UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARICOPA COUNTY SHERIFF'S OFFICE, JOE ARPAIO, the duly Elected Sheriff of Maricopa County, et al., Appellants. v. DAMIAN HART, et al. Appellees,	Ninth Circuit Docket No. 98-16995 Lower Court Docket No. CV-77-00479-EHC

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

OPENING BRIEF OF APPELLANTS MARICOPA COUNTY (ARIZONA) BOARD OF SUPERVISORS AND MARICOPA COUNTY SHERIFF'S OFFICE

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this prisoner civil rights case pursuant to 28 U.S.C. §§ 1343(a) and 1331. See also 42 U.S.C. § 1983.

This is an appeal from an interlocutory order of the district court refusing to terminate a consent decree in accordance with the provisions of the Prison Litigation Reform Act ("*PLRA*"), 18 U.S.C. § 3626(b). CR 774 (ER 3).[1] This court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

The order appealed from was entered by the district court on September 10, 1998. CR 774 (ER 3).[2] On October 8, 1998, Appellants filed a notice of appeal, which was timely under Rule 4(a)(1) of the Federal Rules of Appellate Procedure. CR 777 (ER 4).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the consent decree termination provisions of the PLRA, 18 U.S.C. § 3626(b), are unconstitutional and, therefore, whether the district court was required to deny Appellants' motion to terminate the consent decree in this case (and thus terminate the case) in accordance with the provisions of the PLRA?

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[1] Citations to the original district court record as indexed in the District Court Clerk's Civil Docket are designated herein by the letters "CR," followed by the docket number for the document as shown on the District Court Clerk's Index. Citations to Appellants' Excerpts of Record are designated herein by the letters "ER." When both a "CR" and "ER" cite is given, the "ER" cite appears in parenthesis.

[2] The order was apparently signed by the district judge on September 8, 1998, but was stamped filed by the Clerk of the Court and entered on the Clerk's Docket on September 10, 1998.

STATEMENT OF CASE

This case is a class action commenced in 1977 against certain defendants, including Appellant Maricopa County (Arizona) Board of Supervisors (the "*County*") and Appellant Maricopa County Sheriff's Office ("*MCSO*"). CR 1. The Complaint alleged in essence that the civil rights of pretrial detainees held in the Maricopa County, Arizona, jail system had been violated. Id.

On or about March 27, 1981, the parties entered into a consent decree which addressed and regulated various aspects of County jail operations as they applied to pretrial detainees. CR 166. The original 1981 consent decree, as supplemented by certain subsequent amendments, additions and supplemental stipulations, continued to govern certain aspects of the County jail operations until it was superseded by an Amended Judgment entered pursuant to stipulation of the parties on or about January 10, 1995. By its terms, the Amended Judgment superseded the initial Judgment entered in 1981, and all subsequent amendments, additions and supplemental stipulations relating thereto and was designed to control the future direction of this case. CR 705 (ER 1). The Amended Judgment imposed certain obligations on the MCSO and the County, and established certain goals, with respect to the jail operations. Id.[3]

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[3] Both the original consent decree and the Amended Judgment are the epitome of judicial micro-management of the County jail system. In addition to various jail population goals, the Amended Judgment addresses issues related to dayroom access, lighting, temperature control, noise, access to reading material, access to religious services, mail processing, telephone privileges, clothing, sanitation, access to a law library, medical, dental and

The Amended Judgment continues to govern a wide range of jail management issues relating to the conditions of confinement for pretrial detainees in the County's jails. See CR 705 (ER 1).

During April 1998, the Appellants moved for termination of the case and the Amended Judgment, based upon the decree termination provisions of the PLRA, 18 U.S.C. § 3626(b). CR 755 (ER 2). At the time Appellants filed their motion, six federal appellate courts had passed on the constitutionality of the PLRA and each had upheld the decree termination provisions.[4] The Ninth Circuit had

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psychiatric care, use of mechanical restraints, inmate segregation, outdoor recreation time, inmate classification, visitation, food services, staff training and screening, handicapped facilities, disciplinary procedures, grievance procedures, and security procedures. CR 705 (ER 1). The Amended Judgment also imposes various reporting requirements and requires on-going court involvement in the dispute resolution procedures. Id.

