



No. 96-2548

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EVERETT HADIX, et al.,

Plaintiffs-Appellees

v.

PERRY JOHNSON, et al.,

Defendants-Appellants

and

UNITED STATES OF AMERICA,

Intervenor

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES
AS INTERVENOR

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STATEMENT REGARDING ORAL ARGUMENT

For the reasons stated in Argument I of this brief, this Court does not have jurisdiction over this appeal, and it should, therefore, be dismissed. If this Court disagrees with our jurisdictional argument, oral argument may be useful in light of the fact that the State's appeal presents issues of first impression concerning the proper interpretation of the Prison Litigation Reform Act, codified at 18 U.S.C.A. 3626.

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BRIEF FOR THE UNITED STATES
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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This suit was brought by plaintiffs-appellees, inmates of the State Prison of Southern Michigan, pursuant to 42 U.S.C. 1983, concerning the constitutionality of the conditions of their confinement. The district court's jurisdiction was based upon 28 U.S.C. 1343.

State officials (hereinafter the State) filed a motion for immediate termination of the Consent Decree, pursuant to 18 U.S.C.A. 3626(b)(2) of the Prison Litigation Reform Act (PLRA). In the November 18, 1996, order from which this appeal was taken,

the district court (1) reserved a final determination on the State's motion, including the question whether the immediate termination provision is constitutional, pending this Court's decision on the constitutionality of the automatic stay provision of the PLRA, 18 U.S.C.A. 3626(e)(2) in three pending appeals (Nos. 96-1907, 1908, and 1943); (2) identified twenty provisions of the Consent Decree that are appropriate for termination if the immediate termination provision of the PLRA is constitutional; (3) found current constitutional violations with respect to six aspects of medical care covered by the Consent Decree; and (4) found noncompliance with two provisions of the Consent Decree that do not involve a constitutional violation.

The order involved in this appeal is not a final order appealable under 28 U.S.C. 1291, nor is it among the types of interlocutory orders made appealable by 28 U.S.C. 1292(a)(1). Accordingly, this appeal should be dismissed.

STATEMENT OF THE ISSUES¹

1. Whether the order of the district court is appealable.
2. Assuming this Court has jurisdiction, whether the immediate termination provisions of the PLRA, 18 U.S.C.A.

¹ The State also seeks review of the district court's finding that it is in violation of the Eighth Amendment to the U.S. Constitution as to six areas of medical health care. As argued in Part I of this Brief, this Court does not have jurisdiction to review those findings in this appeal. In any event, the United States has intervened in this case solely to address the constitutionality of the PLRA and issues of interpretation that bear on its constitutionality; our participation on the merits of this case is only as amicus. Accordingly, we do not address here the correctness of the district court's findings on those issues.

3626(b)(2) and (b)(3), permit the district court to receive evidence about current conditions to determine whether any existing prospective relief "remains necessary to correct a current or ongoing violation of the Federal right" and is narrowly tailored within the meaning of 18 U.S.C.A. 3626(b)(3).

STANDARD OF REVIEW

If this Court has jurisdiction over this appeal, questions of interpretation of the PLRA involve solely legal issues, which are subject to de novo review. Long v. Norris, 929 F.2d 1111, 1114 (6th Cir.), cert. denied, 502 U.S. 863 (1991).

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Below

1. Prior history

In 1980, prisoners confined at the State Prison of Southern Michigan (SPSM) filed suit against various state officials of the Michigan Department of Corrections pursuant to 42 U.S.C. 1983, alleging that the conditions of their confinement violated the Constitution of the United States and state law. See Hadix v. Johnson, 694 F. Supp. 259, 262 (E.D. Mich. 1988). In 1985, the district court approved a Consent Decree designed to address those claims (E.D. R. 199: Consent Decree; E.D. R. 208: Opinion).^{2/}

In 1992, the portions of the Decree involving medical and

^{2/} "E.D. R. ____" refers to docket entries in Hadix v. Johnson, No. 80-CV-73581 (E.D. Mich.) (Feikens, J.). "R ____" refers to docket entries in Hadix v. Johnson, No. 92-CV-110 (W.D. Mich.) (Enslen, J.).

mental health care were transferred to the United States District Court for the Western District of Michigan (Judge Enslen). Hadix v. Johnson, 792 F. Supp. 527, 528-529 (E.D. Mich. 1992).^{3/}

2. Passage of the Prison Litigation Reform Act.

On April 26, 1996, the President signed into law the Prison Litigation Reform Act. Section 802 of the Act, which consists of amendments to 18 U.S.C.A. 3626, establishes standards for the entry and termination of prospective relief in civil actions concerning conditions in prisons, jails, and juvenile detention facilities.^{4/} With regard to the entry of such relief, Section 3626(a)(1)(A) provides:

Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.^{5/}

Termination of relief is governed by several sections of the

^{3/} Jurisdiction of the part of the case concerning access to courts was likewise transferred to the Western District. Knop v. Johnson, 977 F.2d 996, 1014 (6th Cir. 1992), cert. denied, 507 U.S. 973 (1993); see Hadix v. Johnson, 933 F. Supp. 1360 (E.D. Mich. 1996).

