UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

SCOTT TILLMAN and WILLIAM LENNEAR, et al., Plaintiffs, vs. CLAUDE MILLER, et al., Defendants.	Case No. 83-199-CIV-ORL-22
SCOTT TILLMAN and WILLIAM LENNEAR, et al., Plaintiffs, vs. CLAUDE MILLER, et al., Defendants.	Case No. 83-285-CIV-ORL-22
LARRY EUGENE BROWN, JR., Plaintiff, vs. JERRY W. HICKS, et al., Defendants.	Case No. 88-281-CIV-ORL-22

PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE AND FOR ATTORNEYS' FEES AND EXPENSES
and
REQUEST FOR STATUS CONFERENCE

Plaintiffs, by and through undersigned counsel and pursuant to Rule 70 of the Federal

Rules of Civil Procedure, seek to enforce the provisions of the Final Consent Decree entered by this Court on December 3, 1993, which directed the Defendants to reduce the jail population of the Brevard County Detention Facility (County Jail), and move this Court for the entry of an order to show cause why the Defendants should not be held in contempt for their failure to comply with the Final Consent Decree.

For many years, Plaintiffs have attempted to compel Defendants to take meaningful steps to reduce the chronic overcrowding of the County Jail. Those efforts have included the engagement of a consultant, mediation, extensive negotiations, persistent monitoring, and monthly phone conferences. Nonetheless, Defendants have failed to alleviate the overcrowding of the County Jail and continue to operate the facility significantly in excess of its operational capacity. Therefore, Plaintiffs have been left with no choice but to file this motion to enforce the Final Consent Decree.

Plaintiffs also seek an award of attorneys' fees and expenses for the work they have performed monitoring and enforcing the Final Consent Decree.

Finally, because this case has spanned for such a long time and may require expert discovery to resolve the issues raised in this motion, Plaintiffs respectfully request a status conference to discuss methods for all parties to move forward with resolving this motion.

Factual and Procedural Background

This case began in 1983 with the filing of *pro se* complaints by plaintiffs Tillman and Lennear (83-cv-199 and 83-cv-285). On May 27, 1983, Plaintiffs retained counsel, who filed an amended complaint challenging the constitutionality of the conditions of confinement at the Brevard County Jail. The challenged conditions related to housing, overcrowding, sanitation, plumbing, recreation, ventilation, classification, lack of due process, staffing, medical care,

visitation, and law library access.

On July 21, 1988, the parties entered into a Partial Stipulation and Agreement for Consent Decree which addressed only the claim related to law library access. That agreement required that the Defendants provide jail detainees a law library. It further required Defendants to modify attorney-client conference rooms to assure privacy during legal visits and to improve general visitation areas so that inmates could speak freely and conveniently with family.

Just months before the entry of the Partial Stipulation and Agreement for Consent Decree, plaintiff Brown filed a *pro se* complaint on April 4, 1988 (88-cv-281), alleging numerous constitutional deficiencies in the Brevard County Jail, including a claim concerning the inadequacy of the inmate law library. On June 25, 1991, the Court granted summary judgment against Brown on all claims, except the claim addressing the inmate law library. The Court severed the law library claim and consolidated it with the on-going class action cases of plaintiffs Miller and Lennear in *Tillman v. Miller*, Case Nos. 83-cv-199 and 83-cv-285. *See* DE 75 (88-cv-281).

On June 30, 1993, all parties entered into the current Final Consent Decree. *See* Final Consent Decree and Order Approving Final Consent Decree, attached as Exhibit 1. In the Final Consent Decree, Defendants agreed not to operate the County Jail in an overcrowded condition and in excess of its overall capacity or in excess of the cell-by-cell capacity approved by the Florida Department of Corrections. The Final Consent Decree further provided for a notification process to the Court and all parties in the event the jail population exceeded the approved capacities. Finally, the Defendants agreed to hire a corrections expert to prepare a report recommending improvements in jail classification to reduce inmate population. The Court issued an Order Approving the Final Consent Decree on December 3, 1993. *See* Exhibit 1.

In the several years after the entry of the Final Consent Decree in 1993, the County Jail remained severely overcrowded. The Board of Brevard County Commissioners conducted several voter referendums for a sales tax to fund an expansion of the County Jail during the 1990s and in 2002, but those were defeated. Other internal administrative efforts to reduce the jail population likewise failed.

