When a significant change in circumstances has been shown, then, but only then, is the district court bound to give great weight to the judgment of the responsible officials in determining how best to achieve the purposes of the decree in light of the new circumstances. Fiscal limitations, therefore, may be taken into account in fashioning a modification tailored to overcoming the newly-arisen problem, but "they may not be used to justify the creation or perpetration of constitutional violations." Id. at 12.

2. Defendants Have Made No Showing Of A Change In Factual Conditions Since The Entry Of The 1991 Consent Decree And Their Proposed Modification Is Inconsistent With The Essential Purposes Of The Decree

Although they correctly anticipated the Supreme Court's adoption of a flexible standard for considering modifications to institutional reform consent decrees, defendants were wrong in assuming that under such a standard, they would be relieved of the burden of establishing a significant and unforeseen change in the factual conditions or in the law. They were also mistaken in believing that a governmental "change of heart" (whether by reason of a change in officeholders or a change in an officeholder's thinking about the utility of his agreement) justifies modification or, as this motion entails, abandonment of a consent decree.

In sharp contrast to Rufo, and to the other institutional reform cases discussed in their Memorandum,[12] defendants have not shown, and cannot show, that any changed or new circumstances make compliance with the Consent Decrees in this case any more onerous than it was at the time the agreements were made and entered as judgments of this Court, much less that such circumstances were unforeseen by the past administration at that time. Nor have defendants demonstrated that the operation of the consent decrees has produced unanticipated results. They simply claim that the past administration was powerless to agree to the short-term relief and was wrongheaded in doing so. Defendants' Mem. at 18 n. 14. Such an argument fails to satisfy any standard for modification under Rule 60(b), no matter how flexible. As the Third Circuit recognized in Mayberry v. Maroney, 558 F.2d 1159, 1164 (3d Cir. 1977), a government cannot be relieved of the terms of a consent order merely "'because hindsight seems to indicate to [it] that [its] decision . . . was probably wrong. . . . There must be an end to litigation someday, and free, calculated and deliberate choices are not to be

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12. See, e.g., Philadelphia Welfare Rights Organization v. Shapp, 602 F.2d 1114 (3d Cir. 1979) (modification granted where, because of unanticipated decline in welfare rolls, state could not find sufficient clients to meet decree targets), cert. denied, 444 U.S. 1026 (1980); Plyler v. Evatt, 846 F.2d 208, 213 (4th Cir.) ("Plyler I") (modification granted where unforeseen increase in the prison population made it impossible for state defendants to comply any longer with its strict single-celling restrictions), cert. denied, 448 U.S. 897 (1988).

relieved from.'" Id. (ellipses original) (quoting from Ackermann v. United States, 340 U.S. 193, 198 (1950)).[13]

Furthermore, defendants' attempt to downplay the effect of their proposed modification upon the class by stating that the modification will only affect "numerical population limits" and therefore will not upset the overall goal of the Consent Decrees "to foster constitutional conditions of confinement," Defendants' Mem. at 5 (quoting Plyler I), misses the point. Even if the moving party meets the requirement of showing changed circumstances, "the court should consider whether the proposed modification is suitably tailored to the changed circumstance" Rufo, 1992 WL 3667 at 9, and, in all events, "a modification must not create or perpetuate a constitutional violation". Id. at 12.

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13. Mayberry is factually similar to this case insofar as the proponents of modification there were also unable to show any new conditions. After agreeing, in a consent order, to discontinue confining inmates in the basement of a state correctional institution, the Commonwealth suddenly had a change of heart and sought to use the basement for confinement once again arguing, inter alia, that the necessity of using the basement facility had only since become apparent to the defendants. The Third Circuit rejected the district court's modification, finding lack of changed circumstances because the need to use the basement facility was apparently just as great when the consent order was signed as when the petition for modification was submitted. Mayberry, 558 F.2d at 1164. Similarly here, any negative effects relating to the population cap or the release and non-admissions provisions were considered by the defendants and deemed acceptable in order to avoid further litigation. That the same conclusion would not have been reached by this particular administration does not change the fact that the advantages and disadvantages of the short-term relief were fully appreciated by the defendants when they entered into both the 1986 and 1991 Consent Decrees.

Because defendants refuse to offer an alternative population limit, seeking instead the freedom to house two, three, or four inmates in a cell (since they believe themselves powerless to do otherwise), the Court can hardly determine that the proposed modification meets minimal constitutional standards, much less that it is sufficiently "tailored" to protect plaintiffs' interests or preserve a cardinal object of the Consent Decrees. To the contrary, the requested modification -- complete elimination of the population caps and the means for reaching them -- would remove entirely the means by which the parties agreed to insure current and prospective overcrowding and would worsen already dreadful conditions. Since conditions in the Philadelphia Prison System were unconstitutional in 1972 when the three largest facilities had 20 years less wear and tear and housed many fewer inmates than they house today,[14] and since defendants offer no evidence that conditions in those facilities have been upgraded and remain so, lifting the population cap would certainly violate plaintiffs' constitutional rights.

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14. "[T]here can be no question that the sordid conditions prevailing in the Philadelphia Prisons at the time of the commencement of this protracted litigation [in 1971] violated the Eighth Amendment." Jackson v. Hendrick, 509 Pa. 456 470, 503 A.2d 400, 407 (1986). While the Pennsylvania Supreme Court went on in its opinion to refer to the "vast improvements" in prison conditions since the 1976 remedial decree, those improvements have been largely eroded as subsequent developments in Jackson, including the $1,046,000 fine for contempt of court, amply demonstrate.

