

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

Frederick Harper, individually, and on)
behalf of all present and future inmates in)
the Fulton County Jail, Atlanta, Georgia,)

Plaintiffs,)

v.)

Deputy Tyrone Bennett, individually;)
Fulton County, Georgia; and Members,)
Fulton County Board of Commissioners,)
in their official capacities;)

Defendants,)

Myron Freeman, Fulton County Sheriff,)
in his official capacity,)

Defendant and Third Party Plaintiff,)

v.)

Jim Donald, Commissioner, Georgia)
Department of Corrections, in his official)
capacity, and the **Georgia Department of**)
Corrections,)

Third Party Defendants.)
-----)

Civil Action File No.:

04-CV-1416-MHS

**FULTON COUNTY SHERIFF MYRON FREEMAN'S REPORT
PURSUANT TO THE COURT'S ORDER, DATED JULY 22, 2008**

Comes now, Fulton County Sheriff Myron Freeman, Defendant and Third
Party Plaintiff in the above-styled case, and files his Report Pursuant to the

Court's Order, dated July 22, 2008, as follows:

I. Introduction and Procedural History.

On July 8, 2008, the Court Monitor filed the Seventh Quarterly Report on compliance with the Consent Order in this case, which was approved by the Court on February 6, 2006. This was the third (3rd) quarterly report filed by the current Court Monitor, who was appointed in the Fall of 2007.

On July 10, 2008, the Court issued an Order to Show Cause, requiring Sheriff Freeman to appear on July 25, 2008, to show cause why he should not be held in contempt regarding certain specified areas of alleged noncompliance with the Consent Order. On July 22, 2008, a pre-hearing conference was held. At this conference, the Court agreed that the parties, pursuant to Paragraph 112 of the Consent Order, should have an opportunity to meet and discuss the compliance issues raised in the Court's July 10, 2008, Order. Accordingly, the parties were directed to meet and the show cause hearing was rescheduled for September 8, 2008. In addition, Sheriff Freeman was directed to file a report with the Court, on or before August 22, 2008, regarding efforts to resolve the alleged violations of the Consent Order. Class Counsel was directed to file a response on or before August 29, 2008.

On July 25, 2008, Sheriff Freeman, undersigned counsel, members of the Sheriff's administrative and jail management team, as well as counsel for Fulton County, Class Counsel, the Court Monitor and the Court Auditor, met at the Office of the County Attorney for the purpose of discussing the areas of alleged noncompliance with the Consent Order. For approximately four (4) hours, there was an open, frank and professional discussion of the issues. With respect to each of the compliance issues, discussions were held regarding the level of compliance, obstacles to 100% compliance, as well as time lines and strategies for improving compliance.

On August 7, 2008, another meeting occurred, in which members of the Sheriff's management team, the Court Monitor and Court Auditor, as well as Class Counsel and counsel for the Sheriff and Fulton County, convened for the sole purpose of discussing jail staffing. Details of the various steps taken by the Sheriff's Office to increase, train and appropriately deploy staff were explored. What follows is a more detailed description of the discussions that took place at these meetings.

II. Applicable Standard of Review for Contempt.

Whether Sheriff Freeman can be found in contempt of court for less than 100% compliance with the terms and conditions of the Consent Order is a function of 11th Circuit precedent and the terms of the Consent Order

itself. The existence of facts showing less than 100% compliance is just the first step in determining whether the conduct proceeding the fact of noncompliance is contemptible. This is especially true where compliance is equated with perfection as it is under the terms of the Consent Order in this case in the areas of jail housing staff and inmate release times. The purpose of civil contempt is to reform bad behavior leading to noncompliance - it is not simply a response to noncompliance. Thus, the reasonableness of the behavior of the party responsible for compliance must be at the heart of any decision on contempt.