On August 11, 2004, Plaintiffs filed a Motion for Rule to Show Cause alleging that the Defendants continued to operate the County Jail in an overcrowded condition in excess of its overall capacity or in excess of the cell-by-cell capacity, in violation of Paragraph I.(A) of the Final Consent Decree. DE 47, 83-cv-199. Citing the County's own jail population numbers, Plaintiffs established that the County Jail had been overcrowded and in excess of capacity for many years. In their response to the motion, Defendant Brevard County admitted that the County Jail was overcrowded and had "been operated on a regular basis in excess of its capacity." *See* Response of Brevard County, DE 53 at 2-3 (83-cv-199). Likewise, Defendant Sheriff of Brevard County responded that there "has been chronic overcrowding" in the County Jail. *See* Response of Sheriff, DE 47 at 2 (83-cv-199).

On November 20, 2007, the parties filed a Joint Report on the Need for an Evidentiary Hearing. DE 80 (83-cv-199). The parties reported that they had explored alternatives to an evidentiary hearing and proposed that the Defendants employ a jail management expert to perform an analysis of the criminal cases affecting the jail population and prepare a report with recommendations to lessen overcrowding. *Id*. at 2. The parties further proposed that, once the report was finished, a mediation/workshop should be attended by all parties plus key criminal justice players not parties to the case, to be held and chaired by a federal judge. *Id*. at 3. On January 7, 2008, the Court entered an Order which postponed the evidentiary hearing, approved

the Report, and designated Judge Gregory A. Presnell as the workshop mediator. DE 83 (83-cv-199).

On August 12, 2008, the mediation/workshop was held. At the mediation, the expert, former Miami-Dade County Judge Charles Edelstein, presented his analysis of the Brevard County criminal justice system and made recommendations for reducing the jail population. As a result, several ongoing workshop groups were established to devise procedures to reduce overcrowding. In March 2010, Brevard County retained a Jail Population Management Coordinator (JPMC) to lead and direct its efforts to reduce the jail population. *See* Joint Status Report, DE 93 at 2-3 (83-cv-199).

On March 29, 2011, the parties submitted a Joint Status Report. DE 93 (83-cv-199). By that time, due to construction and renovation, the County Jail had grown considerably. In the Joint Status Report, the parties agreed that the "optimum amount of inmates that can be housed in the Brevard County Jail Complex with a physical bed count of 1701 (rated design) is 1446 (operational capacity) after factoring 15% for classification purposes." *Id*. at 4.

In a Memorandum attached as an exhibit to the Joint Status Report, the Brevard County Sheriff explained the significance of the metric "operational capacity" and how the number for the operational capacity of 1446 inmates was derived:

> Using the National Institute of Corrections (N.I.C.) classification factor, the 1446 inmate spaces in the Brevard County Jail Complex is calculated by taking the 1701 beds at the jail and subtracting the 15% classification factor of 255 beds for a total of 1446 inmate spaces. …
>
> The classification factor is designed to place inmates of like custody levels into appropriate housing. Using this evaluation process ensures that the Florida Model Jail Standard for housing are followed.
>
> ***Overcrowding occurs when jail population exceeds operational capacity***. Compromising the jail's classification capabilities is likely to compromise the safety and well-being of the inmates, staff and public. The National Institute of

> Corrections supports the use of the 15-20% classification factor as an industry standard in jail facilities to determine operational capacity. Using this classification factor ensures compliance with the Florida Model Jail Standard as well a maintains and decreases potential liability (emphasis added).

See DE 93-3 at 1 (83-cv-199), attached as Exhibit 2. At the time of the Joint Status Report, the monthly jail population numbers trended from the high 1500s into the 1600s, well above the operational capacity of 1446. DE 93 at 4 (83-cv-199).

The parties reported to the Court that they "remain optimistic that reaching the operational capacity remains doable." *Id*. at 5. Toward that end, the Defendants requested that the County's Jail Population Management Coordinator continue to submit reports and that the Court allow for the implementation of the recommendations that the parties anticipated would result from a training of the Brevard County judiciary conducted by the American University's Criminal Courts Technical Assistance Project, to be held on September 16, 2011. *Id*. The Court held a status conference on the Joint Status Report, accepted the report, and directed the parties to file a follow-up report by September 30, 2011. DE 97 (83-cv-199).