Even if the abrogation of the Consent Decrees would not create or perpetuate unconstitutional conditions, however, there is no question that the change would completely eviscerate the parties' agreements which, contrary to defendants' assertion, were specifically intended to effectuate a population cap of 3,750 regardless of whether it was constitutionally required. As the Fourth Circuit recognized in Plyler II -- in language that has specifically been adopted in the Rufo decision -- modification should be denied where it would significantly undermine the relief agreed upon by the parties, even if the modification might not necessarily produce unconstitutional results.[15] Plyler II, 924 F.2d at 1326-27 (interpreting Plyler

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15. The language of the Plyler II court, being so complete a rebuttal of the City defendants' argument that plaintiffs' interests are not sufficiently implicated unless the proposed modification is shown to be unconstitutional, bears repeating here at some length:

> [T]he [district] court apparently thought that Plyler I allowed it to find cognizable harm to the plaintiff class resulting from modification of the decree only if it could determine that the modification would result in unconstitutional conditions -- a matter that, as the court noted, had never been adjudicated.
>
> This was much too draconian a reading of Plyler I's holding on that point. As a moment's reflection will show, so to read that decision [would necessarily imply that the only legally enforceable obligation assumed by the state under the consent decree was that of ultimately achieving minimal constitutional prison standards.] For the practical effect would be that every effort by the plaintiff class to

(continued...)

I). See also Rufo 1992 WL 3667 at 13 ("a proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor").

The notion that the election of a new mayor represents a significant change in the factual conditions for decree modification purposes would, if accepted, destroy the incentive to settle institutional reform litigation. A municipality's consent decrees, like its contracts with vendors or contractors or its collective bargaining agreements, survive changes in political administration. Municipal corporations can no more disavow their contractual obligations by pointing to a change in management than can private corporations.

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15. (...continued)

> enforce specific provisions of the decree could be effectively countered by a motion by the state to modify so long as the modification did not generate unconstitutional conditions overall. [Substantively, this would do violence to the obvious intention of the parties that the decretal obligations assumed by the state were not confined to meeting constitutional requirements. Procedurally, it would make necessary, as this case illustrates, a constitutional decision every time an effort was made either to enforce or modify the decree by judicial action.] . . . Both the substantive and procedural implications of such a drastic reading of Plyler I are simply unacceptable.

Plyler II, 924 F.2d 1326-27 (emphasis original) (bracketed language quoted with approval in Rufo, 1992 WL 3667 at 12). See also Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987)(modification denied under "flexible approach" where it would eliminate agreed-upon conditional limits regardless of constitutionality.)

Defendants argue nevertheless that the inauguration of a new administration which interprets the "public interest" differently than did the prior administration constitutes a changed circumstance sufficient to warrant modification, particularly where the Court relied on the judgment of the prior administration in approving the Stipulation and Agreement. This argument is based on a mischaracterization of the Court's decision regarding the equities of the Stipulation and Agreement. The Court did not, and could not, simply defer to the City's determination of the public interest in approving either the Stipulation and Agreement or the 1986 Consent Decree, but instead weighed the pros and cons of the proposed decree and concluded that, on balance, the negative effects anticipated by the District Attorney were outweighed by the benefits to be derived from the short and the long-term relief the decree could bring about. See Harris v. Reeves, 761 F. Supp. 382, 397 (E.D. Pa. 1991) ("[t]he Court is aware of the District Attorney's concerns about release of pretrial detainees and certainly considers the impact of its orders on public safety"); Harris v. Pernsley, 654 F.Supp. 1042, 1056 (E.D. Pa. 1987) ("The Court has not ignored the fact that the District Attorney contends the settlement would require the release of dangerous criminals").

In the passage quoted out of context by defendants, see Defendants' Mem. at 22, the Court simply rejected, quite correctly, the District Attorney's argument that he was the

official primarily competent to define and dictate what constitutes the "public interest." See Reeves, 761 F.Supp. at 399 ("The District Attorney's contention that the Stipulation and Agreement is against the public interest is based on the false premise that the District Attorney is the governmental official responsible for making that determination"). The Court did not, by that passage, avoid an independent determination of the effect of the Stipulation and Agreement on the administration of justice and the public safety, as its opinions, read in their entirety, demonstrate.

Equally unavailing is the argument that remedies to undo or prevent constitutional violations can be cast off at the will of the electorate or that an expression of public indifference or hostility to constitutional rights qualifies as a "change in circumstances."[16] The constitution embodies values

16. Given the wide range of policy positions advocated by Mr. Rendell in the mayoral campaign, it is hard to measure the degree to which his election was due to popular support for his opposition to the Consent Decrees in this case as opposed to his position on other issues. What makes the analysis doubly difficult is that none of his opponents in the primary or general elections chose to take the side of constitutional conditions for prison inmates -- hence, there was no referendum over the issue, even in the figurative sense. Without suggesting for a moment that it has the slightest relevance to a determination of the instant motion, but solely in the interest of historical accuracy, it should be noted that Mayor Goode campaigned twice after entering into the 1986 Consent Decree and triumphed both times, the first time over primary opponent Edward G. Rendell, already a vociferous opponent of prison reform consent decrees.

that are meant to endure the vicissitudes of temporary public clamor or alarm over their supposed ill-effects.

The new mayor's quick judgment that conditions in Philadelphia's prisons meet constitutional standards, with or without a population cap, would engender more confidence and respect were the factual premise of that judgment shared with the Court. Defendants offer no showing that prison conditions have improved over what they were in 1971 or as they were described by Superintendent Lyons in 1989. As it is, the Court knows only that conditions branded unconstitutional 20 years ago are as bad or worse today based upon the heightened overcrowding, further physical deterioration, and the staffing and program deficiencies for which the state court has fined the City more than $1 million. As the mayor's oath to uphold the Constitution transcends even his most solemn campaign promise, he surely should not expect the Court to exalt the latter over the former or to abdicate its duty to enforce the Bill of Rights merely to be in harmony with a clamorous segment of the public even if its voice represents the majority.