^{4/} The Act does not apply to habeas corpus proceedings challenging "the fact or duration of confinement in prison." 18 U.S.C.A. 3626(g)(2).

^{5/} Section 3626(a)(2) provides that preliminary injunctive relief entered under the Act "shall automatically expire" 90 days after its entry if the court fails to make the required findings

Act. In general, defendants are entitled to request the termination of prospective relief according to a time schedule set out in Section 3626(b)(1)(A), which provides:

In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener --

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

Section 3626(b)(2), however, provides for the immediate termination of relief that was entered without the findings required by Section 3626(a)(1):

In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

When termination is sought under either Section (b)(1) or (b)(2), the standard applicable to the termination decision is set out in Section 3626(b)(3), which provides that relief shall not terminate

if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

Procedures for motions to terminate prospective relief are

set out in Section 3626(e):

(1) Generally. -- The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions.

(2) Automatic Stay. -- Any prospective relief subject to a pending motion shall be automatically stayed during the period --

(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b);
[and]

* * * * *

(B) ending on the date the court enters a final order ruling on the motion.

For the purposes of all of these provisions, prospective relief includes injunctive relief ordered under a consent decree. See 18 U.S.C.A. 3626(g)(7), (g)(9).

The Act contains a provision concerning retroactivity, stating that "IN GENERAL" Section 3626 "shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title." Pub. L. No. 104-134, § 802(b)(1), 110 Stat. 1321-70 (1996). Finally, the Act contains a severability provision that preserves the remainder of its provisions in the event that any portion is held to be unconstitutional. Pub. L. No. 104-134, § 810, 110 Stat. 1321-77 (1996).

Taken together, the PLRA's provisions reflect Congress's concern that relief in prison reform cases be narrowly tailored to address violations of federal rights. See H.R. Rep. No. 21, 104th Cong., 1st Sess. 24 n.2 (1995)(subsection (a)(1)) (hereinafter H.R. Rep.); H.R. Rep. at 26 (subsection (b)(2)). As applicable to relief entered after the PLRA's effective date, the

Act is designed to establish a uniform remedial structure, and to provide for periodic review of decrees to determine whether they remain necessary to remedy violations of federal rights. As applicable to decrees entered before the PLRA's passage, the Act seeks to ensure that continuing relief satisfies the new requirements of the PLRA.

3. Motions under the PLRA.

On June 10, 1996, the defendants filed motions pursuant to Section 802(b)(2) of the PLRA, 18 U.S.C.A. 3626(b)(2), in both district courts having jurisdiction over the Hadix Consent Decree, for immediate termination of the Decree and subsequent orders granting prospective relief (R. 715: Motion; E.D. R. 1068: Motion). The defendants asserted in their motions that, by operation of Section 802(e)(2) of the PLRA, 18 U.S.C.A. 3626(e)(2), all prospective relief in the Decree would be stayed automatically beginning on the 30th day after the filing of the motion for immediate termination and ending on the date "the court enters a final order ruling on the motion." (R. 715: Motion; Brief in Support of Defendant's Motion at 9; E.D. R. 1068: Motion; Brief in Support of Defendant's Motion at 9-10).^{5'}

In addition, at the time the PLRA was passed, two appeals were pending in this Court from earlier orders of the district

^{5'} On September 6, 1996, the court granted the motion of the United States to intervene in this case, pursuant to 28 U.S.C. 2403, in order to address the constitutionality of the PLRA (R. 795: Order).

court (Nos. 94-2008, 96-1422). The State filed motions in this Court for immediate termination of the relief granted in those orders. On July 2, 1996, this Court denied the State's motions for immediate termination and remanded the appealed orders to the district court for "reconsideration in light of the recent amendments to 18 U.S.C. § 3626" (R. 746: Order at 2).

On July 3, 1996, the district court issued a decision in which it stated that there was "no possible way" that it could decide the motions to terminate before the automatic stay provision would take effect, given the "complexity of the issues presented" and the need for thorough briefing. Hadix v. Johnson, 933 F. Supp. 1362, 1364 (W.D. Mich. 1996). It held, therefore, that the automatic stay provision of the PLRA "usurped a role that is exclusively judicial," in violation of the doctrine of separation of powers. 933 F. Supp. at 1366. The court also held that the automatic stay provision violates the Due Process Clause of the Fifth Amendment by abrogating plaintiffs' vested property right in the Consent Decree without an opportunity for hearing. 933 F. Supp. at 1366-1369. Accordingly, it ruled that the automatic stay would not take effect pending its decision on the motion for immediate termination. 933 F. Supp. at 1369-1370.

