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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Fred Graves, Isaac Popoca, on their own
10 behalf and on behalf of a class of all pretrial
detainees in the Maricopa County Jails,

11 **Plaintiffs,**

12 v.

13 Paul Penzone, Sheriff of Maricopa County;
14 Bill Gates, Steve Gallardo, Denny Barney,
15 Steve Chucri, and Clint L. Hickman,
Maricopa County Supervisors,

16 **Defendants.**

No. CV-77-00479-PHX-NVW

ORDER

17 Before the Court are:

18 (1) Plaintiffs' Motion for Leave to File Amended/Corrected Expert Report (Doc.
19 2490), the response (Doc. 2491), and the reply (Doc. 2492);

20 (2) Defendants' Supplemental Report Regarding Corrective Actions, Compliance
21 Data Collection Procedures, and Compliance Data Summaries for April, May, and June
22 2017 (Doc. 2473), the response (Doc. 2484), and the reply (Doc. 2487); and

23 (3) Defendants' Proposed Plan for Demonstrating Compliance Regarding
24 Subparagraph 5(a)(26) of Revised Fourth Amended Judgment (Doc. 2485), the response
25 (Doc. 2488), and the reply (Doc. 2489).
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1 **I. BACKGROUND**

2 The Revised Fourth Amended Judgment was entered on September 30, 2014, and
3 ordered specific remedies to correct constitutional deficiencies, which included adopting
4 or amending policies to satisfy 31 specific requirements for providing medical and mental
5 health care, implementing the policies, and demonstrating implementation of the policies.
6 (Doc. 2299.) On March 1, 2017, the Court found that Defendants had demonstrated
7 compliance with 21 of the 31 specific requirements but had not yet demonstrated
8 compliance with the remaining 10 requirements. (Doc. 2404.) On August 22, 2018, the
9 Court found that Defendants had demonstrated compliance with 7 of the 10 remaining
10 specific requirements. (Doc. 2483.) The Court granted Defendants' request to submit
11 supplemental briefing regarding subparagraphs (22) and (23) of Paragraph 5(a) of the
12 Revised Fourth Amended Judgment and ordered Defendants to file a proposed plan for
13 demonstrating compliance with subparagraph (26) of Paragraph 5(a) of the Revised Fourth
14 Amended Judgment concerning instances of disciplinary isolation. (*Id.*)

15 **II. TERMS**

16 MCSO: Maricopa County Sheriff's Office

17 CHS: Correctional Health Services

18 SMI: Seriously Mentally Ill, as identified by community health providers

19 MHCC: Mental Health Chronic Care, as identified by CHS

20 TechCare: CHS's electronic medical records program

21 Operation Journal: MCSO's electronic records program

22 Speed letter: a communication from CHS to MCSO regarding planned involuntary
23 treatment or action with assistance from MCSO if force is needed

24 DAR: Disciplinary Action Report

25 **III. PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED/CORRECTED**
26 **EXPERT REPORT (DOC. 2490)**

27 Plaintiffs submitted an expert report with their response to Defendants'
28 Supplemental Report (Doc. 2473) regarding subparagraphs 5(a)(22) and (23). Defendants

1 subsequently identified errors in the expert report, which included Plaintiffs' expert's
2 omission of 16 planned use-of-force incidents and his assertion that Defendants had failed
3 to produce one incident report. Plaintiffs seek leave to file a corrected report that includes
4 the 16 incidents, concede Defendants had produced the one report, and do not address
5 Defendants' other objections. Defendants object to Plaintiffs filing a corrected expert
6 report because it provides Plaintiffs' expert additional opportunity to analyze the 16
7 incident reports he previously overlooked. Defendants' response to Plaintiffs' motion to
8 amend was filed ten days late without requesting leave to do so.

9 Plaintiffs' corrected report does not raise new issues or unfairly prejudice
10 Defendants. Plaintiffs' Motion for Leave to File Amended/Corrected Expert Report (Doc.
11 2490) will be granted.

12 **IV. DEFENDANTS' SUPPLEMENTAL REPORT (DOC. 2473) REGARDING**
13 **SUBPARAGRAPHS 5(a)(22) AND (23) OF THE REVISED FOURTH**
14 **AMENDED JUDGMENT**

15 **A. Subparagraph 5(a)(22): Prior Consultation with Mental Health**
16 **Providers**

17 Subparagraph 5(a)(22) states:

18 (22) A mental health provider or professional will be consulted before
19 each planned use of force or involuntary treatment on a seriously mentally ill
pretrial detainee.