On October 12, 2011, the Defendants filed a Status Report to which Plaintiffs had no objection. DE 100 (83-cv-199). The Defendants outlined the efforts made by the previously established workgroups to track and reduce inmate population through the criminal justice system and reported that the most important development was the case management training presented to the Brevard County judiciary by the Justice Programs Office of the American University in Washington, D.C. *Id*. at 2. The next step as recommended in the case management training was for the Brevard County judiciary to set up a task group to begin to address the principles demonstrated in the training and outlined in the additional materials provided. *Id*.[1]

[1]The Status report submitted on October 12, 2011, is the most recent docket entry in this case. The Court has thus never ruled on Plaintiffs' claims of continued excessive overcrowding as

Unfortunately, these efforts all failed and the Brevard County Jail remained stubbornly overcrowded in violation of the Final Consent Decree.

More Recent Efforts to Address Overcrowding without Judicial Intervention

More recently, despite Defendants' inability to comply with the Final Consent Decree, Plaintiffs have made every effort to provide Defendants a chance to come into compliance. In May of 2013, the parties' counsel resumed having telephone calls to discuss the best procedures for moving forward. In 2014, the jail numbers were at levels that were just higher than the operational capacity. Plaintiffs decided to monitor the situation to determine whether they would remain these levels.

Unfortunately, they did not. Beginning in 2015, the jail numbers began steadily climbing. From 2015 through 2017, Plaintiffs stayed in regular communication with Defendants, monitoring the jail numbers to determine whether they would fall below the operational capacity. Defendants continued to express to Plaintiffs that changes in the Brevard County Criminal Court system—from new and different judges to increased diversion programs to lower bails to more quickly resolving cases—would alleviate the Jail's overcrowding. Plaintiffs agreed to wait and give these efforts a chance to work.

Again, these efforts did not have their intended effect. On August 10, 2017, Plaintiffs' counsel conducted an inspection of the jail as part of the ongoing monitoring efforts.

In early 2018, the parties began even more frequent communications about the status of the Jail overcrowding. Contact was made with a former Chief Judge who agreed to review all possible resolutions with the current criminal court judges. In December 2018, Plaintiffs

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raised in their Motion for a Rule to Show Cause, DE 47 (83-cv-199). Plaintiffs ask the Court to consider the present motion as either an amendment to that motion, or, as a separate motion to enforce the terms of the Consent Decree on jail overcrowding.

proposed that if Defendants could bring the jail population numbers underneath the cap for six consecutive months, Plaintiffs may be amenable to dismissing the lawsuit upon a resolution of attorneys' fees and costs. Unfortunately, the numbers have not decreased. On July 12, 2019, Plaintiffs sent a letter to Defendants summarizing the failed efforts and the parties' discussions and stating that Plaintiffs had no choice but to return to court.

Plaintiffs have given Defendants every opportunity to come into compliance without court intervention. They have failed to do so. Plaintiffs have been left with no choice but to file this motion to enforce the Final Consent Decree on behalf of the class members.

Brevard County Jail Remains Overcrowded in Violation of the Consent Decree

The Brevard County Jail remains overcrowded in violation of Paragraph I.(A) of the Final Consent Decree. Due to another expansion and renovation, the current total bed capacity of the County Jail is 1756, making the operational capacity 1493.

Brevard County is required under state law to report its average daily jail population on a monthly basis to the Florida Department of Corrections pursuant to Florida Statute § 951.23(2).[2] As the chart below demonstrates, the Brevard County Jail continues to be overcrowded and operated far in excess of its operational capacity of 1493. Indeed, as their own reports of the county jail population demonstrate, Brevard County has not reported an average daily jail population under 1600 since March 2018:

[2] *See* Florida County Detention Facilities' Average Inmate Population, at http://www.dc.state.fl.us/pub/jails/index.html.

Average Daily Jail Population, Brevard County Jail[3]

	2017	2018	2019
January	1533	1654	1703
February	1570	1579	1690
March	1582	1591	1689
April	1551	1678	1643
May	374[4]	1703	1723
June	1566	1718	1741
July	1666	1740	1703
August	1748	1748	1736
September	1679	1732	1702
October	1654	1754	1681
November	1682	1734	
December	1679	1679	

On a monthly basis, counsel for Defendant Brevard County provides Plaintiffs with the jail population numbers for the last several days of each month. Recently, for November through early December 2019, that snapshot of data for a few select days shows daily population numbers in the range of the mid-1500s. However, these data points are from individual days and do not represent the cumulative monthly average.

