IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAVID RUIZ, et al.,	)	
Plaintiffs,	)	
UNITED STATES OF AMERICA,	)	
Plaintiff-Intervenor	)	Civil Action No. H-78-987-CA
vs.	)	
JAMES A. COLLINS, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION

Plaintiffs and defendants have submitted a proposed comprehensive final judgment covering all issues in this action. Plaintiffs and defendants jointly submitted that proposed final judgment on August 13, 1992, along with a proposed notice to the class. On August 20, 1992, the court approved the proposed notice and ordered it published in the prison newspaper, the Echo. That order also established the procedures to be followed for prisoners to file objections to the proposed final judgment and for plaintiff class counsel to summarize those objections for the court. A hearing on the proposed final judgment was held on October 28, 1992.[1/] At that hearing the parties submitted, and

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1/ In a letter to the court that was entered into the record by order of October 26, 1992, counsel for the plaintiff-intervenor stated that the United States has no objection to the entry of the proposed final judgment. No representative of the United States attended the October 28, 1992, hearing on the proposed final judgment or filed any pleading or other formal response to the proposed final judgment. Accordingly, all references to plaintiffs in this order exclude the United States.

stipulated to the admissibility of, a total of 36 exhibits, and the court received testimony from three witnesses.

The purpose of the publication of the proposed final judgment, along with notice to the class members of the contents of that document, was to provide class members with the opportunity to object to the proposed final judgment. The hearing on the proposed final judgment was to determine, as required by Fed. R. Civ. P. 23(e), if the proposed final judgment is a fair, reasonable, and adequate settlement of this lawsuit. The intent of these procedures is to protect the interests of the class. For the reasons set forth in this order, the court has determined that the proposed final judgment is a fair, reasonable, and adequate settlement of this action, and that its approval is in the best interests of the class. Accordingly, the court will approve the proposed final judgment.

On March 6, 1990, the parties were ordered to begin negotiations to bring about a comprehensive final order in this civil action. Specifically, the court ordered the parties "... to meet and negotiate in good faith modification of the various orders of the court...." The March 6, 1990, order established the criteria the parties were to use in that process. Specifically, the order required the parties to address compliance problems, ensure that unconstitutional conditions do not recur, eliminate unnecessary detail, institutionalize reforms, improve defendants' internal monitoring mechanisms, and establish remedies and timetables for termination of the court's jurisdiction. The

record reflects that the proposed final judgment is the result of the parties' compliance with that order. The court notes, however, that in one important respect the parties have varied from the March 6, 1990, order. Although that order permitted them to do so, rather than establish a timetable for the complete termination of the court's jurisdiction, the parties have chosen to include in the proposed final judgment certain permanent injunctions that prescribe or proscribe defendants' future actions in several key areas.

The record also reveals that the path of the negotiations that produced the proposed final judgment was not always smooth. In January 1991, defendants filed a motion seeking complete relief from judgment, essentially a vacation of all extant orders. Although defendants initially requested that action on the motion be held in abeyance pending the filing of "a plan for orderly termination of the court's jurisdiction," in September 1991, defendants moved for an expedited hearing on their motion for relief from judgment. In March 1992, defendants filed a comprehensive memorandum supporting that motion, and plaintiffs responded and subsequently moved to dismiss the motion. Over the succeeding months, the parties filed numerous memoranda and engaged in discovery in anticipation of litigation on defendants' motion. The parties finally reached agreement in July 1992, however; and in §I of the proposed final judgment, defendants withdraw their motion to terminate the court's jurisdiction.

The proposed final judgment is divided into 22 sections and contains two exhibits. In each section related to a specific area of the extant orders in this case, the parties have outlined in a condensed fashion the continuing relief ordered as a result of the proposed final judgment, noted any supplemental relief that is ordered, described any continuing monitoring obligations for that particular area, and established a timetable for relief from judgment, if applicable. Furthermore, in §I defendants are relieved of all further legal obligations under extant court orders, plans, and stipulations in specified areas: classification, necessities, and the Physically Handicapped Offender Program. The following findings of fact generally track the organization of the proposed final judgment.

FINDINGS OF FACT

1. The proposed final judgment was published in the Echo accordant to court order and was distributed throughout the prison system, so that prisoners had a reasonable opportunity to read the proposed final judgment and file objections to it.

2. Prisoners' objections to the proposed final judgment were thoroughly summarized by plaintiff class counsel in their two memoranda on the objections.

3. The plaintiff class has been and continues to be represented adequately by experienced and highly competent counsel.

4. The vacation of all witness protection orders except the three that permitted witnesses to transfer to a federal facility

is fair, reasonable, and adequate for the class. The protections afforded other witnesses in the orders vacated under the proposed final judgment remain in place under the access to courts provisions of the proposed final judgment.