20 (Doc. 2299 at 5.) Defendants report that they reviewed entries in the Operation Journal to
21 identify all planned uses of force in April, May, and June 2017. For each of the Operation
22 Journal entries involving a pretrial detainee designated as SMI or MHCC, Defendants
23 identified the name and/or CHS identification number for the mental health provider or
24 professional consulted before a planned use of force from the Operation Journal, a speed
25 letter from CHS requesting MCSO's assistance, an incident report generated if force was
26 used, the medical chart, and/or correspondence in TechCare. Defendants assessed a
27 potential planned use of force or involuntary treatment as compliant if the Operation
28 Journal and/or TechCare records showed that a consultation occurred.

1 For April 2017, Defendants identified 38 planned uses of force and CHS requests
2 for assistance involving seriously mentally ill pretrial detainees. Of those 38 events,
3 MCSO consulted a CHS mental health provider or professional 37 times.

4 For May 2017, Defendants identified 35 planned uses of force and CHS requests for
5 assistance involving seriously mentally ill pretrial detainees. Of those 35 events, MCSO
6 consulted a CHS mental health provider or professional 35 times.

7 For June 2017, Defendants identified 14 planned uses of force and CHS requests for
8 assistance involving seriously mentally ill pretrial detainees. Of those 14 events, MCSO
9 consulted a CHS mental health provider or professional 14 times.

10 In Mr. Vail's amended opinion, he concluded that MCSO consulted a CHS mental
11 health provider or professional in 35 of 47 (74.4%) planned uses of force in April 2017, 39
12 of 43 (90.7%) planned uses of force in May 2017, and 17 of 21 (81.0%) planned uses of
13 force in June 2017. Mr. Vail identified 9 more planned uses of force and CHS requests for
14 assistance involving seriously mentally ill pretrial detainees than did Defendants for April
15 2017, 4 more for May 2017, and 3 more for June 2017. Defendants identified three uses
16 of force they considered spontaneous that Mr. Vail considered as planned. They also
17 identified two situations included by Mr. Vail that involved inmates who were not
18 designated as SMI or MHCC. Mr. Vail also deemed some events as non-compliant when
19 CHS generated a speed letter to MCSO, but no force was used and no response from CHS
20 mental health staff was documented. If a speed letter was generated by mental health staff,
21 a response from mental health staff was unnecessary.¹ Mr. Vail also described certain
22 situations that he thinks require further review although force was not used, but he did not
23 explain whether he included these situations in his summary for subparagraph 5(a)(22). In
24 fact, Mr. Vail said he focused more on Defendants' compliance with subparagraph 5(a)(23)
25 than he did on Defendants' compliance with subparagraph 5(a)(22).

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28 ¹ Defendants state that a speed letter is generated by a psychiatric or intake provider based on an assessment by CHS mental health staff or a licensed nurse who has received mental health training and supervision.

1 Even if the Court adopts all of Mr. Vail's characterizations of planned uses of force
2 and CHS requests for assistance for April, May, and June 2017, Defendants have shown
3 that they have sufficiently implemented the remedy described in subparagraph 5(a)(22).

4 **B. Subparagraph 5(a)(23): Involvement of Mental Health Staff During**
5 **Implementation**

6 Subparagraph 5(a)(23) states:

7 (23) Mental health staff will be involved in the implementation of any
8 planned use of force or involuntary treatment on a seriously mentally ill
9 pretrial detainee.

10 (Doc. 2299 at 5.) Defendants report that they reviewed the planned uses of force that
11 MCSO implemented and CHS requests for assistance for involuntary treatment when force
12 was used as documented in the Operation Journal, TechCare, and incident reports.
13 Defendants assessed a planned use of force or request for assistance as compliant if a CHS
14 mental health staff was physically present during the use of force. Defendants found that
15 a CHS mental health staff was physically present during 9 of 9 planned uses of force or
16 involuntary treatment in April 2017, during 12 of 12 planned uses of force or involuntary
17 treatment in May 2017, and during 1 of 1 planned use of force or involuntary treatment in
18 June 2017.