The defendants appealed the district court's order (R. 749: Notice of Appeal). They also filed an emergency motion in this Court for a stay of proceedings in the district court, to the extent that the court proposed to hold evidentiary hearings on the motion for immediate termination. Specifically, the motion

sought a stay of the hearings scheduled for September 5-6, 1997, on delivery of medical health care at SPSM. They also sought a writ of mandamus to require the district court to rely solely on the existing record in ruling on the motion for immediate termination, or, alternatively, to have this Court rule on the motion for immediate termination directly. On September 4, 1996, this Court denied the motion for stay of the September 5-6 hearings (R. 799: Order at 2). On September 17, 1996, this Court denied the motion for a writ of mandamus, as well as a stay of further proceedings, and expedited the appeal of the July 3, 1996, order (R. 803: Order).^{2/} Oral argument in that appeal was held on February 4, 1997, and the case is under submission.

4. The Decision Below.

On December 13, 1995, prior to the passage of the PLRA, the district court had issued an Order and Opinion establishing a schedule leading to compliance hearings concerning the medical provisions of the Decree (R. 604: Opinion; R. 605: Order) ¹

^{2/} On October 1, 1996, this Court consolidated, for purposes of submission, the appeal from Judge Enslen's July 3, order, with an appeal of a similar order issued on July 5, 1996, by the district court for the Eastern District of Michigan (Judge Feikens) in the portion of the Hadix litigation over which it has jurisdiction, Hadix v. Johnson, 933 F. Supp. 1360 (appeal No. 96-1943), and with the appeal of Judge Enslen's July 3, 1996, order in United States v. Michigan (appeal No. 96-1907).

^{1/} The court also denied the motion of the Hadix plaintiffs and the United States to consolidate the compliance hearings in Hadix with those on medical care in United States v. Michigan (R. 679: Opinion at 3-4). In addition, it granted the United States' motion for continuation of its status as amicus in this case, but limited its participation in the compliance hearings to submission of briefs and presentation of oral argument (R. 679: Opinion at 6).

Those hearings were held on September 5-6, 1996 (R. 833: Tr. 9/5/96; R. 834: Tr. 9/6/96).

On November 18, 1996, the district court entered the order and opinion that are the subject of this appeal, making a preliminary ruling on the compliance issues addressed in the September hearings. The court decided certain issues raised by the defendant's motion for immediate termination of the Consent Decree but left two issues to be decided in the future. First, the order reserved a final determination on the State's motion for immediate termination pending this Court's decision on the constitutionality of the automatic stay provision (R. 823: Order at 2). The district court stated that it "remains of the opinion" it entered when holding the automatic stay provision unconstitutional, i.e., "that the Consent Decree constitutes a final judgment, and by requiring the Court to alter that judgment pursuant to new standards, the PLRA impermissibly invades upon the province of the judiciary" in violation of separation of powers principles (R. 822: Opinion at 7). The court stated that this Court's decision in the automatic stay appeals "will determine how the [immediate termination] motion will ultimately be decided," because if this Court "decides that the Consent Decree is a final judgment, it necessarily follows that the provisions of the PLRA that attempt to alter the Decree are unconstitutional" (R. 822: Opinion at 7-8). However, if this Court "decides that Congress does have the power to alter the Consent Decree," the district court "will apply the PLRA

standards to the Decree, and terminate those provisions that do not meet the requirements of § [3626] (b) (3)" (R. 822: Opinion at 8). Accordingly, the district court declined to rule on the issue, preferring to wait for the guidance soon to be provided by this Court.

The other still unresolved issue is what kind of prospective relief should remain in effect in this case. The court recognized that "Section 3626(b)(3) specifically provides that where there is a current violation of a Federal right, the court shall not terminate the prospective relief, provided that the specific relief is narrowly tailored" (R. 822: Opinion at 9).

The district court's order dealt mainly with the first findings required under Section 3626(b)(3) in order to retain prospective relief, i.e., whether there is a current or ongoing violation of a constitutional or federal statutory right that requires a remedy. With one exception, however, the issue whether the prospective relief in the Decree is narrowly tailored, as required by the PLRA, remains to be decided.