5. The prisoner classification system developed by the Institutional Division of the Texas Department of Criminal Justice ("TDCJ-ID") has become an important and entrenched part of the operation of TDCJ-ID. James A. Collins, Director of the TDCJ-ID, testified that, like security staffing, classification is one of the primary ingredients for operating a prison system successfully. The thrust of his testimony was that TDCJ-ID intends to maintain its current classification system, although that system undoubtedly will evolve over time as conditions change and prison managers improve and redefine it.[2/]

6. Although at least one prisoner objected to the proposed final judgment alleging that the classification plan was not preventing the mixing of prisoners of different custody levels in the same housing areas, the court finds that the present computer tracking system is designed to flag any mixing that occurs, and that, in most cases, a staff member cannot enter a housing move for a prisoner into the TDCJ-ID computer if the move would cause the prisoner to reside in a housing area other than one

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2/ Throughout these findings of fact the court refers to testimony and documentary evidence adduced at the October 28, 1992, hearing. The use of such references does not restrict the particular finding to a mere recitation of the witness' testimony, or reflect only that the court is finding that the witness so testified, but indicates instead that the court finds the evidence credible and is using it as a source for the substantive findings.

designated for the prisoner's custody level. The court is satisfied that an adequate system exists and will remain in place to prevent improper mixing of custody levels and to identify any situation in which such mixing occurs inadvertently.

7. TDCJ-ID has greatly improved its classification system, which at the time of the trial in this case focused exclusively on age, size, and the number of prior incarcerations. Reports of the Special Master and the defendants reflect that the present classification system provides prison managers with detailed information on prisoners and establishes reasonable criteria for grouping prisoners based on their needs, security and custody levels, medical condition, and relevant physical characteristics. As of April 1992, only six of 236 classification counselor positions were vacant, and the record reflects that those vacant positions were slated to be filled by June 1, 1992. The court concludes that TDCJ-ID is likely to continue to employ this system of classification, or one equally appropriate for the operation of safe and secure prisons. Accordingly, based on the record as a whole, the court finds that elimination of all orders relating to classification is fair, reasonable, and adequate for the class.[3/]

8. Defendants are in compliance with extant court orders on the provision of necessities to prisoners. Director Collins

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3/ As plaintiffs note in their Memorandum Concerning Objections to Proposed Final Judgment, §XVII of the proposed final judgment requires defendants to continue to monitor compliance with their own plans and policies, including their classification plan.

testified that TDCJ-ID has accorded this area considerable scrutiny and resources. He described steps TDCJ-ID has taken that go beyond the current court orders, and he testified that TDCJ-ID intends to continue to improve this program. The court concludes that TDCJ-ID is likely to continue to employ this system for providing prisoners with necessities, or one equally appropriate. Accordingly, based on the record as a whole, the court finds that elimination of all orders relating to necessities is fair, reasonable, and adequate for the class.

9. Like their policies and procedures for classifying prisoners and for providing prisoners with necessities, defendants have developed and implemented policies and procedures to provide appropriate services to physically handicapped prisoners. Reports by the Special Master and by defendants reflect that programs for physically handicapped prisoners are working well and that the policies and procedures are thoroughly integrated into TDCJ-ID's operations. TDCJ-ID has invested significant resources in a wide range of services for physically handicapped prisoners, including physical therapy.[4/] The court concludes that TDCJ-ID is likely to continue to employ this program for providing services to prisoners with physical handicaps, or one equally appropriate. Accordingly, based on the record as a whole, the court finds that elimination of all orders

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4/ Although one prisoner objected that the physical therapy facility at the Jester III unit had been eliminated, Director Collins testified that that objection was unfounded.

relating to physically handicapped is fair, reasonable, and adequate for the class.

10. Section II of the proposed final judgment requires TDCJ-ID to maintain sufficient staffing, in perpetuity, to meet the safety and supervision requirements of its prisons. Director Collins testified that more staff currently are employed than required under extant court orders, and that maintenance of staffing at or near that level is critical to the safe and secure operation of TDCJ-ID. As of April 1992, only 124 of a total of 12,024 security staff positions were vacant. Director Collins also testified that the proposed final judgment gives prison managers the flexibility to allocate staffing resources as needed in the future, and that although resources may be shifted as the missions and designs of units change, he anticipates very little change in the overall number of staff needed to operate the system. Furthermore, Wayne Scott, the Deputy Director for Operations of TDCJ-ID, testified that TDCJ-ID has developed detailed post orders and other procedural and training materials for security staff, and has greatly expanded the training provided to new security officers. Based on the record as a whole, the court finds that §II of the proposed final judgment is fair, reasonable, and adequate for the class.

11. Deputy Director Scott also testified that the dramatic increases in staffing since the court entered its Amended Decree in 1981 have permitted TDCJ-ID to replace the building tender system with uniformed security staff. Elimination of that brutal

system was required by the Amended Decree and by the Stipulated Modification of Sections II.A and II.D of Amended Decree, which the court approved on June 1, 1982. Section III of the proposed final judgment continues, in perpetuity, the prohibitions against permitting prisoners to exercise authority over other prisoners. The record reflects that TDCJ-ID officials effectively have dismantled the building tender system, and Deputy Director Scott testified that those officials intend to maintain their current polices in this area, including a separate grievance procedure to ensure prompt reporting of any reemergence of building tender activity. Based on the record as a whole, the court finds that §III of the proposed final judgment is fair, reasonable, and adequate for the class.