3. The Conditions Cited by Defendants as Grounds for Modification have Already been Considered by the Court

Without so much as a single affidavit or citation to matters of record in this case, defendants complain that the release and nonadmissions provisions have a pernicious effect on the criminal justice system and on public safety. This argument

is not new. In fact, it is precisely the argument advanced by the Philadelphia District Attorney one year ago in opposition to the Stipulation and Agreement. Compare Defendants' Mem. at 15-20 with Objections of Ronald D. Castille to Proposed Consent Decree (filed January 11, 1991) (App., Tab 20).[17] Defendants fail to demonstrate, however, that the effects of the release and nonadmissions provisions are any different from those recognized and understood by defendants when they entered into the agreement embodying those provisions and argued for its approval.[18]

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17. For example, the statement by the defendants that "[a]lmost 40 percent of pretrial detainees released under the consent decrees are rearrested before they can be tried on the charges for which they were released," and that "[t]his rearrest rate is nearly double the rearrest rate for other pretrial detainees released under state court programs," Defendants' Mem. at 19, is apparently lifted from the District Attorney's Offer of Proof of Joseph DiGuglielmo, submitted to the Court with the District Attorney's objections on January 11, 1991. (App., Tab 20). At the parties' -- including the defendants' -- urging, the Court found that the proffered percentage of rearrests for those released under the Harris programs was artificially high, based on the District Attorney's failure to account for all of the Harris releases in 1990. See Reeves, 761 F. Supp. at 398 (actual percentage appeared to be closer to 25%). Moreover, the Court found that the comparison of rearrest percentages between the Harris releases and the state court release programs was not valid, because the state release programs with which the federal releases were compared involved more intensive supervision. The Court stated that a more accurate comparison -- not included in the District Attorney's submission -- would have been between the Harris releases and state programs where inmates were released on their own recognizance. Id. at 398-99. The District Attorney has not since proffered such a comparison, and defendants do not do so here.

18. Indeed, most of defendants' "evidence" with respect to the effect of the release and nonadmissions provisions comes from the operation of the 1986 Consent Decree, rather than the 1991

(continued...)

Absent a showing that there are any unanticipated developments relating to the operation of the release and nonadmissions provisions, defendants are not able to meet a threshold requirement for obtaining modification under Rule 60(b)(5) or (6). See, e.g., Fed. R. Civ. P. 60(b)(5) (modification available "if it is no longer equitable that the judgment should have prospective application") (emphasis added); Rufo, 1992 WL 3667 at 13 ("Under the flexible standard we adopt today, a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree"). Again, having shown only a change of mind, defendants have not met their burden which would permit the Court to vitiate the agreement, so recently approved by the parties and entered as an order by the Court. See id.; Mayberry, 558 F.2d at 1164.

With respect to the argument that a reassessment of the "public interest" mandates modification, that argument is plainly incorrect. A court simply does not retain the power to modify based solely on a reassessment of facts that were before it when the decree was initially approved. As the Supreme Court has stated:

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18. (...continued)
Consent Decree. The experience under the 1986 Consent Decree was certainly a factor taken into account by the parties when they entered into the Stipulation and Agreement in 1990 and by the Court when it approved it in 1991.

> There is need to keep in mind steadily the limits of our inquiry to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The [consent decree], whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making.

Swift, 286 U.S. at 119 (quoted in Ruiz v. Lynaugh, 811 F.2d 856, 860 (5th Cir. 1987)). See also Rufo, 1992 WL 3667 at 13 ("a court should surely keep the public interest in mind in ruling on a motion to modify based on a change in conditions making it substantially more onerous to abide by the decree" [emphasis supplied]).

Nor is defendants' argument aided by their citation to Duran v. Elrod, 760 F.2d 756, 759 (7th Cir. 1985) ("Duran II"). In Duran II, the issue was whether a consent order which forbade double-celling should be modified where, although the initial plan was to release persons awaiting trial on misdemeanor charges, an unforseen increase in the population meant that double-celling could be avoided only by the release of accused felons as well. The Duran II court held that the interest of the public in preventing against the unforseen release of accused felons overrode the plaintiffs' interest in enforcing, for a limited period (33 days), the provisions of the decree. Id. 760 F.2d at 763. In this case, there are no similar unforeseen effects of the release and nonadmissions provisions which would

present an increased risk to the public beyond that contemplated when the provisions were approved.

4. There is not a Sufficient Change in the Law to Warrant Reconsideration of the Consent Decrees

Defendants argue that the Consent Decrees should be modified because of a change in the decisional law, namely the decision of the Supreme Court in Wilson v. Seiter. Wilson held that plaintiffs must show some evidence of officials' state of mind to establish culpability for objectively unconstitutional prison conditions, 111 S.Ct. at 2323-26, and that the requisite state of mind is "deliberate indifference." Id. at 2326-27.