In particular, based upon the evidence presented at the hearing, the court identified twenty provisions of the Consent Decree over which it concluded that it "no longer need retain supervision" (R. 823: Order at 2-3; R. 822: Opinion at 8). The court stated that, although it could not actually terminate those provisions, they will "maintain the status of 'appropriate for termination' until all of the requirements of the Decree are fulfilled, unless * * * conditions revert to a state of serious

violations" (R. 822: Opinion at 8).^{2/} However, if the immediate termination provision of the PLRA is determined to be constitutional, the court will terminate those provisions (R. 822: Opinion at 8). In addition, the court found noncompliance with two provisions of the Consent Decree that do not involve constitutional violations (R. 823: Order at 3). Finally, the court found current constitutional violations with respect to six aspects of medical care covered by the Consent Decree (R. 823: Order at 3). As to one of those areas, i.e., the Sick Call Access Plan (Section II.A.4.a. of the Decree, E.D. R. 199: Consent Decree at 9), the court also found that the relief provided in its order of July 25, 1994, "is necessary to correct the current violation, and is narrowly drawn and not intrusive" (R. 822: Opinion at 24).

C. Facts

On September 18, 1980, prisoners incarcerated at the State Prison of Southern Michigan-Central Complex (SPSM) filed suit against various state officials charged with the operation of SPSM, pursuant to 42 U.S.C. 1983. Hadix, 694 F. Supp. at 262. They asserted that the conditions of confinement at SPSM violated their rights under the First, Eighth, Ninth, and Fourteenth Amendments to the Constitution (E.D. R. 199: Consent Decree at

^{2/} The court did not actually terminate any provision of the Decree because the Decree does not permit piecemeal termination of its provisions (R. 822: Opinion at 8). See E.D. R. 199: Consent Decree at 33 ("After Defendants have complied with all of the provisions of this Consent Judgment, Defendants may apply to terminate the jurisdiction of the Court.").

1). On May 13, 1985, the district court approved a consent decree designed "to assure the constitutionality of the conditions under which prisoners are incarcerated" at SPSM (E.D. R. 199: Consent Decree at 1). The Decree addressed sanitation, safety, and health; health care; fire safety; overcrowding and protection from harm; use of volunteers; access to courts; food service; management; operations; inmate mail; compliance; and inspection procedures (E.D. R. 199: Consent Decree). In addition, it provided that the areas of classification and Due Process, and two issues concerning access to courts would be submitted to the court for a hearing on the merits (E.D. R. 199: Consent Decree at 1-2).¹⁰

The portions of the Decree addressing medical and mental health care were transferred to the Western District of Michigan. Hadix v. Johnson, 792 F. Supp. 527, 528-529 (E.D. Mich. 1992). Over the years, the district court has entered numerous orders concerning the medical health care issues of the Decree.

¹⁰/ On July 1, 1988, the district court issued a decision finding that SPSM's library, legal assistance, and grievance programs failed to provide meaningful access to the courts as required by Constitution. Hadix, 694 F. Supp. at 291-292. An appeal from that judgment was consolidated with an appeal of an order issued by Judge Enslen in Knop v. Johnson, 685 F. Supp. 636 (W.D. Mich. 1988). This Court affirmed in part and reversed in part, vacated the entire remedial order in Hadix and remanded the access to courts issue to the United States District Court for the Western District of Michigan. Knop v. Johnson, 977 F.2d 996 (6th Cir. 1992), cert. denied, 507 U.S. 973 (1993).

The classification issue was referred by stipulation for resolution in United States v. Michigan.

SUMMARY OF ARGUMENT

The order involved in this appeal reserves a ruling on the constitutionality of the PLRA and, in the interim, resolves only some of the issues relevant to a final ruling on the State's PLRA motion for termination of the relief in the Consent Decree. It makes findings that current or ongoing constitutional violations exist with respect to the State's provision of medical care to SPSM inmates, but leaves for later determination whether the prospective relief in the Decree should be retained in its present form or modified in accordance with the PLRA's remedial standards. Because it disposes of less than all of the issues necessary to a decision on the State's motion, the court's order is not appealable. See Transportation Cybernetics, Inc. v. Forest Transit Comm'n, 950 F.2d 350, 352 (7th Cir. 1992). Specifically, it is not appealable under 28 U.S.C. 1292(a)(1) because the court has not refused to dissolve the injunctive relief in the Decree. It has merely taken some initial steps along the road to resolving the State's motion for termination of that relief. Accordingly, we argue in Part I that this appeal should be dismissed for lack of jurisdiction.

If this Court should disagree with our submission on appealability, however, it should nonetheless reject the State's argument that the district court erred in allowing the parties to create a record reflecting current conditions in the facilities covered by the Decree. The State's reading of the statute poses a serious constitutional question concerning Congress's power to

limit the remedial authority of the judiciary to redress unconstitutional conduct. Instead, however, in enacting Section 3626(b)(3), Congress manifested its intention that a court deciding a motion to terminate relief granted in a prison conditions suit inquire into the existence of "a current or ongoing violation of the Federal right." That provision necessarily gives the court the power to examine current conditions.

Finally, the district court's preliminary ruling on the State's termination motion demonstrates that it fully appreciates the fact that a court must find a current or ongoing violation of a Federal constitutional or statutory right in order to maintain prospective relief in a prison conditions Consent Decree.

