

jurisdiction in nine substantive areas and continuing permanent injunctive orders on eight substantive issues.

Defendants' motion seeks relief from all aspects of the Final Judgment. In doing so, it expressly puts in issue not only the eight substantive areas as to which the Final Judgment entered permanent injunctions but also the constitutionality of the entire operation of the Texas prison system.

In Plyler v. Evatt, 902 F.2d 273 (4th Cir. 1990), the United States Court of Appeals for the Fourth Circuit closely examined the nature of a post-judgment modification motion. The plaintiff class had obtained the remedy it sought in a consent decree with the South Carolina Department of Corrections. The decree included a prohibition on double celling in cells smaller than 100 square feet. The department subsequently moved to modify the decree to permit double celling in five new facilities.

The Fourth Circuit in Plyler focused on the finding by the district court that the issues in the original Plyler case were so inextricably intermingled with the claims and issues in the subsequent modification motion that it was essentially the same case. The Fourth Circuit agreed with the district court that the claims and issues raised by the motion, which sought to modify the decree to remove a key element of injunctive relief, were inextricably intermingled with the claims and issues raised in the original litigation that resulted in the decree. It noted that "in holding that the modification should be allowed, we found it necessary to review and evaluate the full range of related reforms

that were the objects of the original suit and were finally implemented by the terms of the consent decree." Plyler v. Evatt, *supra*, 902 F.2d at 281.

Defendants' present motion to vacate the Final Judgment is inextricably intermingled with both the underlying history of this litigation and the remedies that the plaintiff class obtained in the litigation, as embodied in the Final Judgment. Accordingly, plaintiffs may be forced to litigate to preserve the relief previously obtained and reduced to Final Judgment.

Just as appointment of class counsel was necessary to ensure that the plaintiff class was adequately represented throughout this litigation, which to date had been resolved by entry of the Final Judgment, appointment of class counsel is necessary now to ensure that the plaintiff class will be adequately represented in the response to defendants' pending motion to vacate the Final Judgment.

Moreover, the court notes that by its terms § XVI.E of the Final Judgment contemplates representation of the plaintiff class by counsel if a motion is pending. Although defendants' motion to vacate was filed after the final date on which the court believed that all outstanding matters would be resolved, June 1, 1993, defendants' motion plainly is the type of pending motion that the Final Judgment acknowledges requires representation by plaintiff class counsel.

The court has been informed that Donna Brorby, who was lead counsel for the plaintiff class when the Final Judgment was


entered, will accept appointment again as lead counsel for the plaintiff class for the purpose of responding to the pending motion to vacate. Ms. Brorby is a highly experienced and competent attorney who demonstrated throughout the litigation of this matter both her integrity and her zealous representation of the plaintiff class. Ms. Brorby may associate additional counsel as necessary to meet her obligations to the class.

The court being fully advised in the premises and for good cause shown, it is

ORDERED that Donna Brorby shall be, and is hereby, **APPOINTED** as lead counsel to represent the plaintiff class in this cause for the purpose of responding to the pending motion to vacate. It is further

ORDERED that Ms. Brorby and lead counsel for the defendants shall meet and confer within forty-five days from the entry of this order and attempt to (1) narrow the issues in dispute, (2) establish a joint discovery plan, (3) discuss what role, if any, the Special Master in this cause could play in the efficient development of a factual record, and (4) propose to the court an agreed-upon schedule for a hearing on defendants' motion. Within sixty days of the entry of this order the parties shall report to the court on the results of this meeting.

SIGNED this 29th day of May, 1996


William Wayne Justice
United States District Judge