12. Section IV of the proposed final judgment requires TDCJ-ID to maintain its current disciplinary rules for prisoners, subject only to modification by the Board of Criminal Justice. That section also continues certain procedural guidelines, such as tape recording of prisoner disciplinary hearings, maintenance of a staff counsel substitute program, and assurance that prisoners confined to solitary will receive adequate rations of food. Director Collins testified that he can foresee no significant changes in the TDCJ-ID prisoner disciplinary system. As of April 1992, only three of the total of seventy-seven counsel substitute positions were vacant, and the record reflects that all of those vacancies were to be filled by June 1, 1992. Based on the record as a whole, the court finds that §IV of the

proposed final judgment is fair, reasonable, and adequate for the class.

13. Section V of the proposed final judgment replaces detailed court orders in the area of administrative segregation with only one abiding requirement: that each prisoner assigned to administrative segregation be housed in a single occupancy cell. Director Collins testified that TDCJ-ID officials do not intend to modify in any significant manner the present system for housing, securing, and providing services to administrative segregation prisoners; that that system is established in a series of internal policy directives. Deputy Director Scott testified about the development of TDCJ-ID policies and procedures relating to this population, including implementation of computer-based tracking of recreation and showering opportunities. Based on the record as a whole, the court finds that §V of the proposed final judgment is fair, reasonable, and adequate for the class.

14. At the hearing on the proposed final judgment, Director Collins described the development of the TDCJ-ID work health and safety program. He stated that since the program has become a model for other state agencies, and inasmuch as TDCJ-ID officials believe that safeguarding staff and prisoner workers is a key function of the proper operation of TDCJ-ID, he intends to continue the present program in place. Section VI of the proposed final judgment relieves defendants of all further obligations in this area. Nevertheless, the court finds that TDCJ-ID is likely

to continue its work health and safety program, or one equally appropriate. Accordingly, based on the record as a whole, the court finds that §VI of the proposed final judgment is fair, reasonable, and adequate for the class.

15. Section VII of the proposed final judgment requires TDCJ-ID to maintain, in perpetuity, written policies and procedures governing use of force and chemical agents. That section also establishes basic criteria for those policies and procedures and prohibits modification of them by any entity other than the Board of Criminal Justice. Director Collins testified that he foresees seeking no significant modifications to current policies and procedures, which prohibit excessive and unnecessary force, and provide guidelines for investigating prisoner allegations of abuse, as well as for disciplining staff found to have violated TDCJ-ID policies in this area. Deputy Director Scott described the development of the Internal Affairs department to investigate allegations of abuse, and the reduction in the number of allegations of serious brutality. He stated that the changes in the area of use of force have been beneficial both for staff and for prisoners, and opined that TDCJ-ID had replaced brutality with bureaucracy. Based on the record as a whole, the court finds that §VII of the proposed final judgment is fair, reasonable, and adequate for the class.

16. As is true with use of force, §VIII of the proposed final judgment requires defendants perpetually to maintain written policies and procedures affording prisoners access to

courts, lawyers, and public officials, policies that only the Board of Criminal Justice can alter. The record reflects that TDCJ-ID officials have institutionalized access to courts policies and procedures, and Director Collins testified that he anticipates no significant changes in this area. Based on the record as a whole, the court finds that §VIII of the proposed final judgment is fair, reasonable, and adequate for the class.

17. Section IX of the proposed final judgment relieves defendants of all extant orders in the area of maintenance of facilities. Director Collins testified about the development of a preventive maintenance program that involves all levels of staff, including correctional officers, who are required to observe maintenance concerns as part of their routine patrols in prisoner housing areas. The record reflects that TDCJ-ID has incorporated basic preventive maintenance practices into all relevant operations, and Director Collins testified with reference to the importance of preventive maintenance in fulfilling the obligations of TDCJ-ID officials to be good stewards of state property. He also testified that he foresees no significant changes in TDCJ-ID's approach to preventive maintenance. Based on the record as a whole, the court finds that §XI of the proposed final judgment is fair, reasonable, and adequate for the class.

18. Section X of the proposed final judgment provides detailed requirements for completing defendants' obligations in the area of major structural deficiencies. Defendants will be

relieved of their obligations to identify and repair major structural deficiencies only after the procedures established in this section of the proposed final judgment are completed to the satisfaction of experts retained by the Special Master. Based on the record as a whole, the court finds that §X of the proposed final judgment is fair, reasonable, and adequate for the class.