[4] See Hadix v. Johnson, 133 F.3d 940 (6th Cir. 1998), cert. denied, 118 S.Ct. 2368 (1998) (PLRA consent decree termination provisions do not violate separation of powers principles); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997), cert. denied, 118 S.Ct. 2366 (1998), reh'g. denied, 119 S.Ct. 14 (1998) (consent decree termination provisions upheld against challenges based upon separation of powers, equal protection and due process); Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997), cert. denied, 118 S.Ct. 2375 (1998), reh'g. denied, 119 S.Ct. 16 (1998) (PLRA provisions requiring termination of consent decrees do not violate separation of powers doctrine, due process or equal protection); Benjamin v. Jacobson, 124 F.3d 162 (2nd Cir. 1997) (consent decree termination provisions upheld against separation of powers, equal protection and due process challenges); Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997), cert. denied, 118 S.Ct. 2374 (1998), reh'g. denied, 119 S.Ct. 285 (1998) (PLRA's immediate termination provision does not violate separation of powers doctrine, due process or equal protection); Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996), cert. denied, 520 U.S. 1277, 117 S.Ct. 2460 (1997) ("Federal right" as used in the PLRA does not include rights conferred by consent decrees providing relief greater than required by federal law and the PLRA violates neither the separation of powers doctrine nor equal protection principles).

not yet addressed the PLRA's constitutionality, and some district courts had held the PLRA unconstitutional. The motion for termination, while noting the existence of the constitutional issue, relied upon the unanimous federal appellate decisions upholding the PLRA as constitutional and argued that the PLRA, if constitutional, required termination of the Amended Judgment and this litigation.[5] Id.

On May 4, 1998, while the Appellants' motion to terminate was pending before the district court, a panel of the Ninth Circuit rendered its opinion in Taylor v. United States,[6] holding the decree termination provisions of the PLRA to be unconstitutional as a violation of separation of powers principles. On November 3, 1998, after the district court denied Appellants' motion to terminate, the Ninth Circuit ordered that the Taylor case be reheard en banc and that the panel's opinion in Taylor be withdrawn. Taylor v. United States, 158 F.3d 1059 (9th Cir. 1998).

Appellants advised the district court of the panel decision in Taylor holding unconstitutional relevant portions of the PLRA and acknowledged that the holding of Taylor was controlling and required denial of their motion to terminate. See CR 772. The dis-

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[5] The plaintiff-class did not file a response to the motion at that juncture as no attorney was then of record representing the class. The class representation issue has since been resolved and the plaintiff-class is represented by counsel on this appeal. CR 773.

[6] Taylor v. United States, 143 F.3d 1178 (9th Cir. 1998), opinion withdrawn, reh'g. en banc granted, 158 F.3d 1059 (9th Cir. 1998).

trict court thereafter, on September 10, 1998, entered its Order Denying Defendants' Motion for Termination and Certification Pursuant to 28 U.S.C. § 1292 (the "*Order*"). CR 774 (ER 3). The Order denying Appellants' motion for termination was "based upon the Ninth Circuit's decision in Taylor v. Arizona." Id.[7] This appeal followed.[8]

SUMMARY OF ARGUMENT

The consent decree termination provisions of the PLRA, 18 U.S.C. § 3626(b), both generally and as applied to the Amended Judgment entered pursuant to stipulation in this case, do not violate separation of powers principles or infringe upon any due process guarantees. In this respect, the decision initially entered by a panel of the Ninth Circuit Court of Appeals in Taylor v. United States,[9] and deemed controlling by the District Court, is incorrect.

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[7] In the district court, the opinion in Taylor v. United States, 143 F.3d 1178 (9th Cir. 1998) was referred to as "Taylor v. Arizona."

[8] The district court found, pursuant to 28 U.S.C. § 1292(b), that the Order involved a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. CR 774 (ER 3). Consequently, pursuant to the district court's certification, Appellants immediately petitioned this Court for permission to appeal pursuant to 28 U.S.C. § 1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure. Permission was denied, apparently because an appeal as of right was available under 28 U.S.C. § 1292(a)(1). See Order, filed October 6, 1998, in Ninth Circuit Docket No. 98-80591.