The 11th Circuit, in Chairs v. Burgess, 143 F.3d 1432 (11th Cir. 1998), explained that an alleged contemnor may avoid contempt by (i) showing that he or she has complied with the involved order, or (ii) showing that noncompliance with the order is excused because either compliance is impossible or the alleged contemnor has made "in good faith all reasonable efforts to comply." Chairs at 1437. The seriousness and purposefulness with which Sheriff Freeman and his management team have approached compliance with the Consent Order in this case was clearly evident in the meetings on July 25 and August 7, 2008. Sheriff Freeman has aggressively sought funding from Fulton County, conducted a remarkable hiring and training campaign for new staff, and employed many innovative techniques

and programs in the pursuit of compliance. At the same time, the Sheriff's Office endures County funding obstacles and the additional demands and challenges of an ongoing \$50 (+) million jail renovation program, state prison / inmate program budget cuts and area policing / criminal case management strategies over which the Sheriff has no meaningful control. Under these circumstances, Sheriff Freeman should not be found in contempt of court for achieving less than perfect compliance with any provision of the Consent Order.

It must also be noted that the Consent Order itself provides an additional test determinative of whether contempt is present. Paragraph 7 of the Consent Order provides that a mere failure to comply with the terms and conditions of the Consent Order does not equate to the existence of an unconstitutional condition of confinement, nor does it show, in and of itself, that any particular constitutional violation has occurred. Paragraph 112 of the Consent Order further provides that a finding of noncompliance, in order to result in a finding of contempt, must be accompanied by a finding that noncompliance did, in fact, result in an unconstitutional condition of confinement or in a particular constitutional violation. Conditions at the Fulton County Jail are not unconstitutional by any standard.

For these and other reasons discussed below, Sheriff Freeman should not be found in contempt of court for noncompliance with any of the terms and conditions of the Consent Order. With respect to any area for which noncompliance can be demonstrated, noncompliance is slight, Sheriff Freeman and his management teams have continually acted in good faith to take all reasonable steps to achieve compliance, and noncompliance has resulted in no constitutional violation.¹

III. Specific Areas of Concern.

Section 1. Jail Staffing.

The parties to this case, along with the Court Monitor and Court Auditor, have extensively discussed the issue of jail staffing. Sheriff Freeman and his staff believe that these discussions were beneficial, in terms of understanding the exact level of compliance, the obstacles that exist to full, sustainable compliance, and the steps that have been taken and will be taken to achieve full compliance.

The parties agree that having adequate staff available at the Jail is the most important factor to achieving full compliance with the Consent Order.

This is obvious in the area of housing, where the Consent Order provides

¹ As directed, Class Counsel and counsel for Sheriff Freeman discussed the possibility of an agreement by which the Court would impose sanctions for reasons discussed in the Court's Order, dated July 10, 2008. Sheriff Freeman has respectfully declined to enter into any such agreement.

definite and easily measurable requirements. It is equally true in numerous operational areas also subject to Consent Order provisions, such as intake, release, laundry, medical and food service.

When the Consent Order was approved in February, 2006, the Jail was approximately 456 employees short of what was determined as necessary for (i) staffing the housing units as required by the Consent Order, and (ii) staffing all other operational areas of the Jail as necessary to deliver inmate services. Sheriff Freeman immediately identified and reassigned approximately 100 additional employees to jail operations, which reduced the overall staff shortage to approximately 350 employees needed to consistently meet the requirements of the Consent Order.

As the Court and the parties are well aware, Sheriff Freeman does not have control over the amount of funds made available for personnel. Annual funding decisions for the Sheriff's Office are under the exclusive control of the Fulton County Board of Commissioners. Since the approval of the Consent Order, there have been two (2) budgets approved by the Board of Commissioners for the Sheriff's Office. These were the 2007 budget, which was formulated at the end of 2006 and approved in early 2007, and the 2008 budget, which was formulated at the end of 2007 and approved in early

2008. The Sheriff's Office is just now beginning to formulate a budget for 2009.

As a result of interdepartmental transfers and the budget approved for 2007, taking also into consideration the filling of existing vacancies, the Sheriff's Office has added approximately 250 employees to jail operations since the 1st quarter of 2007. Presently, the Jail is approximately 163 personnel short of the 882 needed to fully staff jail operations, down from a shortage of 426 at the time the Consent Order was approved.²

Effectively, the personnel shortage at the Jail has been reduced by approximately 60% since the Consent Order was approved. This is all the more remarkable considering that the Fulton County Board of Commissioners funded absolutely none of the new positions requested by the Sheriff's Office for 2008. There are, in fact, essentially no ("0") detention officer vacancies in the Sheriff's Office at this time. When combined with non-mandatory overtime, the Sheriff's Office has for several months been consistently meeting the nonsupervisory uniformed officer requirement in the housing units approximately 94% of the time.