19. The effect of §XI of the proposed final judgment is to relieve defendants of their obligations under the §V of the Stipulation Modifying Crowding Provisions of Amended Decree ("Crowding Stipulation") to provide prisoners with adequate out-of-cell activities such as recreation and educational opportunities. The record reflects that defendants are in substantial compliance with §V of the Crowding Stipulation, and Director Collins testified that he intends to maintain and improve on that record of compliance. He described at length steps TDCJ-ID is now taking to expand out-of-cell opportunities for prisoners in response to the provisions of §XIII.C of the proposed final judgment. These changes are designed to ameliorate the effects of the additional crowding that the proposed final judgment permits in TDCJ-ID facilities. They include discontinuation of the use of dayrooms as staging areas for prisoner movement, creation of alternate day space in other locations in the prisons, expansion of recreation schedules, use of library and multipurpose space for a broader range of prisoner activities, modification of scheduling to optimize prisoners' access to out-of-cell opportunities, and changes in the

vocational education programming to make more positions available for students. Director Collins testified that these and other ideas intended to ameliorate the effects of increased density and crowding have been successful in pilot programs at certain units and will be applied with appropriate adaptations at the remaining units in the system. Based on the record as a whole, the court finds that §XI of the proposed final judgment is fair, reasonable, and adequate for the class.

20. Section XII of the proposed final judgment relieves defendants of all extant court orders in the area of visiting, but requires TDCJ-ID permanently to maintain a contact visiting program. Based on the record as a whole, the court finds that §XII of the proposed final judgment is fair, reasonable, and adequate for the class.

21. Section XIII of the proposed final judgment sets out the provisions on crowding and capacity that will replace the capacity provisions of the Crowding Stipulation. Plaintiff class counsel correctly describe this section as the heart of the proposed final judgment. In §XIII.A, the parties acknowledge the basic understandings and facts that each was aware of at the time the proposed final judgment was negotiated. In addition, the record reflects that the parties also had before them, and relied on, the following facts:

a. the system capacity as defined in the Crowding Stipulation has increased from 40,134 in September 1985, to 51,234 as of March 24, 1992;

b. on April 6, 1992, the total number of prisoners incarcerated in TDCJ-ID, excluding boot camps and the mental health facilities at the Skyview unit, was 48,343, which was 94.36% of system capacity;

c. in September 1985, the total number of prisoners in TDCJ-ID was 37,281, which was 92.89% of the system capacity;

d. the TDCJ-ID construction schedule presently calls for increases in the system operational capacity from 61,645 in fiscal year 1992, to 64,333 in fiscal year 1993, and to 77,213 in fiscal year 1995; in addition, by fiscal year 1995, 12,000 drug treatment beds will be available;

e. the county jail backlog had been 6,742 in August 1990, but by March 1992, the number of prisoners housed in county facilities who were ready to be transferred to TDCJ-ID was 14,223, and on May 1, 1992, the county jail backlog of TDCJ-ID-ready prisoners was 17,198;

f. the parties foresee that the county jail backlog will increase to 28,667 in fiscal year 1997, if TDCJ-ID maintains an average of 138 releases per day, which it averaged between September 1991 and April 1992;

g. if TDCJ-ID releases 150 prisoners per day, which is its goal, the parties foresee that the jail backlog in fiscal year 1998 will be 20,635;

h. admission pressure, which is the number of prisoners who would be admitted to TDCJ-ID if no capacity limitations existed, is anticipated to increase from 220 per day in fiscal year 1991 to 315 per day in fiscal year 1997;

i. the annual difference between admission pressure and actual prison admission is the admission shortfall, and that shortfall is expected to increase from 16,270 in fiscal year 1991 to 35,372 in fiscal year 1997;

j. although §XIII.B.1 of the proposed final judgment permits TDCJ-ID to increase the maximum population of its system by 2,300 prisoners, given the present and anticipated jail backlog and the present and anticipated admission pressure and admission shortfall, it is foreseeable that the increase in TDCJ-ID's population permitted by the proposed final judgment will have little effect in abating the demand for and shortage of prison beds;

k. arrests of adults on felony charges in Texas increased 10.2% between 1989 and 1990, and the

rate of felony convictions in Texas increased 57.9% between 1985 and 1991;

l. the parties anticipate that the present trend of a more rapid rate of release for property and first time offenders than offenders convicted of a violent crime and repeat offenders serving longer sentences, will continue, thereby resulting in a "hardened" prison population, and that an increasing number of prisoners who must serve one-third of their sentence prior to becoming eligible to earn good time will be incarcerated in TDCJ-ID;

m. the Texas Prison Management Act was implemented twelve times in 1987-1989, but has not been invoked since 1989;

n. on September 29, 1992, the United States District Court for the Southern District of Texas issued a Final Order in Alberti v. Sheriff of Harris County, Civil Action No. H-72-1094, which provides, inter alia, for a total capacity limit on the Harris County Jail of 9,800, and requires the population in the jail to be reduced to that level by March 31, 1993; that order further provides that the State Defendants in that case, who also are the defendants in the instant action, will be fined $50.00 per day for each

prisoner by which the Harris County Jail exceeds 9,800 beginning March 31, 1993;

o. as of April, 1992, TDCJ-ID had designated a total of 4,444 cells for single occupancy to meet the needs and demands for housing safekeeping prisoners, prisoners receiving mental health or mental retardation treatment or services, and prisoners assigned to administrative segregation, death row segregation, a treatment center, or a transient status.