ARGUMENT

I

THIS COURT LACKS JURISDICTION OVER THIS APPEAL

The State contends (Br. vii) that this Court has jurisdiction to review the district court's order pursuant to 28 U.S.C. 1292(a)(1). Under 28 U.S.C. 1292(a)(1), this Court has jurisdiction over interlocutory orders of the district courts "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." Appellants' theory of jurisdiction is that the district court has denied injunctive relief because its order "suppresses the termination provisions mandated by a congressional act" (Br. vii). Because appellants are seeking termination of the

injunctive relief in the Decree, however, the issue is really whether the district court has refused to dissolve an injunction. Since the district court has not finally ruled on the State's motion for immediate termination, it is wrong to claim that it has refused to dissolve the injunctive relief.

In considering the appealability of this order, it is useful to contrast it with other orders entered by the court under the PLRA. For example, the district court's July 3, 1996, order ruling that the automatic stay provision is unconstitutional and cannot, therefore, be implemented, was effectively a refusal to dissolve an injunction, albeit temporarily. Although the district court had not yet refused to dissolve that injunction permanently, it did refuse to suspend the enforceability of that judgment during the time it takes for the court to determine whether any of the prospective relief in the Decree meets the PLRA's requirements.¹¹ The July 3, 1996, order was therefore appealable under 28 U.S.C. 1292(a)(1).

The order appellants seek to appeal here can also be

¹¹ The district court's July 3, 1996, order finding the automatic stay provision unconstitutional is also appealable under 28 U.S.C. 1291 pursuant to the judicially-recognized exception to the final judgment rule for "collateral orders." Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). The constitutionality ruling is one of

that small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Id. at 546.

contrasted to the order entered by the district court for the Eastern District of Michigan concerning the portion of the Hadix Decree over which it has jurisdiction. On November 1, 1996, Judge Feikens issued an order denying the State's motion for termination of the Hadix Decree and associated orders because of the court's conclusion that Sections 3626(b)(2) and (b)(3) of the PLRA violate separation of powers principles and are, therefore, unconstitutional. Hadix v. Johnson, 947 F. Supp. 1100, 1109-1112 (E.D. Mich. 1996). It did not schedule hearings under Section 3626(b)(3) of the PLRA nor in any way suggest that it intended to consider terminating or modifying any of the relief in the Decree. It simply held the immediate termination provisions unconstitutional and denied the PLRA motion for immediate termination. This Court has jurisdiction over the appeal from that order (Hadix v. Johnson, No. 96-2582) pursuant to 28 U.S.C. 1292(a)(1) because the district court's order refused to dissolve or modify the injunctive relief in the Decree in light of the PLRA.

Here, however, the district court's ruling has two components, neither of which has the requisite finality to make it appealable. First, the court reserved a final determination on the State's motion until this Court has ruled on the constitutional issues in the appeals pending before it (R. 823: Order at 2-3). Thus, the State's contention (Br. vii) that the district court's November 18 order "found the immediate termination provisions mandated by [the PLRA] unconstitutional"

is belied by the order itself. In the opinion accompanying that order, the court states (R. 822: Opinion at 9):

[T]he issue of whether the Consent Decree is final is determinative of the validity of the PLRA.

Therefore, the Court will refrain from deciding again the issue of whether Congress may order the courts to alter consent decrees over which they maintain supervisory jurisdiction.

See also R. 822: Opinion at 38 ("the Court is refraining at this time from a holding regarding the constitutionality of §3626(b)(2) & (3) of the PLRA ") Consequently, unlike Judge Feikens' November 1 decision, which conclusively denied the State's motion for termination because it held the termination provisions unconstitutional, Judge Enslen's November 18 order is not appealable under 28 U.S.C. 1292(a)(1) as one that refuses to dissolve an injunction.

Second, the court announced that it would make a preliminary ruling on the State's PLRA termination motion in the event that such a ruling becomes necessary after the constitutional issue is resolved. It reviewed evidence introduced during its previously scheduled hearings to monitor compliance with the Consent Decree and made findings about the first prong of Section 3626(b)(3) -- whether there is a "current or ongoing violation of the Federal right" as to the adequacy of medical services to respond to the serious needs of prisoners. Except for one area, however, it has not made findings concerning the second prong, i.e., whether the prospective relief in the Decree "extends no further than necessary to correct the violation of the Federal right, * * * is

narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C.A. 3626(b)(3). Indeed, the court's order states that there are two issues remaining for decision on the State's motion, the second of which is "whether prospective relief is tailored as required by the PLRA" (R. 823: Order at 2). In order for a post-judgment order to be appealable, it should at least dispose of all of the issues raised by the post-judgment motion. Transportation Cybernetics, Inc. v. Forest Transit Comm'n, 950 F.2d 350, 352 (7th Cir. 1992).