19 In Mr. Vail's amended opinion, he found that CHS mental health staff were present
20 during the implementation of 10 of 19 (52.6%) planned uses of force or involuntary
21 treatment in April 2017, 13 of 15 (86.7%) planned uses of force or involuntary treatment
22 in May 2017, and 5 of 10 (50.0%) planned uses of force or involuntary treatment in June
23 2017. To determine these compliance rates, Mr. Vail did not include situations for which
24 the records did not clearly indicate whether force or involuntary treatment occurred.
25 Nevertheless, Mr. Vail found more situations during which planned use of force or
26 involuntary treatment on a seriously mentally ill pretrial detainee was implemented than
27 did Defendants, likely for the same reasons he included more situations in his analysis
28 regarding subparagraph 5(a)(22).

1 Mr. Vail opined that nine use-of-force situations occurred in April 2017 that did not
2 comply with subparagraph 5(a)(23). In five of the nine, a speed letter was generated,
3 nursing staff responded, and there is no documentation of a response from mental health
4 staff. In the remaining four situations, Mr. Vail opined there was use of force and mental
5 health staff should have been called, but it was not a planned use of force.

6 Mr. Vail opined that two use-of-force situations occurred in May 2017 that did not
7 comply with subparagraph 5(a)(23). In one, a nurse responded to a planned use of force,
8 mental health staff was notified, but mental health staff did not respond. In the other
9 situation, there was a speed letter for a restraint bed, the inmate submitted to one restraint
10 but then resisted. Mr. Vail opined that mental health staff should have been called when
11 the inmate resisted.

12 Mr. Vail opined that five use-of-force situations occurred in June 2017 that did not
13 comply with subparagraph 5(a)(23). In one, the Operation Journal indicates a cell
14 extraction was performed and CHS was consulted, but no response was documented. In
15 one, a speed letter was generated to place the inmate in therapeutic restraints, and a nurse
16 responded. In one, medical staff responded to a planned use of force because mental health
17 staff were unavailable. In the remaining two situations, the use of force was not planned,
18 but Mr. Vail opined that mental health staff should have been called.

19 Involving mental health staff when use of force or involuntary treatment is planned
20 is intended to reduce the need to use force. However, it is unrealistic to think that every
21 situation can be anticipated. It also is unrealistic to think that all spontaneous uses of force
22 can be put on hold while mental health staff are summoned. Regarding planned situations,
23 according to Mr. Vail there were eight times in three months that medical or nursing staff
24 responded, and the involvement of mental health staff was not documented. Even if the
25 eight situations were accurately identified and classified by Mr. Vail, they involve a very
26 small percentage of the pretrial detainees who are identified as seriously mentally ill.

27 Defendants have shown that they have sufficiently implemented the remedy
28 described in subparagraph 5(a)(23).

1 **V. DEFENDANTS’ PROPOSED PLAN FOR DEMONSTRATING**
2 **COMPLIANCE REGARDING SUBPARAGRAPH 5(a)(26) OF THE**
3 **REVISED FOURTH AMENDED JUDGMENT (DOC. 2485)**

4 Subparagraph 5(a)(26) requires Defendants to “adopt and implement a written
5 policy requiring that mental health staff be consulted regarding discipline of any seriously
6 mentally ill pretrial detainee.” The Court found Defendants had generally shown
7 compliance with subparagraph 5(a)(26), but not for consultation concerning disciplinary
8 isolation. Defendants were ordered to “propose how they will demonstrate that before a
9 seriously mentally ill pretrial detainee is placed in disciplinary isolation, CHS mental health
10 staff are consulted and their recommendations addressing the potential effects of isolation
11 on the pretrial detainee’s mental health are received and considered.” (Doc. 2483 at 35.)

12 Again, the purpose of subparagraph 5(a)(26) was to articulate a minimum
13 constitutional measure of disciplinary isolation of seriously mentally ill detainees. The
14 minimum is consideration of effects of the isolation on the mental health of the detainee.
15 That requires demonstration that mental health staff are consulted and that corrections staff
16 make their disciplinary decision in light of the consultation. The subparagraph does not
17 state any substantive standard that must be met for disciplinary isolation. The consultation
18 requirement should end disciplinary isolation in ignorance of the likely mental health
19 consequences for the specific detainee, without trampling on the authority of corrections
20 staff.