Regardless of whether the requirement of showing "deliberate indifference" on the part of prison officials is a departure from previous decisions of the Third Circuit,[19] that requirement is largely irrelevant to the type of modification that defendants seek here. The Wilson decision, which addresses the standard for proving liability, does not affect the particular terms of the 1986 or 1991 Consent Decrees, but bears upon the more general decision of whether the case should have been settled at all. Compare Rufo (Supreme Court asked to review

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19. Defendants' assertion that "[t]he Wilson decision represents a clear break with Third Circuit precedent regarding the standard for resolving eighth amendment challenges to systemic and continuing conditions" is, to put it kindly, an overstatement. See Defendants' Mem. at 26. In Tillery v. Owens, 907 F.2d 418, 426-28 (3d Cir. 1990), and Peterkin v. Jeffes, 855 F.2d 1021, 1024 (3d Cir. 1988), the cases relied on by defendants, the Third Circuit never considered whether a showing of "intent" is necessary to prove the unconstitutionality of prison conditions.

single-celling provision in consent order where intervening decision found double-celling to be constitutional in some circumstances). Because defendants do not here seek to vacate the settlement, but only to eliminate certain agreed-upon remedies, Wilson is not the sort of change in the law that supports their request.[20]

Second, Wilson v. Seiter was pending before the Supreme Court when the 1991 Consent Decree was entered by this Court. Defendants must be presumed to have been aware of the case and of the potential ruling, just as the defendants in Rufo were deemed to be aware of Bell v. Wolfish when they entered their decree one week before the Supreme Court rendered its ruling in that case. For the same reason that the Bell decision was not an unforeseen change in the law warranting modification, Wilson v. Seiter also fails so to qualify.

Finally, Wilson did not effect a significant change in the decisional law regarding the proof required to demonstrate unconstitutional conditions of confinement. While it is true that under Wilson plaintiffs will have to demonstrate an official's "state of mind" during the formulation or persistence of conditions falling below constitutional standards, the threshold for such a showing of "deliberate indifference" is not

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20. Indeed, if Wilson v. Seiter has such a significant impact on the City's liability in this case, one wonders why the City defendants did not simply move to vacate the decrees altogether and take their chances at trial.

particularly high and does not add materially, if at all, to the traditional burden shouldered by plaintiffs in prison conditions litigation. Deliberate indifference may occur when an official "disregards a known or obvious risk that is very likely to result in the violation of a prisoner's constitutional rights." Berry v. City of Muskogee, 900 F.2d 1489, 1496 (10th Cir. 1990). Moreover, deliberate indifference may be "inferred" from the objective facts that obvious problems were not sufficiently addressed; direct evidence of an official's mental state is not required. See Cortes-Quinones v. Jiminez-Nettleship, 842 F.2d 556, 559-60 (1st Cir. 1988) (cited with approval in Wilson, 111 S.Ct. at 2327). See also Wilson, 111 S.Ct. at 2325 ("The long duration of a prison condition may make it easier to establish knowledge and hence some form of intent" (emphasis in original)).[21]

Defendants' implied assertion that the prior administration would not have agreed to terms had its understanding of the law been informed by Wilson v. Seiter is ludicrous. If there was ever a case of "deliberate indifference" it is surely one in which there has been a prior adjudication of

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21. Circuit court opinions since the Wilson decision apparently agree that deliberate indifference may be shown by defendants' failure to correct known conditions. See, e.g., Williams v. Griffin, 1991 WL 267131 (4th Cir., December 30, 1991) ("to demonstrate deliberate indifference, [plaintiff] must show that the Prison Officials had knowledge of the conditions that are the subject of the complaint").

unconstitutional conditions, two state court contempt penalties, an unexcused failure to comply with an obligation to comply with an obligation to build a new jail, ongoing overcrowding and the admission of the Superintendent of Prisons that conditions are inhumane. If the new administration finds the time to study the past reports of this Court's Special Master and of the Master in Jackson v. Hendrick, the contents of which reports defendants can be presumed to have known, the new administration is likely to revise its opinion as to the probability of "deliberate indifference."

Despite all this, the City claims that a showing of "deliberate indifference" is unlikely in this case given that the "conditions are the result of fiscal and other constraints beyond the control of government officials," Defendants' Mem. at 25-26 (citing Wilson), and that "the Court has recognized the City's good faith in its efforts to improve conditions in Philadelphia's prisons." Id. at 27 n. 25 (citing Reeves, 761 F. Supp. at 401). Both of these arguments are misleading.

Contrary to defendants' assertion, the Court in Wilson expressly declined to address whether, and to what extent, the fiscal shortcomings of a government could provide a defense to accusations of "deliberate indifference." Wilson, 111 S.Ct. at 2326. Moreover, courts before and since Wilson have consistently held that lack of funds is not a defense to claims of constitutional deprivations against persons acting in their

official capacities, particularly in the context of actions seeking injunctive relief. See, e.g., Rufo, 1992 WL 3667 at 13 ("Financial constraints may not be used to justify the creation or perpetuation of constitutional violations"); Bounds v. Smith, 430 U.S. 817, 825 (1977) ("[T]he cost of protecting a constitutional right cannot justify its total denial"); Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 336-37 (3d Cir.) (and cases cited therein), cert. denied, 486 U.S. 1066 (1987). The logic behind the rule is evident: because governmental entities always have the power either to increase taxes or to redirect funds in order to alleviate constitutional deprivations, the fact that such actions may be politically unpopular does not make the government's failure to address the deprivations any less an act of "indifference" or any less "deliberate."

The claim that the Court's acknowledgment of the City's "good faith" provides a defense to "deliberate indifference" is even less supportable. In its opinion, the Court merely recognized that, given that the Stipulation and Agreement imposed financial burdens on the City, acceptance of the Stipulation and Agreement was itself an act of good faith. Reeves, 761 F. Supp. at 401. The City defendants are therefore arguing that their willingness to enter into the Stipulation and Agreement is now the very thing that permits them to avoid it.