² The numbers provided here are approximate and do not relate to one another with exact mathematical logic. This is the case because the numbers are snapshots taken at a particular point in time, which are affected by such diverse factors as then existing vacancies.

In the coming weeks, the Sheriff's Office expects to complete the training of approximately 20 new employees that can be released for independent assignment in the jail housing units. As this training is completed, there should be two (2) observed results: 1) the concentration of detention officers on any given shift observed by the Monitor in his recent Report should be greatly reduced, this being primarily the result of having to deploy officers in training with available shift training officers; and, 2) the large staff shortages observed on the day shift should improve, in that this is often the result of the unavailability of cadets who are attending training classes.

The availability of these additional detention officers will also provide the first real opportunity that the Sheriff's Office has had since 2007 to begin aggressively promoting officers to fill supervisory positions. The ability of the Sheriff's Office to increase the level of compliance required by the Consent Order in the area of housing unit supervisors has been severely limited by the unavailability of front line detention officers. In effect, it would have been impractical and wasteful of resources for the Sheriff's Office to have been aggressively promoting officers into supervisory positions before filling the bulk of front line positions.

Even with these steps being taken, as noted above, the Jail remains approximately 163 positions short of where it should be for full compliance with both housing and operational requirements. In addition, there remain various other obstacles to full staffing. These include the Board of Commissioners' failure to fund new positions for 2008, changes in the operation of state training facilities that now require a minimum class size of 25, the loss of some new hires due to performance problems, the loss of other employees through normal attrition (which was down a remarkable 67% between January, 2007, and January, 2008), and a recent change in Fulton County's pension program, which resulted in the early retirement of several, highly experienced supervisors.

Essentially, the present shortage of staff, while it clearly impacts the ability of the Sheriff's Office to fully meet housing staff requirements, while at the same time staffing other jail operations at the level required to provide inmate services, has an even more dramatic effect due to the absence of any meaningful relief factor for both anticipated (e.g., vacation) and unanticipated (e.g., sick) absences. In order to immediately address this issue, the Sheriff's Office has implemented a mandatory overtime requirement following the meetings with Class Counsel on July 25 and August 7. Although the Sheriff's Office has resisted implementing a

mandatory overtime program because of its anticipated effect on overall morale and the very real possibility that it will increase unanticipated absences, such a program is in effect as of August 15, 2008. With the added tool of mandatory overtime, Watch Commanders should be able to achieve near perfect compliance in the staffing of jail housing units, particularly at the detention officer level.³

Section 2. Jail Population.

In the Monitor's Report, filed with the Court on July 8, 2008, it was reported that the Jail averaged a daily population in excess of the adjusted capacity of 1,842. Compliance with the population cap has otherwise been consistent in the previous two (2) years.

Many factors contribute to the Jail's population, and virtually none of them are within the exclusive control of the Sheriff. These include area policing policies, criminal case management practices, transfer rate of convicted inmates to the Georgia Department of Corrections, and the

³ Please see Attachment 1 for more information regarding the mandatory overtime program. In addition, please see the memorandum from Roland Lane and Shiela Benefield, dated August 18, 2008, which is contained in Attachment 1, for more information regarding staffing challenges, strategies and timelines. Also contained in Attachment 1 is further information regarding efforts by the Sheriff's Office to obtain sufficient funding for staff and other purposes.

availability of funding for alternative confinement.⁴ Nevertheless, the Sheriff's Office has been remarkably successful in maintaining the Jail's population at or below the cap established by the Consent Order.