[9] 143 F.2d 1059 (9th Cir. 1998), opinion withdrawn, reh'g. en banc granted, 158 F.3d 1059 (9th Cir. 1998).

The PLRA does not preclude any relief that a court determines is actually necessary to protect the federal rights of pretrial detainees. The PLRA requires only that prospective decrees in cases such as this be narrowly tailored to that which is necessary to protect federal rights and that such decrees be terminated in accordance with the statute unless the relief granted is shown to still be necessary to correct current and ongoing violations of federal rights. Enactment of criteria, timetables and presumptions governing the termination of such decrees is well within the unquestioned power of Congress.

Application of the decree termination provisions of the PLRA to pre-PLRA consent decrees -- such as the Amended Judgment in this case -- does not contravene separation of powers, due process or any other constitutional principle. Prospective decrees involving jail operations are always subject to continuing court supervision and future modification, or even termination, in light of changing legal and factual circumstances. Thus, until finally terminated, such decrees are by their very nature never the "last word" of the courts on the subject. Application of the PLRA to the future course (including termination) of cases involving such decrees is neither retroactive change of a prior court decision nor unconstitutional tampering by Congress with a court's judgment. History is not rewritten; prior rulings are not undone. All that may change is the timing and nature of future modifications of a consent decree that is inherently subject to revision at any time. More-

over, the PLRA does not direct any specific result in any particular case. Instead, it leaves to the judiciary the task of applying PLRA decree termination standards to the circumstances of each case and leaves to the courts the power to decide whether a particular consent decree should be terminated. The core judicial functions -- finding facts, applying law to facts and deciding cases and controversies -- stand unaffected. For these reasons, application of the PLRA termination provisions to the Amended Judgment in this case is entirely consistent with the controlling decisions of the United States Supreme Court, including Plaut,[10] Robertson,[11] Rufo,[12] and [illegible] Bridge Co.[13]

The six circuit courts of appeal (excluding the panel in Taylor) that confirmed the constitutionality of the PLRA's decree termination provisions are correct in their analysis. The Ninth Circuit should reverse its decision in Taylor (now on rehearing) and join the other circuits in upholding the PLRA. The PLRA termination provisions are not constitutionally infirm, and for that reason, the district court's Order denying Appellants' motion

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[10] Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 115 S.Ct. 1447 (1995).

[11] Robertson v. Seattle Audubon Society, 503 U.S. 429, 112 S.Ct. 1407 (1992).

[12] [illegible] 502 U.S. 367, 112 S.Ct. 748 (1992).

[13] Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 241 (1856).

to terminate must be reversed and the case remanded for further proceedings consistent with the PLRA.

STANDARD OF REVIEW

The question of whether the PLRA's consent decree termination provisions are constitutional is a pure question of law and subject to de novo review. See, e.g., Masayesva v. Hale, 118 F.3d 1371, 1377 (9th Cir. 1997). The issue of the PLRA's constitutionality was raised by Appellants' motion for termination and decided by the district court's Order denying that motion. See CR 755 (ER 2), CR 772 & CR 774 (ER 3).

ARGUMENT

I. INTRODUCTION.

This institutional reform class action arose from alleged violations of the constitutional rights of pretrial detainees held in the County jails more than twenty (20) years ago and resulted in a consent decree which has for the past seventeen (17) years, in various forms, governed many aspects of the jail system in Maricopa County, Arizona. In the court below, Appellants moved, pursuant to the consent decree termination provisions of the PLRA,[14] to terminate the current version of that consent decree, i.e., the Amended Judgment entered in 1995. CR 755 (ER 2). Termination of this case fully comports with the intent and purpose of the PLRA.

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[14] The PLRA's decree termination provisions are contained in 18 U.S.C. § 3626, the full text of which is set forth in the addendum to this brief.