In sum, even under a more liberal standard for modification in institutional reform cases, defendants must still show that the proposed modification is necessary because some unanticipated occurrence makes further compliance with the population limitations and release and non-admissions procedures inequitable, and that the modification will not destroy the objective of the decree. Because the only new "circumstance" is the changed attitude of the defendants, because that attitude does not render the City's compliance with the population restrictions more "onerous," but merely subjectively undesirable, and because the modification sought by defendants would eliminate the short-term relief which was essential to plaintiffs' bargain, the motion to modify must be denied.

B. THE CITY OF PHILADELPHIA HAD THE AUTHORITY TO CONSENT TO THE POPULATION LIMITS, RELEASE AND NONADMISSIONS PROVISIONS OF THE CONSENT DECREES

Apparently recognizing their inability to satisfy the traditional equitable standards for modifying consent decrees, defendants initially attack the release and nonadmissions provisions under Rule 60(b)(4) on the ground that the agreement of the prior administration to those provisions was ultra vires, and therefore that the provisions are void. This argument is without merit. Defendants have failed to show that Pennsylvania law forbids them from entering into a consent decree either to establish population caps at its prisons or to release or refuse to admit prisoners into those facilities in order to meet those

caps.[22] Moreover, this very argument was already raised by the District Attorney prior to the Court's approval of the Stipulation and Agreement. See App., Tab 20 at 15. By approving the Stipulation and Agreement in the face of this challenge to the City's authority to enter into it, the Court implicitly held that the Stipulation and Agreement was within the City's powers of agreement and should not reconsider that decision.

Alternatively, the City defendants claim that a previous administration does not have the power to limit, by a consent decree, its exercise of "police powers." This argument proves too much. By arguing that the Court cannot enforce consent orders that affect the administration of the City's law enforcement duties, defendants call into question the validity of every consent order which seeks to reform allegedly unconstitutional practices in the administration of justice -- the subject of most civil rights litigation. Similarly, any argument that consent orders are always voidable by future administrations based on revised opinions regarding public policy would all but do away with settlements as a means of resolving reform litigation.

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22. Defendants, in fact, argued precisely the opposite -- that the Stipulation and Agreement did not violate state law and therefore was a valid exercise of municipal power -- in appeal No. 91-1194 before the United States Court of Appeals for the Third Circuit. Either defendants' position on appeal was disingenuous or, as is more likely, their position here is without merit.

1. The Release and Nonadmissions Provisions of the 1991 Consent Decree do not Contravene State Law or Public Policy

As the Court has recognized, the Mayor's authority to agree to an admissions moratorium and pretrial releases necessarily derives from his authority to control the population of county prisons contained in the Philadelphia Home Rule Charter, 351 Pa. Code § 5.5-700(c). See Reeves, 761 F. Supp. at 399-400 ("the Mayor is responsible for fixing the capacity of the City's jails and has done so in this case"). The Home Rule Charter specifically provides that the Executive branch of the City of Philadelphia shall "have general supervision over all City penal, reformatory and correctional institutions . . . [and] shall determine the capacity of City institutions and designate the type of persons and the proportion of each type to be received therein." Id. Inherent in the right to set the capacity of penal facilities and to determine the types of persons to be received is the right to enforce capacities by releasing or refusing to admit pretrial detainees as may be necessary.[23]

23. The City defendants acknowledge that the Home Rule Charter authorizes the Executive of the City of Philadelphia to determine prison capacity, but argue that "[t]he enabling provisions of the Home Rule Charter . . . preclude the City defendants from exercising these powers in a manner that violates state law," Defendants' Mem. at 9 n. 7, and that "to the extent that the city charter provision conflicts with state law, it is invalid." Id.

Since June 1988, the Consent Decrees in this case have indeed prevented the City from incarcerating in its existing jails thousands of persons charged with non-violent crimes, who were committed to jail for inability to raise bail. Not one state court judge, to our knowledge, has cited the City or any of its officials for contempt of court for failing to abide by any of those thousands of commitment orders. Consequently, we challenge the basis of the new mayor's assumption that obedience to the Consent Decrees in this case places him or the City in violation of any state court order. Moreover, if the City has violated state court orders by not providing cells for all persons committed into the City's custody, the violation is not compelled by the Consent Decrees in this case which are not facially inconsistent with any state court order. Those Decrees do not impair the City's ability to incarcerate as many accused persons as the state courts commit to its custody; they merely restrict the use of certain existing facilities beyond their respective capacities as determined by the prior administrators, and incorporated into the Consent Decrees.

Defendants misread the Consent Decrees as forbidding them from adding to the capacity of the City's prison system whereas in fact they were free to do so by providing housing, plumbing, security staff, food, clothing, medical care and other services sufficient to house more than the 3,740 inmates authorized by the MAPs plus the 300 or more inmates currently in

residence in Francis House, the Women's Community Correctional Center, and the Greater Philadelphia Center for Community Corrections. Nothing in the Consent Decrees restrains the City from building or acquiring additional prison capacity nor, for that matter, transferring inmates to state or other county facilities; adopting and funding alternatives to incarceration including increased use of probation and parole; demanding funding from the state to meet local custodial needs; or instituting improvements in the administration of the criminal courts which would reduce jail population by expediting trials and sentences. Any violation of state commitment orders or of state law is due entirely to the considered decision of a succession of City administrations to limit City spending on prison maintenance, construction, and operation.[24] The new administration is free to increase spending on jails if it truly believes that it has the duty to incarcerate all pretrial detainees or that a sound public policy so dictates.

In any event, the statute primarily relied upon by the defendants which allegedly requires the City of Philadelphia "to commit to houses of detention 'all persons awaiting trial on criminal charges who have been committed thereto by any judge or officer having the power to make commitments,'" Defendants' Mem.