As an exception to the final judgment rule, 28 U.S.C. 1292(a)(1) should be narrowly construed. Carson v. American Brands, Inc., 450 U.S. 79, 84 (1981). The federal appellate jurisdictional statutes express a policy against piecemeal appeals. Switzerland Cheese Ass'n v. E. Horne's Mkt., 385 U.S. 23, 25 (1966). Reviewing this order will not serve that policy. First, the court has not yet decided an issue that could be dispositive, *i.e.*, the constitutionality of the immediate termination provisions of the PLRA. Further, although the court has made findings as to the first element required for retention of prospective relief under Section 3626(b)(3), it has not done so for the narrow tailoring component. The district court's decisions on the narrow tailoring issue "could alter the 'appellate perspective.'" Groseclose v. Dutton, 788 F.2d 356, 361 (6th Cir. 1986) (per curiam). In short, the district court simply has not yet issued a final and appealable order determining whether to grant or deny the State's motion to

terminate in whole or in part and more specifically has not decided whether any or all of the prospective relief in the Decree meets the remedial standards of the PLRA. Until the district court does so, this Court does not have jurisdiction to review preliminary rulings en route to such a final order.

II

SECTION 3626(b)(3) OF THE PLRA REQUIRES A COURT TO INQUIRE INTO CURRENT CONDITIONS BEFORE RULING ON A MOTION FOR IMMEDIATE TERMINATION UNDER SECTION 3626(b)(2)

If this Court holds that it has jurisdiction over this appeal, it should reject the State's argument (Br. 28-31) that the PLRA does not authorize the creation of a new evidentiary record for purposes of resolving a motion for immediate termination.

Section 3626(b)(2) of the PLRA provides that

[i]n any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

18 U.S.C.A. 3626(b)(2).

Although the district court has entered subsequent orders that were predicated on constitutional violations, much of the relief in the original Consent Decree is not supported by the findings required by Section (b)(2). Accordingly, the PLRA requires the district court to determine if Section (b)(3)'s "[l]imitation" on (b)(2) is applicable. Section (b)(3) provides

(emphasis added):

Limitation. -- Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

18 U.S.C.A. 3626(b)(3). Section 3626(b)(3) is, therefore, intended to preserve the inherent power of a court, presented with a motion for immediate termination under Section 3626(b)(2), to retain relief that is necessary, and narrowly drawn, to remedy constitutional violations.

Contrary to the State's argument, although 18 U.S.C.A. 3626(b)(3) requires that the appropriate findings be "based on the record," nothing in the statute's language or legislative history indicates that such findings must be made only on the factual record that exists at the time the motion is filed, which, after all, was developed in the past, and, in some cases, under a different standard. Rather, the statute's requirement that a court deciding a defendant's motion to terminate must inquire into the existence of "a current or ongoing violation of the Federal right" necessarily gives the district court the authority to examine current conditions. The court in this case has ruled that it does not have the information about such current conditions necessary for it responsibly to apply the standard set by Section (b)(3), and has invited the parties to create that record. See Hadix v. Johnson, 933 F. Supp. 1362, 1364 (W.D. Mich. 1996). The PLRA did not change the basic fact that "[o]nce

the jurisdiction of the court has been invoked, that court has an obligation to exercise its jurisdiction meaningfully." United States v. Michigan, 18 F.3d 348, 352 (6th Cir.), cert. denied, 115 S. Ct. 312 (1994).

Indeed, the State itself argues (Br. 29, n.11 (emphasis in original)) that "**past** violations alone are insufficient to warrant federal jurisdiction in the absence of any current violations of federal right [sic] or real threat of future violations." Yet it would deny the district court to right to inquire whether such current violations exist by insisting that the statute forbids the creation of a current record.¹²

The State is also in error in arguing that Congress could not have intended for the district court to supplement the existing record because it expected the district courts to act on the motion for immediate termination within 30 days (Br. 30-31). While the PLRA requires the court to rule "promptly" on a motion for immediate termination, 18 U.S.C.A. 3626(e)(1), and appears to provide that the automatic stay will take effect 30 days after such a motion is filed, 18 U.S.C.A. 3626(e)(2), nothing in the statute requires the final determination on such a motion to be made within 30 days.

Moreover, if the PLRA is construed as the State would have it -- to forbid a district court from supplementing the existing

^{12/} The process followed by the district court here has nothing to do with whether CRIPA authorizes the United States to conduct investigations prior to filing a complaint. Thus, the State's reliance on the district court's decision in United States v. Michigan, 868 F. Supp. 890, 895 (W.D. Mich. 1994) is inapposite.