The PLRA embodies a congressional judgment that judicial micro-management of jails and prisons has often gone too far -- certainly beyond that which is reasonably necessary to protect the constitutional rights of inmates -- and has too often unnecessarily burdened local governments without any formalized (and sometimes without any) meaningful review and reassessment of the genuine need for continuing judicial oversight. Thus, fundamental precepts of the PLRA are (i) that oversight of prison and jail operations by federal judges should be limited to that which is actually necessary to protect the federal rights of inmates; and (ii) that long-standing consent decrees (such as the Amended Judgment in the instant case) should be terminated unless continuation of the decree is demonstrably necessary to correct a current and ongoing violation of federal rights. See Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 655, 660-61 (1st Cir. 1997); Dougan v. Singletary, 129 F.3d 1424, 1427 (11th Cir. 1997).

To effectuate these goals, the PLRA proscribes consent decrees that are not narrowly drawn to correct a proven violation of federal rights and mandates that consent decrees entered prior to enactment of the PLRA conform to that standard in the future. The House Conference Report succinctly confirmed this intent, stating that under the PLRA "[p]rior consent decrees are made terminable upon motion of either party, and can be continued only if the court finds the imposed relief is necessary to correct the violation of the federal right." H.R. Conf. Rep. No. 104-378 at 166 (1995).

There is no question that this case falls squarely within the PLRA's decree termination provisions codified in 18 U.S.C. § 3626. This is a "civil action with respect to prison conditions" within the meaning of the PLRA, because it is a "civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials" on the lives of persons confined in jail. Id. § 3626(g)(2). See also 18 U.S.C. § 3626(g)(5). Moreover, because the terms "prison" and "prisoner" in the PLRA include jails and pretrial detainees, respectively, the direct application of the PLRA to this case is not subject to serious dispute. See 18 U.S.C. §§ 3626(g)(3) & (5).

The Amended Judgment, a revised consent decree entered by the district court on January 10, 1995, refined and updated in certain respects, a broad, class-wide and system-wide consent judgment entered more than a decade earlier, imposed certain obligations upon the MCSO and the County, and established certain goals with respect to the operation of the Maricopa County jail system. CR 705 (ER 1). The Amended Judgment (like the initial 1981 Judgment) contained no finding (or even suggestion) 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" for that purpose. The PLRA's immediate termination provision (18 U.S.C. § 3626(b)(2)), therefore applies. Moreover, even if this were not the case, the statutory life of the Amended Judgment -- two (2) years from enactment of the PLRA -- expired April 26, 1998.

As of that date, 18 U.S.C. § 3626(b)(1) requires termination "upon motion of any party." Thus, termination of the Amended Judgment and this case is mandated by the PLRA, absent proof that some specific remedy is required to correct a current and ongoing violation. On this narrow point (individual grievances are, of course, still subject to judicial review in an appropriate proceeding), the congressional directive is unambiguous.

Operations of the Maricopa County jail system are, to the best of Appellants' knowledge, compliant with all aspects of the Amended Judgment (and with the federal rights of pretrial detainees), although Appellants acknowledge that, despite diligent and often successful efforts, the continuing growth of the inmate population has prevented complete achievement of all of the jail population goals established in the Amended Judgment.[15] See CR 755 (ER 1). Appellants have pursued and are continuing to aggressively implement a number of significant programs and policies consistent with the goals expressed in the Amended Judgment. Grievance procedures have been formulated, implemented and refined. No complaint of non-compliance has been brought before the district court since adoption

[15] Even with the effective implementation of innovative measures designed to reduce the jail population, the fact is that Maricopa County is one of the fastest growing metropolitan counties in America and the corresponding inevitable growth in inmate populations, coupled with the time delay inherent in the construction of additional facilities, has made achievement of the jail population goals extremely difficult. The Appellants have, nevertheless, made significant strides toward addressing the jail population problems.

of the Amended Judgment, and no proceeding before the assigned magistrate (to whom such matters are first presented under the Amended Judgment) has resulted in a finding of non-compliance by either the County or the MCSO. Id.