22. Although TDCJ-ID is permitted to house 2,300 additional prisoners in specified existing facilities as a result of §XIII.B.1 of the proposed final judgment, it may not do so until it complies with the requirements of Exhibit B to the proposed final judgment by, among other things, adding additional beds in certain locations and converting some of the present administrative segregation units to general population housing.

23. As noted above in Finding of Fact 19, TDCJ-ID already is taking steps to meet its obligations under §XIII.C to devise methods to ameliorate the effects of the additional crowding permitted by §XIII.B.1. Director Collins testified to his intention to apply these changes to the entire system, as appropriate to each unit.

24. Section XIII.D of the proposed final judgment establishes the requirements and limitations that will apply to new TDCJ-ID facilities. Although these provisions afford TDCJ-ID

more discretion than the similar provisions of the Crowding Stipulation that they replace, §XIII.D contains numerous safeguards for the prisoner class, including a ban on tent housing except in certain limited circumstances, and requirements that designs for new construction be prepared by licensed architects, that the maximum unit design capacity be specified in advance, that the designs of new facilities promote sound classification and safety practices, and that new units incorporate adequate space for inter- and intra-unit classification flexibility.

25. In the court's view, adding 2,300 prisoners to already overcrowded prisons creates a significant risk that those prisons will relapse to unconstitutional conditions. Nevertheless, the court is convinced by the arguments of plaintiff class counsel that the imposition of immutable population limits in §XIII of the proposed final judgment is sufficiently valuable to the plaintiff class, given the admission pressure and jail backlog described above and the threat of the loss of **any** population limits as a result of the litigation of defendants' motion to vacate, to make §XIII of the proposed final judgment fair, reasonable, and adequate for the class. The parties clearly anticipate that the apparently insatiable demand for prison beds in Texas will overwhelm this relatively modest addition to capacity; yet plaintiffs and defendants have presented the court with a proposed final judgment that draws a bright line on existing prison capacity that the parties plainly intend to stand

as a bulwark against the ever-increasing pressures to force more prisoners into TDCJ-ID's existing facilities. The court agrees with plaintiff class counsel that this erection of a permanent barrier to unlimited prison population density renders the entire proposed final judgment palatable.

26. Although §XIV of the proposed final judgment relieves defendants of their prior obligations to the Gomez subclass, Deputy Director Scott testified at length on the current policies and procedures that ensure that monolingual Spanish-speaking prisoners will have translation service available to assist them in the grievance, discipline, access to courts, classification, and health care programs. Those services are provided primarily by volunteer staff, for whom translation for monolingual prisoners is a collateral duty. These volunteer staff are tested to ensure their language proficiency. Deputy Director Scott testified that TDCJ-ID has not experienced any shortages of volunteers for this program, and he anticipates none in the future. In disciplinary cases, the volunteer translator becomes the prisoner's substitute counsel. Grievance forms are now printed in Spanish, and a grievance written in Spanish is answered in Spanish. In connection with the access to courts program, a list of prisoner volunteers who are willing to assist prisoners with legal work too sensitive to involve a staff member has been compiled, and certain basic legal materials have been translated into Spanish and are available in the law library. Deputy Director Scott also testified that he foresees no

significant changes in the future in the provision of translation services to monolingual Spanish-speaking prisoners. Based on the record as a whole, the court finds that §XIV of the proposed final judgment is fair, reasonable, and adequate for the Gomez class.

27. Section XV of the proposed final judgment provides that the Order of Reference appointing the Special Master and describing his duties will be vacated when the plaintiff class counsel are relieved of their duties. Under §XVI.E, this will occur on June 1, 1993. Until that date, the Special Master will continue to assist the parties in resolving compliance issues, primarily by retaining expert consultants to monitor certain areas of compliance such as major structural deficiencies. Based on the record as a whole, the court finds that §XV of the proposed final judgment is fair, reasonable, and adequate for the class.

28. Section XVI establishes the procedures the parties will follow in connection with monitoring by plaintiff class counsel of remaining compliance issues until they are relieved of their class representation obligations on June 1, 1993. Based on the record as a whole, the court finds that §XVI of the proposed final judgment is fair, reasonable, and adequate for the class.

29. Section XVII details defendants' future monitoring and enforcement obligations. It requires TDCJ-ID to employ sufficient monitoring staff effectively to audit and enforce "all TDCJ-ID rules, regulations, policies and practices" related to every area

addressed by the proposed final judgment. In their memoranda, plaintiff class counsel repeatedly and correctly point to this obligation as a critical element of the proposed final judgment, one that in large measure makes the proposed final judgment fair and reasonable as a whole.