And, while the Sheriff's Office does not dispute the population numbers reported by the Court Monitor, a deeper analysis of both the numbers themselves and the contributing factors is warranted. Population at the Main Jail, after the completion of renovations at the Bellwood annex, did briefly return to compliance (there has never been a reported population issue at the annex facilities). Unfortunately, in recent weeks, the Jail's population has been rising. In the last three (3) days, the population has exceeded the Consent Order cap by approximately 100 inmates.

The reasons for this increase in population are diverse. For example, budget reductions at the state level have resulted in the closing of both housing and program facilities. In recent weeks, the Georgia Department of Corrections has accepted no new inmates from Fulton County.⁵ Another involves the funding of outsourcing contracts.

⁴ Please see Attachment 1, pages 7-8, as well as Attachment 2 for a more complete discussion.

⁵ To the extent that DOC (or anyone else) maintains that the Sheriff's Office has not adequately informed DOC of inmates eligible for transfer, signed receipts showing that such information has been received by DOC are available.

The Sheriff's Office has and continues to maintain an aggressive program to outsource pre-trial inmates to DeKalb County and the City of Atlanta, plus there is a pending arrangement to outsource inmates to the South Fulton Jail Authority. Inmates who have been convicted and are awaiting transfer to the DOC are being outsourced to outlying facilities. These outsourcing arrangements, however, have limitations.

The first such limitation is financial. For 2008, Fulton County funded the inmate outsourcing program at \$10 million, versus the \$13 million that was expended in 2007 and which was requested for 2008 by the Sheriff's Office. Now, during the closing months of 2008, this underfunding of the program has resulted in the recent refusal by Fulton County officials to renew the DeKalb County outsource agreement and the refusal to go forward with an amendment to the City of Atlanta outsource agreement to increase the number of available beds. The Sheriff's Office is hopeful that these budget issues will be resolved before the middle of September, and there are ongoing discussions. In any case, notwithstanding that the contracting issues have not been resolved, the Sheriff has authorized the Chief Jailer to identify additional inmates for immediate transfer to the City of Atlanta and for immediate transfer to the South Fulton Jail Authority

A second, major limitation on outsourcing (an emerging, previously unanticipated issue) is that outsource facilities will not accept inmates with significant health and/or behavioral problems. It has been estimated that approximately 45% of the Mail Jail population is effectively disqualified from outsourcing. The percentage of such inmates must be expected to increase.

An additional issue relevant to whether the reported excess in population is contemptible concerns the actual capacity of the Main Jail. In the Monitor's 6th Report, he acknowledged that the actual capacity of the Main Jail, with double bunking and the currently required level of staff is 2,652, versus the 2,250 number contained in the Consent Order. (Monitor's 6th Report, page 3). Thus, slight violations of the population cap should not form the basis for a finding of contempt. This is the case because the Sheriff is acting reasonably to reduce the population and the Main Jail, as a matter of fact, is not overcrowded.

Of further discussion at the meeting on July 25 was the Monitor's displeasure that the Sheriff's Office has not created his version of a "population control committee". Sheriff Freeman did, in fact, convene a meeting of elected officials to discuss the Court Monitor's proposal. Unfortunately, no interest was expressed (other than by Sheriff Freeman) in

going forward. Moreover, the Sheriff's Office has implemented an in-house program (in conjunction with the Clerk of the Superior Court) to identify inmates "lost in the system", which often involve bonding paperwork problems and inmates with mental issues. This program has been in place for some time and its success in assisting inmates with release can be documented. It seemed to be the consensus of the group on July 25 that this program is working along the same lines proposed by the Court Monitor. Since that meeting, jail managers have reviewed their process and are taking more of Court Monitor's concerns into consideration.

A final issue, about which there was an agreement to work on, concerns the availability of electronic monitoring. Funding issues have prevented a truly effective implementation of electronic monitoring. However, the parties agreed to renew their efforts to secure funding and see that such a program is brought to fruition.

Section 3. Inmate Housing at South Georgia Facilities.