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24. In their memorandum in support of the instant motion, defendants themselves acknowledge that the City has at all times had the means to comply with all state court commitment orders. Defendants' Mem. at 10.

at 9 (quoting 61 P.S. § 785), has nothing to do with whether the City is compelled to incarcerate persons pretrial. Rather, section 785 prescribes that persons who are held awaiting trial must be confined in houses of detention rather than county prisons, presumably because county jails are to be used exclusively for housing sentenced inmates. See 61 P.S. § 785 ("all persons held to await trial on any criminal charge, or as witnesses, shall be committed to such house or houses of detention instead of county prison . . ."") (1917). In other words, section 785 merely directs where detainees must be housed as between two kinds of facilities. It does not mandate that the City incarcerate such persons as a matter of law, and it certainly does not forbid the City from entering into a consent decree to place limits on the population of particular facilities and agreeing to pretrial release or non-admission in the settlement of a second lawsuit alleging unconstitutional conditions due to overcrowding after the first such suit resulted in an adjudication of unconstitutionality.[25]

The only other authority cited by defendants for the proposition that the City must incarcerate persons awaiting trial

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25. Moreover, the Pennsylvania legislature has repealed 61 P.S. §§ 781-789 insofar as they require separation of sentenced prisoners and pretrial detainees. See 61 P.S. § 2191 (1981). As a consequence, section 785 has been stripped of its very purpose and the brittle straw upon which the City defendants rest their argument that the City is required to commit pretrial detainees to houses of detention has been removed.

is County of Allegheny v. Commonwealth of Pa., 507 Pa. 360, 490 A.2d 402 (1985), and a dissenting opinion in Jackson v. Hendrick, 498 Pa. 270, 446 A.2d 226 (1982). Neither opinion provides any support for defendants' position. In the Allegheny County decision, the Pennsylvania Supreme Court never said that a municipality is required by state law to incarcerate pretrial detainees. The only issue in Allegheny County was whether a county could maintain a complaint in mandamus to force the state to provide funds for the incarceration of, or accept for incarceration, convicted persons who would have been placed in state correctional institutions or under state supervision but for the Commonwealth's decision to delegate the responsibility for their incarceration to the County. See Allegheny County, 507 Pa. at 380-382, 490 A.2d at 411-13 (determining that Commonwealth could be held liable because relevant persons were convicted state prisoners).[26]

Likewise in Jackson v. Hendrick, neither the majority nor the dissent addressed whether, under Pennsylvania law, a municipality is required to incarcerate pretrial detainees. The majority merely determined that the District Attorney of Philadelphia could not intervene to block a state remedial decree

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26. Interestingly, in Allegheny County, the county sought the removal of convicted state prisoners from its institutions in order to prevent it from having to meet population caps and avoid further implementation of a population reduction scheme calling for the release of pretrial detainees.

concerning prison population because his petition was untimely. Jackson, 498 Pa. at 272-79, 446 A.2d at 227-30. In dissent, then Justice Nix wrote that, regardless of timeliness, the District Attorney should have been entitled to intervene because the prospective releases of pretrial detainees would harm his interest in law enforcement. Id., 498 Pa. at 282-85, 446 A.2d at 232-35 (Nix, J. dissenting). In the course of the dissent, Justice Nix did note that "the City Solicitor has been designated the public official to execute the city's delegated responsibility to maintain the housing of those charged with crimes." id. 498 Pa. at 284-85, 446 A.2d at 233 (Nix, J. dissenting), but that statement was made in the context of comparing the City's function -- to maintain prisons -- with that of the District Attorney -- to carry on the duties of law enforcement through prosecution. Id. At most, the dissenting opinion in Jackson only recognizes the Home Rule Charter's provision that maintenance of prisons is the City's responsibility; it does not address the question of whether and under what circumstances the City must incarcerate pretrial detainees.

Deprived of any statute or decision which requires the City to incarcerate accused persons, and against which the release and nonadmission provisions of the 1986 and 1991 Consent Decrees might clash, defendants alternatively seek to imply such a prohibition because the laws of Pennsylvania do not

affirmatively "authorize the City defendants to release inmates as a solution to overcrowding," see Defendants' Mem. at 9-10, and because the City defendants may have other options to reduce overcrowding such as building more prisons and seeking monetary relief from the Commonwealth. Id. at 10. While both are true, neither proposition supports the conclusion defendants would draw from them.

Given the recognized authority of defendants under the Home Rule Charter to determine and enforce the population of the Philadelphia Prisons, actions taken pursuant to that power can only be considered ultra vires if the City has acted in such a manner as to violate state law. In other words, unless state law somehow forbids the City from declining to hold certain pretrial persons in its existing jails, the release and nonadmission aspects of the Consent Decrees are valid exercises of defendants' authority. The simple fact that state law does not explicitly authorize the City to engage in such releases or nonadmissions to alleviate overcrowding does not create a conflict between state law and the Home Rule Charter, and therefore does not make defendants' agreement to such procedures ultra vires.[27]

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27. Defendants imply that Pennsylvania does not permit them to release or refuse to admit persons held pretrial because it, unlike other states, has failed to enact legislation permitting such releases. See City Defendants' Memorandum at 9-10 (referring to Benjamin v. Malcolm, 564 F. Supp. 668, 690 (S.D.N.Y. 1983) which describes legislation enacted in Michigan, Ohio, Connecticut, Georgia and proposed in New York). Benjamin, (continued...)