30. Section XVIII of the proposed final judgment provides that all extant orders in the area of programs for mentally retarded prisoners will be vacated upon court approval of the proposed final judgment. The record reflects that TDCJ-ID has established a well-functioning system to provide services to these prisoners, one that is an integral part of TDCJ-ID's overall operations. Director Collins testified that the only change he foresees in this program is the establishment of a separate and dedicated unit for the program in Rusk, Texas, a move supported by plaintiff class counsel. Based on the record as a whole, the court finds that §XVIII of the proposed final judgment is fair, reasonable, and adequate for the class.

31. Section XIX of the proposed final judgment relating to health care contains two key elements. First, §XIX.B sets out certain tasks on which defendants will be focusing between now and June 1, 1993, including development of a patient liaison program to serve as an internal monitoring mechanism in this area. Second, §XIX.D establishes as a baseline of safeguards for the plaintiff class five continuing obligations imposed on TDCJ-ID. In addition, as with other areas covered in the proposed final judgment, under §XVII defendants must maintain an adequate

number of monitoring staff to ensure compliance with their own rules and regulations, including policies, procedures, and protocols in the health care area. Based on the record as a whole, the court finds that §XIX of the proposed final judgment is fair, reasonable, and adequate for the class.

32. The record concerning psychiatric services afforded to prisoners, which is the topic of §XX of the proposed final judgment, is less complete than any other aspect of this case. It appears that significant monitoring remains to be accomplished between now and June 1, 1993, and in their supplemental memorandum plaintiff class counsel pledge themselves to pursue aggressively that oversight function. In addition, §XX.D provides that all of the measures set out in §XIX.D are equally applicable to psychiatric services, and further provides that TDCJ-ID will engage the consulting services of one or more board certified psychiatrists for a period of two years. Based on the record as a whole, the court finds that §XX of the proposed final judgment is fair, reasonable, and adequate for the class.

33. Section XXI relieves defendants of most orders concerning prisoners sentenced to death, but it requires TDCJ-ID to maintain, in perpetuity, a work program for eligible prisoners and an activity program for death row segregation prisoners. Director Collins testified about the trepidation with which TDCJ-ID established the work program on death row, and about the positive effects the program has had and the degree to which it has satisfied its most ardent skeptics within the agency. His

testimony that the program is now a model for the country, and that he could not conceive of eliminating such a successful effort, was compelling and convincing. In addition, §XXI requires TDCJ-ID to maintain certain policies with respect to the housing of death sentenced prisoners. Based on the record as a whole, the court finds that §XXI of the proposed final judgment is fair, reasonable, and adequate for the class.

34. Finally, §XXII of the proposed final judgment provides that the proposed final judgment will be enforceable in this court.

35. The senior leadership of TDCJ-ID -- the Chairman of the Board of Criminal Justice, and the Director and Deputy Director of the Institutional Division -- testified at the hearing. Each testified that he supported the proposed final judgment, that he saw no barrier to its full implementation, and that he believed that the proposed final judgment is in the best interests of the agency and the state. Carol Vance, the Chairman of the Board of Criminal Justice, testified that the entire board supports and approves of the proposed final judgment. Chairman Vance also testified that he has no doubts about the ability of the agency to comply with the terms of the proposed final judgment. Finally, Director Collins testified convincingly that this case has provided TDCJ-ID with a "road map" to achieve progress as a professionally operated, safe, and secure prison system, and that he foresees no going back to former unconstitutional practices.

He stated that he has no intent to attempt to "rearrange the world" of TDCJ-ID as it has evolved as a result of Ruiz.

CONCLUSIONS OF LAW

1. A court may not approve a settlement of a class action unless the proposed settlement is fair, reasonable, and adequate for the class members. In Re Corrugated Container Antitrust Litigation, 643 F.2d 195 (5th Cir. 1981), cert. denied, 456 U.S. 998 (1982); Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977).

2. A strong judicial policy favors resolution of disputes through settlement. United States v. City of Miami, 614 F.2d 1322 (5th Cir. 1980), aff'd in relevant part, 664 F.2d 435 (5th Cir. 1981).

3. In evaluating the proposed settlement, the court does not adjudicate the dispute:

> [i]n examining a proposed compromise ... the court does not try the case. The very purpose of the compromise is to avoid the delay and expense of such a trial.

Parker v. Anderson, 667 F.2d 1204, 1209 (5th Cir.), cert. denied, 459 U.S. 828 (1982) (quoting Young v. Katz, 447 F.2d 431, 433 (5th Cir. 1971)).

4. The court must approve or reject the proposed settlement; it may not modify it and require the parties to accept a settlement to which they did not agree. Evans v. Jeff D., 475 U.S. 717 (1986).

5. In evaluating a settlement proposal, the following six factors must be considered:

a. whether the settlement was the product of fraud or collusion;

b. the complexity, expense, and likely duration of the litigation;

c. the stage of the proceedings and the discovery completed;

d. the factual and legal obstacles plaintiffs face in prevailing on the merits;

e. the possible range of recovery and the certainty of damages; and

f. the recommendations of the participants, including class counsel and the absent class members.