The Monitor has reported that Fulton County inmates outsourced to South Georgia jails are being tripled bunked and are sleeping in plastic bunks placed on the floor. The Monitor asserts that this violates the Consent Order.

Sheriff Freeman must respectfully disagree with the Monitor that these housing arrangements violate the Consent Order. The Consent Order establishes specific housing standards for the Fulton County Jail, which do not apply to other facilities. Triple bunking inmates may be entirely appropriate in another jail, as may be sleeping in a plastic bunk on the floor. The Consent Order does not provide that inmates, because they are outsourced by the Fulton County Sheriff, must be confined under all of the same housing conditions that would apply to their confinement in the Fulton County Jail.

In any case, as was discussed at the meeting on July 25, Chief Jailer McNeil has visited the South Georgia outsource facilities.⁶ He has arranged for and received commitments from each South Georgia facility that no Fulton County inmates will be sleeping in plastic bunks. He has also confirmed that none of the facilities are under court orders regarding living conditions.⁷

⁶ The Monitor's 7th Report is the first Report filed since the appointment of Chief Jailer McNeil. It should also be noted that it was resolved at the meeting on July 25 that the Sheriff and his staff will recommit themselves to thoroughly reviewing the draft reports of the Monitor and will promptly communicate with him in this regard.

⁷ See Attachment 3, for example.

Section 4. Medical Services.

Pursuant to the discussions on July 25, steps have already been taken to address the concerns highlighted by the Court in the July 10, 2008, Order. These changes and the information provided by the Jail Medical Director and Chief Jailer appeared to resolve this matter.

First, the manner in which medical / dental appointments are reported is being altered to more accurately show why some inmates may miss them. Second, and more importantly, the Medical Director and Chief Jailer have taken steps to ensure that an adequately staffed movement team is in place, along with increased supervisory involvement, to avoid all instances where appointments are missed due to an inmate not be brought down from the housing units.⁸

Section 5. Inmate Grievance Forms.

In the Monitor's 7th Report, he states that the Sheriff's Office is not in compliance with the Consent Order because, in part, there is no "process" by which inmates can receive grievance forms, and there is no "documentation of the issuance of grievance forms".

The Jail is required under the Consent Order to "maintain a grievance procedure" and to make "[g]rievance forms available ... at all times".

⁸ See Attachment 4.

Consent Order, paragraphs 101-102. There is no requirement that the delivery of a grievance form to an inmate be documented.

As for the availability of grievance forms, blank forms and envelopes are stocked in each housing unit and the supply is replenished whenever necessary. Watch Commanders at the Jail repeatedly have reminded housing staff to ensure that forms are available. In addition, staff from the Grievance Office make daily rounds to collect grievance forms and distribute them to any inmate asking for one. This process, as opposed to using the Jail's mailroom, ensures that grievance forms do not fall into the hands of a person about whom an inmate may be complaining, plus it provides a way for an inmate to obtain a form without asking for it from an officer about which the inmate may want to complain.

There are several problems with making grievance forms otherwise available. First, grievance forms have multiple parts (for copies) and are expensive to produce. In the past, when forms were immediately available, many were wasted, being used as dust pans and scratch paper. Second, effective containers or displays for grievance forms, immediately available to inmates, such as plastic sleeves and plastic or wooden boxes, create serious safety concerns.

Finally, since the July 25 meeting, the Sheriff's Legal Affairs Officer, along with the Jail Lieutenant responsible for the grievance process, have randomly visited jail housing units. During these rounds, for the purpose of auditing the availability of grievance forms, no inmate reported that he had not been able to obtain a grievance form, nor did any housing officer report any such complaint. This matter will continually be reviewed.⁹

Section 6. Inmate Releases.

It is not unusual for the Fulton County Jail to release as many as 600 inmates in a given week. The release process is complex and extremely important, in that it is absolutely crucial that no inmate be released who is not entitled to release.