Similarly, the fact that defendants may have other options available to them to alleviate overcrowding does not place the Consent Decrees at odds with state law. Whether the City defendants can build more prisons, place sentenced prisoners in state facilities, or petition the Commonwealth for additional funds for such facilities is simply irrelevant to whether they might not also, in the context of federal prison litigation, choose to accept ordered releases or nonadmissions of pretrial detentioners as a means to reduce overcrowding. If anything, the existence of these alternatives to the nonadmission and release remedies for overcrowding belies the City's argument that the Consent Decree remedies are incompatible with public safety and the sound administration of criminal justice making their continuation inequitable. It is rather the City's persistent failure over at least the past 20 years to avail itself of alternative means for coping with prison overpopulation and dilapidated facilities that has created the necessity for the remedies adopted in the Consent Decrees.

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27. (...continued)
however, discussed state statutes that authorize the release of sentenced prisoners when the population exceeds certain maximum limits. Moreover, the court in Benjamin refused to modify a population cap embodied in a consent decree even though such a "release authorization" statute had not yet been enacted in New York.

In sum, the Home Rule Charter provides the authority for defendants to determine and limit the population of the prisons, thus providing the authority for their agreement to the release and nonadmission provisions in the Consent Decrees. Because defendants have failed to demonstrate that such an exercise of authority is otherwise prohibited by state law, it is not ultra vires and defendants' motion pursuant to Rule 60(b)(4) to modify the Consent Decrees as void must be rejected.

Defendants' supplemental argument, that the federal court had no authority to uphold the release and nonadmissions provisions of the Consent Decrees because they were illegal and violated public policy must fail for the same reason. First, as shown above, there is nothing "illegal" about the release and nonadmissions provisions of the Decrees. Moreover, even if the release and nonadmission provisions were somehow inconsistent with state law, that fact alone would not prohibit the Court from entering the Decrees, assuming that the City otherwise had the ability to consent. Based on the broad policy in favor of settlement through consent decrees, under the Supremacy Clause, a consent decree, properly made, which settles federal law claims can override state laws that conflict with the decree the same as if a finding had been made after trial.[28] See Badgley v.

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28. The longstanding rule in federal courts is that a district court has the power to enter a consent decree without first determining that a statutory violation has occurred. Swift & Co.
(continued...)

Santacroce, 800 F.2d 33, 38 (2d Cir. 1986) ("When the defendants chose to consent to a judgment, rather than have the District Court adjudicate the merits of the plaintiffs' claims, the result was a fully enforceable federal judgment that overrides any conflicting state law or state court order"), cert. denied, 479 U.S. 1067 (1987).[29] See also San Francisco Police Officers Ass'n v. San Francisco, 812 F.2d 1125, 1129 (9th Cir. 1987), withdrawn, 842 F.2d 1126 (9th Cir. 1988), superseded by, 869 F.2d 1182 (9th Cir. 1988) (employment discrimination); Brown v. Neeb, 644 F.2d 551, 563-64 (6th Cir. 1981); United States v. American Telephone and Telegraph Co., 552 F. Supp. 131, 155 (D.D.C. 1982), aff'd

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28. (...continued)
v. United States, 276 U.S. 311, 327 (1928); Howard v. McLucas, 871 F.2d 1000, 1007 (11th Cir.) ("an employer's denial of liability in the consent decree does not preclude approval of the decree"), cert. denied sub nom. Poss v. Howard, 110 S.Ct. 560 (1989); Camden County Jail Inmates v. Parker, 123 F.R.D. 490, 497 (D.N.J. 1988). The rule recognizes that parties enter into consent decrees in order to avoid protracted, costly litigation and to avoid the risk of an unfavorable adjudication. Rufo v. Inmates of the Suffolk County Jail, supra at 11; United States v. Armour & Co., 402 U.S. 673 681-82 (1971); Harris v. Pernsley, 820 F.2d 592, 603 (3d Cir. 1987), cert. denied, 484 U.S. 947 (1987).

29. In Duran v. Elrod, 713 F.2d 292 (7th Cir. 1983), cert. denied, 465 U.S. 1108 (1984), the Seventh Circuit affirmed the district court's implementation of a consent order by which, after giving state officials an opportunity to resolve overcrowding, it mandated the release of persons in default of the lowest amount of bail. The court of appeals held that the lower court had "acted reasonably to ease a critical problem" when "confronted with a nearly year-old Consent Decree and substantial noncompliance," id. at 298, and rejected the subsequent argument of the defendant county officials that the release of pretrial detentioners unlawfully intruded upon their authority. Id. at 297-98.

without opinion sub nom., Maryland v. United States, 460 U.S. 1001 (1983).

2. The Prison "Cap" Embodied in the Consent Decrees is Enforceable Against the New Administration

Defendants argue that even if the prior administration somehow had the authority to agree to prison population caps, the Court can no longer enforce those provisions because they are a forbidden "delegation of police power," and because the prior administration did not have the authority to set a prison population cap that binds any future administration. Defendants' Mem. at 13-14. These arguments are specious.

The Pennsylvania cases cited by defendants for the proposition that a municipality cannot alienate its police powers all involved situations in which private service companies sought to use existing contracts with municipalities to prevent the application of new ordinances that imposed obligations on the companies that were more restrictive than those imposed by their municipal contracts. See Helicon Corporation v. Borough of Brownsville, 68 Pa. Cmwlth. 375, 449 A.2d 118 (1982) (cable television rate restrictions); City of McKeesport v. McKeesport R. P. R. Co., 2 Pa. Super. 242 (1896) (railroad claimed exemption from certain public utility fees). The courts correctly held in those cases that private companies could not use their municipal contracts to prevent the City from applying to them laws that had been passed for the public good and were applicable generally.