In short, Appellants believe no genuine need exists for judicial management of the County jails. Processes now exist to protect the interests of individual pretrial detainees in the County Jail System and prolongation of this 22-year old case (17 years post-consent decree) is not necessary to protect their rights. This case cries out for termination pursuant to the PLRA. It was on that basis that Appellants moved to terminate the Amended Judgment and this case in the district court.

The District Court denied Appellants' motion on constitutional grounds. At the time, this result was compelled by Taylor v. United States, 143 F.3d 1178 (9th Cir. 1998), opinion withdrawn, reh'g. en banc granted, 158 F.3d 1059 (9th Cir. 1998) -- initially decided after the motion to terminate was filed -- in which a panel of this Court held that the consent decree termination provisions of the PLRA violate separation of power principles. The panel reached this conclusion even though every other federal circuit that had considered the issue upheld the PLRA. Appellants respectfully submit that the six federal circuit courts of appeals upholding the PLRA were not misguided and that the Ninth Circuit panel that decided Taylor was incorrect in its assessment of the pivotal constitutional question.

II. THE PLRA ESTABLISHES STANDARDS AND PROCEDURES DESIGNED TO CURTAIL PERPETUAL, INSTITUTIONALIZED JUDICIAL OVERSIGHT OF JAILS, WITHOUT PRECLUDING ANY RELIEF THAT A COURT DETERMINES IS ACTUALLY NECESSARY TO PROTECT FEDERAL RIGHTS.

The analysis in Taylor rests in part upon an incorrect and incomplete interpretation of the decree termination provisions of the PLRA. Thus, as a threshold matter, it is necessary to examine what these provisions require, and what they do not require, before turning to the separation of powers issues which Appellants submit were decided incorrectly by the panel in Taylor.

A. The PLRA Requires That Prospective Decrees Be Narrowly Tailored To What Is Necessary To Protect Federal Rights And Terminated Unless The Relief Granted Is Still Necessary To Correct Current And Ongoing Violations.

The overarching principle embodied in the PLRA is that prospective relief affecting the operations of jails (including relief granted in consent decrees) should "extend no further than necessary to correct" a violation of the federal right that gave rise to the federal action. 18 U.S.C. § 3626(a)(1)(A). Consistent with this principle, the PLRA requires that prospective relief[16] must be "narrowly drawn," that it "extend no further than necessary to correct the violation" and that it be "the least intrusive means necessary to correct the violation." Id. It further requires that the court must specifically find that these requirements are satis-

[16] "Relief" for purposes of the statute means "all relief in any form that may be granted or approved by the court," including relief granted in "consent decrees." 18 U.S.C. § 3626(g)(9). The term "prospective relief" means, for purposes of the statute, "all relief other than compensatory monetary damages." 18 U.S.C. § 3626(g)(7).

fied before granting the relief. Id. The absence of findings that the PLRA criteria are met is grounds for immediate termination. Id. § 3626(b)(2).

In actions to redress alleged constitutional violations, it is axiomatic that "as with any equity case the nature of the violation determines the scope of the remedy." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971), 91 S.Ct. 1267, 1276, reh'g. denied, 403 U.S. 912, 91 S.Ct. 2200 (1971). The "remedy must therefore be related to the condition alleged to offend the Constitution." Milliken v. Bradley, 433 U.S. 267, 280, 97 S.Ct. 2749, 2757 (1977) (citation and internal quotations omitted).[17] As the United States Supreme Court explained in Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174 (1996), "[t]he remedy [imposed] must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established," and system-wide relief cannot be granted unless the constitutional violation has "been shown to be systemwide". Id. at 358-59, 116 S.Ct. 2183, 2184. Thus, the fundamental principle embodied in the PLRA -- that prospective relief involving jail conditions should be "narrowly drawn," extend "no

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[17] See also McLendon v. Continental Can Co., 908 F.2d 1171, 1182 (3d Cir. 1990) ("[i]n granting injunctive relief, the court's remedy should be no broader than necessary to provide full relief to the aggrieved plaintiff"); Toussaint v. McCarthy, 801 F.2d 1080, 1087 (9th Cir. 1986) ("our goal is to cure only constitutional violations"), cert. denied, 481 U.S. 1069, 107 S.Ct. 2462 (1987); Morgan v. McKeigue, 726 F.2d 33, 35 (1st Cir. 1984) ("While we recognize that the district court 'has broad power to fashion a remedy' * * * if the remedy goes beyond eliminating unconstitutional [conditions], it is improper").

further than necessary to correct the violation of the Federal right," and be "the least intrusive means necessary to correct the violation of the Federal right"[18] -- generally comports with settled criteria for injunctive relief in constitutional cases. The panel in Taylor overstated the change wrought by the PLRA.