The County Jail population still remains well above the operational capacity, and thus, in violation of the Final Consent Decree.

Attorneys' Fees

In 2014, as the parties began to explore the possibility of ending this case, the parties also

[3] The monthly reports for all of 2017 and 2018 are available at the above website. For 2019, the most recent data available is from October 2019.

[4] The reported number of 374 for May 2017 is so clearly an anomaly that it is likely a mistake in recording by the Florida Department of Corrections.

began to discuss the issue of attorneys' fees. On August 1, 2014, Plaintiffs submitted a letter to Defendants outlining their claim to fees, including their specific time sheets detailing the work they had performed, and explaining the number of hours they had incurred and their hourly rates. At that time, Plaintiffs sought $102,773.21 in fees and expenses. On July 21, 2015, the Brevard County Commission approved a fee settlement of $98,000 contingent upon the dismissal of the lawsuit. *See* County Attorney Memorandum, attached as Ex. 3. However, because of the persistent overcrowding, the parties never executed this settlement.

Plaintiffs are entitled to their attorneys' fees and costs for the work they have performed in securing, monitoring, and enforcing the Final Consent Decree. The Consent Decree rendered Plaintiffs "prevailing parties." *Maher v. Gagne*, 448 U.S. 122 (1980). As such, they are entitled to fees for all post-judgment monitoring work. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 558-559 (1986) ("post-judgment monitoring of a consent decree is a compensable activity for which counsel is entitled to a reasonable fee."). *See also Sierra Club v. Hankinson,* 351 F.3d 1358, 1361 (11th Cir. 2003) (plaintiffs entitled to attorneys' fees for any work that is "relevant to the rights established by the decree and related to the terms of the judgment."); *Turner v. Orr*, 785 F.2d1498, 1504 (11th Cir. 1986); *Miller v. Carson*, 628 F.2d 346, 348 (5th Cir. 1980).

The Brevard County Commission has approved payment of $98,000 in fees, but Plaintiffs have incurred further fees and costs since 2015. Moreover, that figure was calculated using the then-prevailing rate under the Prison Litigation Reform Act (PLRA) of $211.50, which has now increased to $223.50. Plaintiffs are entitled to fees calculated at current, rather than historic, rates. *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 284 (1989); *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988). Using that figure, Plaintiffs have incurred

$122,266.29 in fees.

Given Defendants' position on the issue of attorneys' fees, and the fact that this case may require further proceedings before concluding, Plaintiffs can submit further briefing on this issue at the appropriate time in the future. At the Court's request, Plaintiffs will submit their time sheets, if necessary, describing the work they performed in detail.

Request for Status Conference

Given the long and complex nature of this case, and the possibility that discovery may be needed, Plaintiffs respectfully request that the Court set a telephonic status conference to discuss how best to proceed.

Relief Sought by this Motion

Wherefore, Plaintiffs seek the following relief:

A. That this Court schedule a telephonic status conference.

B. That the Court enter an Order to Show Cause why the Defendants should not be held in contempt for failure to comply with the Final Consent Decree, and directing Defendants to take such actions as are necessary to reduce the overcrowding of the Brevard County Jail.

C. Award attorney's fees pursuant to 42 U.S.C. § 1988.

Certificate of Counsel

Pursuant to Middle District Rule 3.01(g), the parties have conferred prior to the filing of this Motion but have been unable to resolve this matter. Defendants oppose Plaintiffs' Motion for a Rule to Show Cause. As to Plaintiffs' Motion for Attorneys' Fees, Brevard County agrees that Plaintiff is a "prevailing party" under 42 U.S.C. § 1998, and that in 2014, the Brevard

County Commission authorized that as part of a settlement agreement wherein the case would be dismissed, the county would pay $98,000 in attorneys' fees. Brevard County does not agree, however, to pay the current prevailing rate under the Prison Litigation Reform Act (PLRA) of $223.50 per hour.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed today, January 6, 2020, the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered to receive electronic notifications for this case, including all opposing counsel.

By: *s/ Ray Taseff*
Ray Taseff