Parker v. Anderson, 667 F.2d 1204. See also Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

6. The record is devoid of evidence that the proposed final judgment is the product of fraud or collusion. On the contrary, the record reflects that the proposed final judgment is the result of two years of spirited, arms-length negotiations that were interspersed with motions, discovery, and other evident indicia of the parties' preparation for protracted litigation over defendants' motion to vacate. Furthermore, the parties have disclosed to the court an ongoing dispute concerning payment to plaintiff class counsel of attorney fees (See Hearing Exhibit 38), a dispute that survives the proposed final judgment. The parties have assured the court, and the court accepts, that negotiation of the proposed final judgment was not affected by this dispute over plaintiff class counsel's fees. Indeed, the fact that the dispute was not resolved during those negotiations is evidence that the proposed final judgment is not collusive.

Based on the record as a whole, the court concludes as a matter of law that the proposed final judgment is not the product of fraud or collusion.

7. The trial of this case consumed 159 days. Ruiz v. Estelle, 503 F. Supp. 1265, 1275-76 (S.D. Tex. 1980), aff'd in relevant part, 679 F.2d 1115 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983). Although it is unlikely that the potential hearing on defendants' motion to terminate the court's jurisdiction would have been that lengthy, an evidentiary hearing on defendants' motion undoubtedly would have been time-consuming, complex, difficult, and expensive for all concerned. The court concludes that the second factor set out in Parker weighs heavily in favor of approval of the proposed final judgment.

8. Given the unusual nature of institutional reform litigation, the third factor taken from Parker is less relevant to this proposed final judgment. Unlike the typical case in which the proposed settlement may be presented to the court at a fairly early stage of the litigation, so that approval of the settlement would avoid protracted and expensive discovery, this proposed final judgment is a "winding up" of over twenty years of litigation. Although the amount of discovery completed or left to be taken is not particularly relevant here, this case is at a point at which a comprehensive final order is both logical and appropriate. Thus, the court concludes that application of this third factor also supports approval of the parties' proposed settlement.

9. Assuming the absence of fraud or collusion, the probability of success for the plaintiff class on the merits is the most important factor to consider in evaluating a proposed settlement. Parker, 667 F.2d at 1209. Defendants sought complete vacation of all extant orders in this case. In their memoranda summarizing the objections filed by class members, plaintiff class counsel frequently refer to the risk they faced in litigating defendants' motion that important safeguards for the prisoners, such as absolute limits on the population of existing TDCJ-ID facilities and restrictions on the design and capacity of future TDCJ-ID facilities, could be lost. The court is mindful of the admonition that it is not to try the case during the process of evaluating the proposed final judgment, and it is unwilling to predict the outcome of litigation on defendants' motion. The court acknowledges, however, that the substitution of a "flexible" standard for modification of consent decrees for the "grievous wrong" standard previously employed presented plaintiffs in this case with a formidable, albeit not insurmountable, task. Compare Rufo v. Inmates of Suffolk County Jail, 112 S.Ct. 748 (1992) with United States v. Swift & Co., 286 U.S. 106 (1932). The court, however, need not decide that plaintiffs would or would not have prevailed in their opposition to defendants' motion to conclude, as a matter of law, that plaintiffs faced sufficient obstacles and risks in the litigation of defendants' motion to make settlement in the best interests of the class.

10. The fifth factor to be used in evaluating a proposed settlement, the possible range of recovery and the certainty of damages, is less relevant to this action than it is to class actions that seek monetary relief. The analysis actually is the reverse of that employed in a typical case, since plaintiffs in this case were seeking to preserve an extant decree rather than obtain new or additional relief. For the reasons set out in Conclusion of Law Nine above, the court concludes that its assessment of plaintiffs' risk of possibly losing the gains they previously had achieved also weighs in favor of approval of the proposed final judgment.

11. Finally, with respect to the six Parker factors, counsel for plaintiffs and defendants support the proposed final judgment and urge its approval. It is entirely appropriate for the court to look to the opinions of experienced trial counsel in evaluating a proposed settlement. Pettway, 576 F.2d at 1215; Anderson v. Torrington Co., 755 F. Supp. 834, 846 (N.D. Ind. 1991). Although prisoners filed numerous objections to the proposed final judgment, the presence of even vociferous objections to a proposed settlement does not require rejection of that settlement. Bennett v. Behring Corp., 737 F.2d 982 (11th Cir. 1984). For example, the court of appeals affirmed the approval of the settlement in Parker, 677 F.2d 1204, despite the strenuous objections of a group that was so well organized and vocal that it had been denominated by the district court as a subclass with separate counsel. Furthermore, the court is

satisfied with the summaries of the prisoners' objections filed by plaintiff class counsel, and counsel's explanations and reasoning for supporting the proposed final judgment despite those objections. The court concludes that the application of the sixth factor from Parker also weighs in favor of approval of the proposed final judgment.