Consistent with the congressional policy of limiting relief to that which is actually necessary to correct the violation of federal rights, the PLRA provides for periodic review of the need for any relief that is granted. In effect, the PLRA creates a rebuttable presumption that prospective relief relating to jail conditions ordinarily should not exceed two years in duration. Section 3626(b)(1)(A) 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 intervenor --
>
> (i) 2 years after the date the court granted or approved prospective relief;
>
> (ii) 1 year after the court entered an order denying termination of prospective relief under this paragraph; or
>
> (iii) in the case of an order [such as the Amended Judgment in this case] issued on or before the effective date of the Prison Litigation Reform Act, 2 years after such date of enactment [i.e., 2 years after April 26, 1996].

18 U.S.C. § 3626(b)(1)(A) (emphasis supplied).

The purpose of these provisions was explained by Senator Abraham, one of the PLRA's sponsors, as follows:

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[18] 18 U.S.C. § 3626(a)(1)(A), (b)(2) & (b)(3).

> We would also provide that any party can seek to have a court decree ended after two years, and that the court will order it ended unless there is still a constitutional violation that needs to be corrected . . ..
>
> [T]he States will be able to run prisons as they see fit unless there is a constitutional violation. If there is, a narrowly tailored order to correct the violation may be entered.
>
> This is a balanced set of proposals, allowing the courts to step in where they are needed, but puts an end to unnecessary judicial intervention and micro management of our prison system we see too often.

142 Cong. Rec. S 3704 (April 19, 1996).

Thus, the PLRA provides for termination of consent decrees and other prospective, system-wide remedies in circumstances where the necessity for continued relief has ceased and, in any event, where Congress deemed review and reconsideration to be appropriate -- two (2) years after granting the relief (or two (2) years after enactment of the PLRA for pre-PLRA decrees), one (1) year after the most recent order refusing to terminate, and at any time the required findings have not been made. 18 U.S.C. § 3626(b)(1) & (2). These presumptions limit unnecessary judicial intrusion into state and county jail operations and ensure that any unnecessary intrusions that do occur are not perpetuated.

B. The Ninth Circuit Panel In The Taylor Case Incorrectly Concluded That The PLRA Required Termination Of All Existing Consent Decrees.

The PLRA manifestly does not direct termination in all cases. It does not usurp the judicial function of applying law to fact in a specific case. It does not deprive the federal courts of any

power to continue relief that is demonstrably necessary to protect the federal rights of prisoners.

To the contrary, the PLRA mandates that prospective relief not terminate when such relief is necessary to protect the federal rights of prisoners. Section 3626(b)(3) states:

> Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and 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. § 3626(b)(3). See Tyler v. Murphy, 135 F.3d 594, 597 (8th Cir. 1998) (the plain language of section 3626(b)(3) affords courts broad authority to order prospective relief necessary to redress and halt any "current and ongoing violation" of the federal rights of inmates). The statute certainly does not support the Taylor panel's conclusion that "pre-PLRA consent decrees effectively are extinguished." Taylor, 143 F.3d at 1185.

The Taylor panel in effect concluded that the words "shall not terminate" actually meant "shall terminate" in all cases. The sophistic reasoning offered by the panel, which variously ignored or declared "illusory" the statutory language that prohibits termination when continuing relief is necessary to protect a federal right, inverted the settled principle that statutes should be construed consistently with the constitution wherever possible. Instead, the panel strained to construe the PLRA in a manner seemingly calculated to maximize the likelihood of invalidity. Such

result-oriented disregard of the plain language and manifest intent of the statute cannot be justified and should not be permitted to stand.