21 Accordingly, the objective of proof of compliance with subparagraph 5(a)(26) is to
22 show such consultation occurs and reaches disciplinary decision-makers, at least as a
23 general matter.

24 Defendants’ description of how they would demonstrate that is convoluted, indirect,
25 and not understandable in important respects. Plaintiffs’ objections are well-taken in some
26 respects and overly demanding in others. For example, Defendants’ proposed “eight step
27 process” is not fully grounded in their written policies, don’t all have to be followed, and
28 require some reconstructed rather than contemporaneous record keeping. As such, they
are difficult to validate for accuracy after the fact. But then, subparagraph 5(a)(26) does

1 not require Defendants to prove compliance with each term of their adopted policies and
2 procedures.

3 Ten years have passed since Defendants were found in continuing violation of
4 constitutional standards under the 1981 consent decree and its amendments. Defendants
5 have undertaken multiple rounds of attempted cure. Progress has been made each time,
6 but after multiple attempts Defendants still do not have it all right. The Court has deferred
7 to Defendants' initiative to propose cures, but after ten years and in light of Defendants'
8 inability even now to come up with a persuasive and effective cure of this last continuing
9 constitutional violation, it is time for the Court to direct a cure and have this over with.

10 Defendants will be directed to come up with a process and contemporaneous record
11 keeping that will show for a three-month period: all pretrial detainees for whom a DAR
12 was issued for possible disciplinary isolation, which of them had been designated as
13 seriously mentally ill, whether CHS mental health staff was consulted for each, the content
14 of each consultation or recommendation, and whether disciplinary segregation was
15 imposed or sanctions were suspended. The report should explain how sanctions proposed
16 by MCSO were communicated to CHS, that consultations with CHS mental health staff
17 occurred, and that recommendations by CHS mental health staff were considered by
18 MCSO. The plan and the report pursuant to it should explain how these communications
19 were documented and how the evidence of the communications was collected.

20 To comply with the Court's order, Defendants must show, if a DAR was issued to
21 a seriously mentally ill pretrial detainee already placed in segregated housing and MCSO
22 proposed disciplinary segregation as a sanction, that MCSO consulted with CHS mental
23 health staff regarding the proposed sanction and considered their recommendations.
24 MCSO must consult with CHS mental health staff every time disciplinary isolation is
25 considered for a seriously mentally ill pretrial detainee regardless of current housing
26 placement. A proposal for disciplinary isolation for a detainee already in disciplinary
27 housing is a proposal for extension of disciplinary housing. There is no reason why
28 extension of disciplinary housing should be exempt from consultation with CHS.

1 Defendants will be ordered to confer with Plaintiffs and submit a plan for
2 demonstrating that “before a seriously mentally ill pretrial detainee is placed in disciplinary
3 isolation, CHS mental health staff are consulted and their recommendations addressing the
4 potential effects of isolation on the pretrial detainee’s mental health are received and
5 considered.” The plan must include a three-month data collection period in 2019 during
6 which data will be contemporaneously collected for each seriously mentally ill pretrial
7 detainee for whom a DAR is generated.

8 IT IS THEREFORE ORDERED that Plaintiffs’ Motion for Leave to File
9 Amended/Corrected Expert Report (Doc. 2490) is granted.

10 IT IS FURTHER ORDERED that Defendants have demonstrated compliance with
11 subparagraphs (22) and (23) of Paragraph 5(a) of the Revised Fourth Amended Judgment.

12 IT IS FURTHER ORDERED that subparagraph (26) of Paragraph 5(a) of the
13 Revised Fourth Amended Judgment remains in effect.


14 IT IS FURTHER ORDERED that by March 1, 2019, Defendants provide Plaintiffs
15 with a proposed plan complying with the foregoing requirements, Plaintiffs may provide
16 Defendants with an alternative proposed plan by March 29, 2019.

17 IT IS FURTHER ORDERED that by April 19, 2019, Defendants’ counsel meet in
18 person and confer with Plaintiffs’ counsel regarding the proposed plan or plans.

19 IT IS FURTHER ORDERED that by May 3, 2019, the parties file a joint plan or
20 separate plans for complying with the foregoing requirements.

21 IT IS FURTHER ORDERED setting a hearing on May 16, 2019, at 10:00 a.m. on
22 the plan.

23 Dated this 15th day of January 2019.

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Neil V. Wake
Senior United States District Judge