12. Despite the court's invitation in its March 6, 1990, order to establish a timetable for termination of the court's jurisdiction, the parties have chosen instead to relieve defendants from prospective orders in selected areas and to retain court-imposed obligations in other areas. For example, defendants are relieved of both extant orders and future legal obligations with respect to classification, but the proposed final judgment imposes permanent obligations on defendants in connection with use of force and chemical agents. Furthermore, §XXII makes the entire proposed final judgment enforceable in this court. The parties' approach of releasing only certain facets of the litigation from jurisdiction is consistent with the approach suggested in Freeman v. Pitts, 112 S.Ct. 1430 (1992). Accordingly, this court retains jurisdiction over this matter with respect to all areas of the case not specifically removed from its jurisdiction by the proposed final judgment. "The decision of a court to relinquish supervisory control over one or more facets of the school system is not tantamount to an abandonment of jurisdiction." Brown v. Board of Educ. of Topeka, 1992 WL 308613 (10th Cir., October 27, 1992).

13. In taking the approach they have, the parties implicitly recognize that the mere passage of time by itself is not sufficient to permit a court to assume that constitutional infirmities have been remedied. Indeed, "[t]he Constitution does not permit the courts to ignore today's reality because it is temporally distant from the initial finding that the school system was operated in violation of the constitutional rights of its students. Temporal distance matters only to the extent that changes across the time period, unconnected to the de jure system's lingering effects, are responsible for what is observable today." Brown, 1992 WL 308613. In the context of this prison case, the parties acknowledge that the passage of twenty years since the first pro se complaint was filed, and indeed the remarkable progress TDCJ-ID has made in many areas that were the subject of this court's orders, are insufficient by themselves to ensure that the prisoners' constitutional rights will be safeguarded into the future. Thus, in key areas such as population limits, restrictions on new facilities, use of force, access to courts, and staffing, the parties have erected permanent edifices for the protection of the prisoners' rights.

14. Courts can and should in appropriate circumstances approve settlements that obligate defendants to take actions not otherwise required under applicable constitutional precedents. Local 93, International Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). That the parties in this case have chosen to include such obligations in the proposed final

judgment is further evidence that approval of the proposed final judgment is in the best interests of the class. For example, in Block v. Rutherford, 469 U.S. 576 (1984), the Court held that prison officials are not constitutionally required to maintain contact visiting programs. Section XII of the proposed final judgment, however, requires TDCJ-ID to maintain a contact visiting program in perpetuity.

15. It is evident to the court that both in fashioning the proposed final judgment, and in marshalling the evidence presented to the court in support of it, the parties were aware of the evolving jurisprudence concerning consent decrees in institutional reform litigation. Rufo v. Inmates of The Suffolk County Jail, 112 S.Ct. 748 (1992); Freeman v. Pitts, 112 S.Ct. 1430 (1992). The parties have gone to great lengths in the proposed final judgment (e.g., §XIII.A), and in the process of seeking the court's approval of it, to delineate and acknowledge their understanding of the present and future interplay of Texas' criminal justice system, political institutions, and correctional policies. The court concludes that the parties intended to avoid not only litigation at this time on defendants' motion but also future litigation that might seek elimination of population caps based, inter alia, on increases in demands for prison capacity or in the backlog of prisoners in county jails who are awaiting transfer to TDCJ-ID. See, e.g., Rufo, 112 S.Ct. 748; Ruiz v. Lynaugh, 811 F.2d 856, 862-63 (5th Cir. 1987).

16. Based on the record as a whole, the court concludes that, as a matter of law, the proposed final judgment is fair and reasonable to the plaintiff class, and that its approval is in the best interests of the class.

CONCLUSION

The order that the court enters today is an historic event marking the end of one phase of this case. Over twenty years ago, a handful of brave prisoners set in motion a process that even defendants' highest officials acknowledge has improved all aspects of TDCJ-ID. TDCJ-ID has remade itself into a professionally operated agency whose goals are to achieve the highest standards of correctional excellence.

Equally important, the measures taken by TDCJ-ID officials to meet their constitutional obligations have been memorialized and institutionalized in numerous internal rules and regulations that have replaced this court's orders as the agency's "road map" to success. The court is satisfied that the defendants not only will maintain and implement these rules and regulations, but also will continue to strive to improve on them and their implementation despite the absence in many areas of detailed court orders.

The parties have caused remarkable and palpable changes to occur within TDCJ-ID, and for that the court is grateful. Furthermore, through their careful and thoughtful work in developing the proposed final judgment, and in their creation of a record permitting the court to be fully informed on all

relevant matters as it evaluates the proposed final judgment, the parties have established a sound and secure basis to prevent "Ruiz II." The court joins the parties in the fervent hope that the order entered today is truly the end of this litigation, and that the court's retention of jurisdiction and enforcement powers will never be invoked.

Accordingly, the court being fully advised in the premises and for good cause shown, the proposed final judgment submitted by the parties in this cause is and shall be approved in accordance with a separate order issued concurrently with this opinion.

Signed this 16th day of December, 1992.

William Wayne Justice
United States District Judge
Eastern District of Texas
Judge Presiding