As the discussion on July 25 showed, the vast majority of releases exceeding the 24 hour standard involve releases to other agencies - in other words, inmates who are not entitled to freedom, but who must be picked-up by another law enforcement agency. For example, in the most recently reported period (for the week ending August 2, 2008), the Jail processed 568 inmates for release, of which 50 were detained more than 24 hours, for an overall compliance rate of 91.2%. However, of the total releases exceeding 24 hours, 33 of them were releases to other agencies, who are under no

⁹ See Attachment 5 for more on this matter.

requirement to assist the Fulton County Jail with getting inmates out within the Consent Order standard. Of the total inmates who were released beyond the standard, only 6 were the result of a processing issue by the Sheriff's Office, and only 9 were the result of a delay by the courts.¹⁰ Thus, with respect to inmates not awaiting release to and pick-up by another law enforcement agency, the level of compliance with the release standard is as follows:

- | | | | |
|----|------------------|--------|--------|
| 1) | Sheriff's Office | 6/568 | 98.9% |
| 2) | Court System | 9/568 | 98.4% |
| 3) | Combined | 15/568 | 97.4%. |

Nevertheless, the Sheriff's Office takes this issue very seriously and is committed to making progress towards 100% compliance. Steps being taken now to improve the process include (i) classification changes for document specialists working in this area to increase pay and reduce attrition, and (ii) the hiring of 17 additional specialists to work on inmate intake and release.

¹⁰ A concerted effort, consisting of daily interaction between the Sheriff's Office and Clerk of the Superior Court, has dramatically reduced the number of late releases.

These newly hired specialists are scheduled to be released from training in October, 2008. Job offers to another group of new hires for this area are expected to be made during the first week of September.¹¹

Finally, with respect to the Monitor's understanding that jail officials may not have notified hold agencies of the availability of an inmate in a timely manner, the Chief Jailer has made a inquiry and received information that indicates that the notifications were made. The Chief Jailer and his management staff will be reviewing this issue and taking steps to ensure both that the notifications are made and that they can be confirmed.

IV. Conclusion.

The meetings held by the parties were both informative and effective in terms of sharing ideas, concerns and for helping to address both actual compliance with the Consent Order, as well as the parties' mutual understanding of the ongoing challenges and strategies in place to move forward. Actions taken by the Sheriff's Office in the past, as well as the strategies implemented both prior to and following the meetings clearly illustrates the seriousness with which Sheriff Freeman and his staff take their obligations under the Consent Order. Moreover, the facts show that the Sheriff has taken and continues to take all reasonable steps necessary and

¹¹ See Attachment 1, page 9.

appropriate to achieve full and 100% compliance, and has marshaled his available resources to this end.

In conclusion, the Sheriff is appreciative of the Court's Order, dated July 22, 2008. In addition, the Sheriff respectfully urges the Court to further delay the holding of a show cause hearing in order to permit a later review of the effectiveness of the new and ongoing compliance strategies discussed in this report. Doing so will ensure that the energy and time of the Sheriff and his management team continue to be focused on improving compliance and on better communication with both the Monitor and other counsel.

Respectfully submitted this 22nd day of August, 2008.

/William R. Turner/

Randy Turner, Attorney at Law, LLC
Counsel for Sheriff Myron Freeman
Georgia Bar No. 719929

Randy Turner, Attorney at Law, LLC
2265 Roswell Road
Suite 100
Marietta, Georgia 30062
770-509-9770
770-509-2243 - Facsimile
Randy.Turner@turnerlawllc.com

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CERTIFICATE OF SERVICE

The undersigned counsel for Fulton County Sheriff Myron Freeman, Defendant in the above-styled action, hereby certifies that I have this 22nd day of August, 2008, electronically filed

**FULTON COUNTY SHERIFF MYRON FREEMAN'S REPORT
PURSUANT TO THE COURT'S ORDER, DATED JULY 22, 2008**

with the Clerk of the Court using the CM/ECF system, in Times New Roman, 14.

/s/ William R. Turner
Georgia Bar No. 719929

Randy Turner, Attorney at Law, LLC
2265 Roswell Road
Suite 100
Marietta, Georgia 30062
770-509-9770
770-509-2243 (Facsimile)
Randy.Turner@turnerlawllc.com