98-6180

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-06189

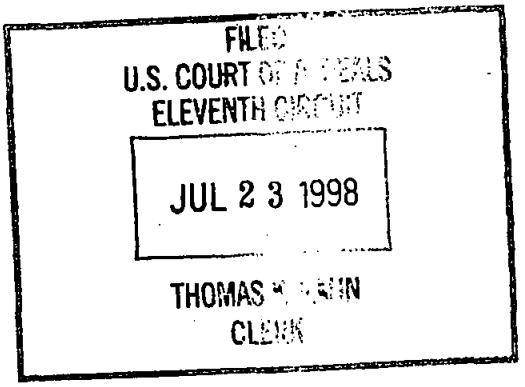
JEFFREY LOYD, et al.,

Appellants,

v.

JOE S. HOPPER, et al.,

Appellees.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

REPLY BRIEF OF APPELLANTS

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief uses Courier 12 point type.

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STATUTORY PROVISIONS

ARGUMENT

I. THE ALABAMA ATTORNEY GENERAL DOES NOT HAVE STANDING TO SEEK TERMINATION OF THE NOVEMBER 1994 CONSENT DECREE.

In defense of his standing, the Attorney General argues that no objection was made in the District Court to the Attorney General's failure to move to intervene. (AG's Brf. at 7). The Attorney General is simply wrong.

On January 12, 1998, two weeks before the hearing on the motion to terminate, the plaintiffs filed a Supplemental Memorandum of Law in Opposition to the State Defendants' Motion to Terminate Consent Order.[1] That memorandum plainly objects to the motion to terminate on the ground that the Attorney General had filed no motion to intervene. (SR1-4-5). Moreover, at the hearing on the motion to terminate, counsel for the plaintiffs raised the issue of standing and specifically referred to the

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1. While preparing the brief on appeal, undersigned counsel noticed that the Clerk of the District Court had failed to include the Supplemental Memorandum in the record on appeal. Accordingly, on June 22, 1998, counsel filed a Motion to Supplement the Record for the purpose of including that pleading in the record on appeal. On June 23, 1998, Judge Nelson granted the motion to supplement the record, and on June 29, 1998, the Clerk of the District Court certified the readiness of the First Supplemental Record on Appeal. Citations of the form (SR1-__) refer to the Supplemental Memorandum contained in that First Supplemental Record.

failure of the Attorney General to move to intervene. (R17-129-4). No extended discussion of the issue took place at the hearing, though, in deference to the court's pointed instruction that it had "received the plaintiffs' most recent brief," (R17-129-2), and did not desire to hear repeated any points made in the pleadings. (R17-129-4).

Because the plaintiffs did object to the Attorney General's standing on the ground that no proper motion to intervene had been made, the Attorney General's argument to the contrary is meritless.

II. THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS THE OPPORTUNITY TO PRESENT EVIDENCE IN OPPOSITION TO THE ATTORNEY GENERAL'S MOTION TO TERMINATE.

In answer to the appellants' second argument, the Attorney General also suggests that the issue was not raised below and so is not preserved for appeal. (AG's Brf. at 8). Again, the Attorney General is wrong.

The transcript of the hearing of January 27, 1998 amply establishes that counsel asked to present testimony in order to make the showing specified in 18 U.S.C. §3626(b)(3). The plaintiffs attempted to call to testify court monitor William Osterhoff, who was present at the hearing. (R17-129-14-15). In support of that effort, counsel referred to the provision of the PLRA allowing continuation of a consent decree that "is necessary and narrowly tailored to prevent an ongoing constitutional

violation," and asserted, albeit somewhat inelegantly, the "real danger" that the lifting of the consent decree would result in unconstutitional conditions. (R17-129-16-17). Later, counsel renewed the request to present evidence and began to cite the relevant statute, but was interrupted by Judge Nelson's denial of the request. (R17-129-18).

Because the request to present evidence was made in the District Court, the claim of error in its denial is preserved for the review of this Court.

CONCLUSION

In terminating the *Consent Decrees* and *Permanent Injunction*, the District Court erred in its interpretation and application of the PLRA. For the reasons stated above and in their initial brief, the appellants ask this Court to reverse the decision of the District Judge and remand for reentry of the *Consent Decrees* and *Permanent Injunction* granting injunctive relief to the plaintiffs.

Respectfully submitted,

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Dated: July 23, 1998

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party with a copy of the foregoing document, by first class United States mail in a properly addressed envelope with adequate postage thereon. The individuals served are:

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This 23rd day of July, 1998.

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