In this case, by contrast, defendants entered into federal consent decrees by which they agreed to reform their penal practices in a certain manner. In doing so, they engaged in a valid exercise of the police power, one aspect of which is to provide for the welfare of pretrial detainees and sentenced inmates. Moreover, despite its name, a consent decree is neither completely voluntary nor a "delegation" of powers and certainly does not involve placing governmental authority into private hands. Rather, a consent decree represents the reluctant but consensual submission of a municipality to restrictions placed on its powers by a court supervising litigation in which the municipality is accused of wrongdoing and in which the municipality runs the risk of nonconsensual imposition of more severe restrictions. The power of the federal courts to implement and enforce nonconsensual restrictions after trial through injunctions, see 28 U.S.C. § 1651, is the same power by which the court may enforce those same restrictions when they are arrived at by settlement.[30] Therefore, while consent decrees necessarily involve some cession of power from a governmental entity to the court, such action is legitimated by the fact that the court, unlike private parties, has the power to affect a

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30. See, e.g., Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) ("a federal court is more than 'a recorder of contracts' from whom the parties can purchase injunctions, it is 'an organ of government constituted to make judicial decisions. . . .'" (citation omitted)).

government's discharge of its obligations. A contrary holding would mean that federal courts could never enforce consent decrees that affected the exercise of executive power.

Defendants' next argument -- that one administration cannot, through a consent decree, bind another administration to a population cap -- fares no better. It is well-established that government officials who lawfully enter into consent decrees in institutional reform litigation have the power to bind the officials who replace them. See Rufo, 1992 WL 3667 at 13 (unless modified by changed conditions, consent decree "bind[s] all future officers of the State, regardless of their view of the necessity of the relief from one or more provisions of a decree that might not have been entered had the matter been litigated to its conclusion"); Navarro-Ayala v. Hernandez-Colon, 1991 WL 268358 at 29 n. 37 (1st Cir. December 18, 1991) ("The general rule that one administration cannot bind its successors by its stated positions does not apply to government officials in the context of public institutional reform litigation"); Newman v. Graddick, 740 F.2d 1513, 1517-18 (11th Cir. 1984) (state officials have the authority to enter into consent decree and bind incoming successors, who upon taking office become parties to decree through automatic substitution).

The rule articulated in Rufo, Hernandez-Colon and Newman is quite sensible. Where governmental officials are sued for institutional problems in their official capacity, and enter

into consent decrees to settle such litigation, it is irrelevant to the enforceability of the decree whether the persons who happen to occupy the office change. The suit is not against individuals, but only against their office. See Fed. R. Civ. P. 25(d) (automatic substitution of official parties). If governmental officials could repudiate consent decrees concerning institutional conditions simply because they were not the persons who actually entered into them, consent decrees in long-term institutional reform litigation would hardly be worth pursuing.

Nevertheless, defendants offer Bates v. Johnson, 901 F.2d 1424, 1426 (7th Cir. 1990), as support for the proposition that one administration cannot bind any future administration to the provisions of a consent decree. In Bates, however, the issue was not the continuing validity of a consent decree but whether, by giving oral command from the bench that a state Department of Family Services not change its visitation policy that had been structured pursuant to a consent order, the district court had properly issued an "injunction" enforceable by contempt. The dicta in the opinion suggest merely that state law may constrain a public official from binding his or her successors through a consent decree. See Bates, 901 F.2d at 1426 ("If as a matter of state law an official lacks the authority to commit the state to maintain a rule beyond his term in office . . ."). Defendants have pointed to no Pennsylvania law that prevents one Mayor from binding his or her successor to an institutional reform consent

decree. Moreover, Bates' suggestion that a government's right to make fresh policy choices as political officials turn over "may be an implied term in a consent decree," id., is meaningless here because the parties explicitly agreed that the Court would retain jurisdiction to enforce the provisions of the 1991 Consent Decree (See App., Tab 18 at ¶ 33) even though such enforcement would necessarily bind a new administration.

Finally, the mere fact that the Home Rule Charter confers upon the City's executive branch the responsibility to determine prison capacity says nothing about whether a consent decree setting a cap on population, properly entered into by responsible officials, can bind future administrations.[31] Thus, we are left with the sensible federal rule that consent decrees in institutional reform litigation necessarily bind future administrations, and the City defendants' argument to the contrary must be rejected.

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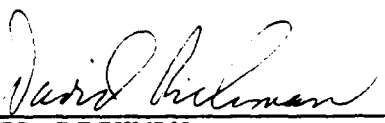
31. Defendants' naked assertion that merely because the Home Rule Charter vests them with the power to determine the prison capacity, that power must necessarily be "unfettered" by any prior obligations, see Defendants' Mem. at 14, is both unsupported and unrealistic. The very same argument -- that the City's power to do something must remain unfettered by a former administration's actions -- would provide the basis for a new administration's repudiation of every municipal contract entered into by the prior administration based on the fact that the contract prevents the new administration from exercising its powers in an "unfettered" manner.

CONCLUSION

For the foregoing reasons, the defendants' motion to modify the 1986 and 1991 Consent Decrees should be denied.

Respectfully submitted,



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Dated: January 29, 1992

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of January 1992, he served, by hand delivery, a copy of Plaintiffs' Memorandum in Opposition to Defendants' Motion to Modify Consent Decrees to the persons listed below.

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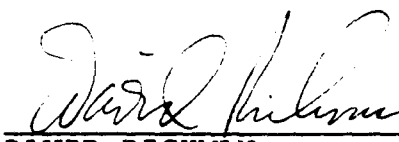

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