(and often old) record in order to determine whether a current constitutional violation exists, whether a past constitutional violation remains unremedied, or whether there is an imminent threat of a return to unconstitutional conditions -- the statute would pose a serious constitutional question about Congress's authority to limit the courts' remedial authority to redress unconstitutional conduct effectively.^{13/} The State has failed to demonstrate that such a constitutionally suspect result was the clear intent of Congress in enacting the PLRA.

Accordingly, the district court did not err in holding hearings on the motion for immediate termination, and allowing the parties to present evidence as to current conditions. That process carries out Congress's manifest intent that the court inquire whether relief is still needed to address current conditions, not past ones. Thus, the State's request (Br. 48)

^{13/} A decision that Congress denied the judiciary the basic authority to remedy constitutional violations would raise serious constitutional questions. Similarly, in our view, a serious constitutional question would be raised if the PLRA was read to require a court to terminate relief upon a finding that unconstitutional conduct has halted, even if the court also finds that the violation has not been fully remedied, or that the defendant is poised to resume the unconstitutional conduct. Hence, the PLRA should be read to maintain the district court's core authority to remedy the proximate effects of past unlawful acts, and to issue prospective relief where there is the present danger of imminent recurrence of a violation of the Constitution or federal statutory right. Freeman v. Pitts, 503 U.S. 467, 490-499 (1992); Board of Educ. v. Dowell, 498 U.S. 237, 248-250 (1991); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 461 (1979). See also Milliken v. Bradley, 418 U.S. 717 (1974); Missouri v. Jenkins, 115 S. Ct. 2038, 2048-2049 (1995); Louisiana v. United States, 380 U.S. 145, 154 (1965) (courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the [unconstitutional] effects of the past as well as bar like [unconstitutionality] in the future").

that this Court rule that the PLRA does not authorize further fact-finding by the district court, or any form of discovery by the plaintiff class, and that this Court order the district court to decide the motion for immediate termination upon the existing record, should be denied.

III

THE DISTRICT COURT HAS EMPLOYED THE PROPER STANDARD IN MAKING ITS PRELIMINARY RULINGS ON THE MOTION FOR IMMEDIATE TERMINATION

The State argues (Br. 31-36) that the district court erroneously concluded that the Consent Decree in this case creates a constitutional right and thus that violations of the Decree itself are "current or ongoing violation[s] of the Federal right" within the meaning of Section 3626(b)(3).^{14/} The State's argument mischaracterizes the court's ruling.

The district court's order divides the medical health care provisions of the Decree into three categories. First, for a variety of reasons, the court found twenty provisions of the Decree appropriate for termination if the immediate termination provisions of the PLRA are ultimately determined to be constitutional (R. 822: Opinion at 14-15). The court stated that, if this Court "decides that the PLRA applies to the Consent Decree," it will terminate those provisions because there is no

^{14/} Where a consent decree provision affords relief that goes beyond what is required to remedy a constitutional violation, it would be contrary to the intent of the PLRA for a court to rule that a violation of such a provision constitutes a "current or ongoing violation of the Federal right" for purposes of Section 3626(b)(3). See Plyler v. Moore, 100 F.3d 365, 369 (4th Cir. 1996).

current violation of a federal right with regard to them (R. 822: Opinion at 8). Conversely, if the PLRA is determined to be unconstitutional, those provisions will not be subject to the court's active supervision "unless * * * conditions revert to a state of serious violation[]" (R. 822: Opinion at 8).

Concerning a second category of provisions, the court found that there was a current or ongoing violation of a federal right. As to those provisions, the court in each instance found a constitutional violation, not simply a violation of the Decree. The court prefaced its findings on the propriety of terminating relief by setting forth the standard for finding an Eighth Amendment violation, noting that "[e]ach of the claims involving medical care invokes the Eighth Amendment" (R. 822: Opinion at 16). It then proceeded to apply that standard to the provisions of the Decree.

As to Section II.A.3.b., the district court found that "the defendants are currently in violation of both the Consent Decree and the Eighth Amendment with respect to the transfer of inmates," because the "failure to conduct a proper evaluation of an inmate before he is transferred constitutes deliberate indifference by the defendants to the serious risk of harm that is likely to occur" (R. 822: Opinion at 20).

The court also found that "the defendants are in violation of [the] provision of the Consent Decree [concerning access to sick call], and with plaintiffs' Eighth Amendment rights" because the "mishandling of numerous kites [requests for medical care]

risers to the level of a deliberate indifference to prisoners' needs" (R. 822: Opinion at 24 (emphasis added)). Similarly, the court found "seriously inadequate supervision [by physicians], as well as lack of appropriate use of standing orders and protocols, in relation to decisions about access to sick call, urgent care, and specialty clinics, which rises to the level of an Eighth Amendment violation" (R. 822: Opinion at 26-27).

