

also provides for proper staffing for medical transport, escorts for visiting, and search and check point security.

The Decree, as amended, bases the required staffing levels in part on the assumption that the dormitory intercom system will be operational. As the Court is well aware, however, the intercom system has been inoperative for many months, and is unlikely ever again to be operational. Even if the system could be made operational, as the Special Officer's report notes, the dormitory intercom system has proved in practice to have inherent flaws that prevent its ever being an effective means of promoting inmate security.

The addition of Dormitory 26 impacts officer staffing "when there are not enough staff available for all posts." Staff Report at 9. Since Dormitory 26 is always covered by two officers, during times of shortage those two officers may not be deployed elsewhere. Depending on how many officers are absent, this lack of flexibility may become critical. Id.

The purpose of the officer staffing requirement of the Decree is to establish a safe environment for both inmates and staff. Current staffing levels are simply not sufficient to achieve this fundamental purpose. The Infirmary records indicate that inmate on inmate violence continues at the Central facility. Staff Report at 12. While the inmates frequently report that the injuries were caused by "falling" or "running into walls", the nature of the injuries belie such reports. Id. The open barracks style of the dormitory buildings, when left essentially unsupervised by officers as

they are at present, with critical posts unfilled and no intercom backup, are a breeding ground for inmate violence. The staff shortages created by the opening of Dormitory 26 and the failure of the dormitory intercom system, the Special Officer concludes, create a compelling need to station at least one officer in each dormitory for each shift. Staff Report at 13. Ms. Monaco's recommended staffing plan would provide such officer coverage.

Because the Decree presently expresses a requirement for officer staffing that is based on assumptions that have been rendered obsolete by changed circumstances, making it impossible to achieve the chief principal purpose of the Decree with the present requirement, plaintiffs respectfully request that the Court direct the Special Officer and defendants to meet and present a staffing plan to provide increased security, and in the absence of a mutually agreed staffing plan, to order that the Decree be modified to provide that a minimum of 373 officers be available for duty.

The Court has inherent power to modify a decree, regardless of "whether the decree has been entered after litigation or by consent." United States v. Swift & Co., 286 U.S. 106, 114 (1932) ("Swift"); see System Federation v. Wright, 364 U.S. 642, 650-51 (1961). A consent decree may be modified upon a showing that there has been a change in facts or a change in law, and that modification is necessary to achieve the original purposes of the consent decree. Ruiz v. Lynaugh, 811 F.2d 856, 860 n.7 (5th Cir. 1987) (citing 11 Wright &

Miller, FEDERAL PRACTICE & PROCEDURE § 2961, at 604-05 (1973)). While Swift establishes a strict standard for modifying a consent decree,^{1/} the subsequent decision in United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968) ("United Shoe") limits Swift to the context of a defendant trying to modify a decree when the purposes of the litigation "have not been fully achieved." United Shoe at 248. United Shoe encourages the district courts to modify consent decrees "to achieve the required result." Id. at 249, 252.

As noted in Twelve John Does v. District of Columbia, 861 F.2d 295 (D.C. Cir. 1988), a number of courts of appeals and academics have advocated "a more flexible standard" for consent decree modification in institutional reform litigation. Twelve John Does at 298; see New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 969-70 (2d Cir.), cert. denied, 464 U.S. 915 (1983). The Court in Twelve John Does appeared to take the position that material changes in law or circumstances may be sufficient to allow modification of a consent decree. Id.

Plaintiffs submit that the failure of the dormitory intercom system and the addition of Dormitory 26 are material changes in circumstances justifying a modification of the Consent Decree in order to achieve the purposes underlying the

^{1/} According to Swift, "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" justifies modifying a decree. Swift at 119.

original Decree. As the Special Officer's report demonstrates, the current level of staffing is inadequate to provide the expected level of security contemplated by the Consent Decree, and this inadequacy is due to the failure of the dormitory intercom system and the added population brought about with the opening of Dormitory 26.

Plaintiffs therefore request that the Court order the defendants and the Special Officer to meet and to provide to the Court within 30 days an officer staffing plan that provides a level of security necessary to address the concerns in the Special Officer's report. Plaintiffs request that the Court order that, if defendants and the Special Officer are not able to submit a mutually agreeable plan within 30 days, then the Consent Decree shall be modified to require defendants to maintain 373 officers available for duty, pursuant to the Special Officer's report of August 23, 1989.

* * * * *

Plaintiffs therefore request the Court to enter the attached proposed order concerning the officer staffing levels at the Lorton Central facility.

Respectfully submitted,



Peter J. Nickles # 53447
Alan A. Pemberton # 367108
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202)662-6000

Counsel for Plaintiffs

Dated: November 7, 1989