As to the provision of the Decree concerning follow-up care for inmates with chronic disease (Section II.A.7), the court found that conditions supporting the constitutional violation it had identified in 1993 "remain[] the same today" (R. 822: Opinion at 32). The opinion issued in support of the March 26, 1993 order found

instances of deliberate indifference to serious medical needs. The indifference occurs because responsible medical staff are not systematically informed about the status of medication compliance when non-compliance could result in serious harm to the prison population and staff. It is deliberate because the lack of systematic information results from an affirmative policy not to systematically monitor compliance with medication orders.

(R. 141: Opinion at 11-12).

The court also found that the defendants' noncompliance with Section II.A.11 of the Decree regarding maintenance of health records was a violation of the Eighth Amendment because the "lack of proper record-keeping and development of treatment plans can present serious risks to the health and safety of prisoners" (R. 822: Opinion at 34). Finally, the court found that evidence introduced in a hearing on April 29, 1994, showed that "treatment

of the frail, disabled, and chronically ill prisoners * * * represent[ed] deliberate indifference to their needs in a way that shocked the conscience" (R. 822: Opinion at 35). The court stated that, on October 25, 1994, it ordered defendants to develop a plan to "assure that prisoners with chronic illnesses and disabilities are identified, that their needs are assessed and accommodated, and that continuity of care is provided" (R. 822: Opinion at 35). The court found that "[i]nasmuch as a constitutional violation has been found, but the remedy has not yet been fully implemented, * * * termination is not yet appropriate" (R. 822: Opinion at 37).^{15/}

Thus, contrary to the State's contention, the court did not base its determinations that any provision of the Decree could be maintained under PLRA standards solely on the basis of a violation of the Decree. In fact, it found violations of two provisions of the Decree that did not rise to the level of a constitutional violation (R. 823: Order at 3). As to Section II.A.6 of the Decree, concerning the provision of "medical and dental prostheses when necessary to meet the serious health needs of any inmate" (E.D. R. 199: Consent Decree at 11), the court found that while "delays in prosthetic care may harm prisoners and prolong the suffering associated with their conditions, the

^{15/} The State disputes whether the court made any finding of constitutional violation in 1994 (Br. 14). Regardless whether it did, however, the court has now found that there is a current constitutional violation that has not been remedied. If that finding is upheld by this Court, it is sufficient to satisfy Section 3626(b)(3) of the PLRA.

record does not support a finding that there is deliberate indifference to a risk to inmate health or safety" (R. 822: Opinion at 31). The court therefore stated that "in the event that the PLRA is determined to be constitutional, this provision would be terminated" (R. 822: Opinion at 31).

The fact that the court made this distinction demonstrates that it understood that the PLRA requires a finding of violation of a underlying federal right before relief can be maintained under the PLRA. When the district court rules finally on the termination motion, it will first decide whether the PLRA is constitutional. If the court then goes on to apply the PLRA to this Decree, its actions so far demonstrate that it will do so with a proper understanding of its standards.

CONCLUSION

The Court should dismiss this appeal.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 96-2548

EVERETT HADIX, et al.,

Plaintiffs-Appellees

v.

PERRY JOHNSON, et al.,

Defendants-Appellants

and

UNITED STATES OF AMERICA,

Intervenor

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

INTERVENOR'S DESIGNATION OF APPENDIX CONTENTS

Intervenor United States, pursuant to Sixth Circuit Rule 11(b), hereby designates the following filings in the district court's record, in addition to those designated by appellants, as items to be included in the joint appendix:

<u>DESCRIPTION OF ENTRY</u>	<u>DATE</u>	<u>RECORD ENTRY NO.</u>
Consent Decree ^{1/}	May 13, 1985	R. 199 (E.D. Mich.)
Opinion Approving Consent Decree	April 4, 1985	R. 208 (E.D. Mich.)
Order Accepting Consent Decree	May 13, 1985	R. 213 (E.D. Mich.)

1 Defendants-Appellants' designation of the contents of the appendix states that the Consent Decree appears at R. 651. According to the docket entries for the Western District of Michigan in this case, however, R. 651 is not the Consent Decree.

<u>DESCRIPTION OF ENTRY</u>	<u>DATE</u>	<u>RECORD ENTRY NO.</u>
Order	Dec. 13, 1995	R. 605
Opinion	Dec. 13, 1995	R. 604
Defendants' Motion For Immediate Termination Of The Consent Decree Pursuant To The Prison Litigation Reform Act	June 10, 1996	R. 715
Opinion And Order Denying A Stay Of The Consent Decree	July 3, 1996	R. 738, 739
Motion By United States To Intervene With Brief In Support	Sept. 5, 1996	R. 794
Order Granting Motion To Intervene Pursuant To 28 U.S.C. 2403(a)	Sept. 6, 1996	R. 795

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief For The United States As Intervenor were served by first class mail, postage prepaid, on the following individuals and counsel of record:

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