The panel's conclusion that a court could not possibly find that continuing relief is necessary to remedy a current and ongoing violation of federal rights ignores two centuries of federal judicial history. The PLRA necessarily enables a district court to examine current conditions of the prisons which become part of the record. Benjamin v. Jacobson, 124 F.3d 162, 179 (2nd Cir. 1997); 993 F.Supp. 749, 756 (N.D. Cal. 1997) (subsection (3) gives the court the power to supplement the record by taking further evidence); Jensen v. County of Lake, 958 F.Supp. 397, 406-07 (N.D. Ind. 1997). The panel's conclusion assumes that federal judges will uniformly fail to exercise powers expressly granted to them, uniformly prohibit plaintiffs from presenting evidence which they may be authorized to present and uniformly prohibit plaintiffs from conducting discovery to the extent necessary and permissible under the circumstances. To say the least, this view is contrary to experience. In fact, courts in appropriate cases have allowed plaintiffs to supplement the record and have continued prospective relief found necessary under Section 3626(b)(3). See, e.g., Carty v. Farrelly, 957 F.Supp. 727, 733 (D. V.I. 1997).

C. Enactment Of The PLRA Was Well Within The Powers Of Congress To Establish Procedures And Rules Governing Remedies For The District Courts.

The PLRA's directives that prospective relief in institutional reform cases involving jails be narrowly drawn, extend no further than necessary and be the least intrusive means -- as well as its mandating of timetables for periodic reassessment and fact finding requirements -- fall squarely within the powers of Congress conferred by Article I of the Constitution. The Constitution confers upon Congress the power to create and structure the inferior federal courts, to establish the jurisdiction of those courts within the outer limits set out in Article III and to establish procedural rules and evidentiary standards that apply in federal court proceedings. See U. S. Const. Art. I, § 8, cl. 9; Art. III, §§ 1-2; Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330, 58 S.Ct. 578, 582 (1938) ("[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States"). Congressional authority also includes the power to regulate and restrict the injunctive powers of the federal courts. See, e.g., Yakus v. United States, 321 U.S. 414, 442 n.8, 64 S.Ct. 660, 676 n.8 (1944). In a sense, the PLRA's standards, presumptions and timing requirements regarding prospective relief are truly unremarkable, because the non-PLRA standards, procedures, timing rules and other limitations which have long governed issu-

ance of injunctive orders by federal courts were themselves established or approved by Congress.[19]

In sum, in enacting the PLRA, Congress set standards for deciding whether to grant or terminate prospective relief affecting jail conditions, required that any such relief be demonstrably "necessary to correct the violation of the federal right," required specific findings by the trial court and established timetables for periodic review of such prospective orders to determine whether they are still warranted. See 18 U.S.C. §§ 3626(a)-(b). With respect to pre-PLRA consent decrees, the PLRA requires that such decrees be required in the future to conform to PLRA standards or that they be terminated. Congress thus exercised its unquestioned power to limit and define federal judicial remedial authority. The courts, however, are left with full power to resolve the cases before them by applying the PLRA standards to the facts adduced in those cases and to grant the injunctive relief necessary (in the specific circumstances of the cases before them) to remedy any demonstrated violation of the federal rights of incarcerated individuals. Thus, the PLRA decree termination provisions not only fall squarely within the settled authority of Congress to prescribe

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[19] By way of illustration, rules established by Congress dictate the standards applicable to temporary restraining orders (Fed. R. Civ. P. 65(b), 28 U.S.C.), require courts to set forth the reasons for the issuance of injunctions (Fed. R. Civ. P. 65(d), 28 U.S.C.); mandate specific findings for the issuance of class-wide injunctive relief (Fed. R. Civ. P. 23(b)(2), 28 U.S.C.) and provide that, unlike other forms of judgments, injunctive orders are not automatically stayed by the filing of an appeal (Fed. R. Civ. P. 62(a), 28 U.S.C.).

rules and standards for courts to follow when issuing prospective relief, but also do not encroach upon the core Article III powers of the judicial branch.

III. APPLYING PLRA CRITERIA TO EXISTING PROSPECTIVE CONSENT DECREES AFFECTING JAIL CONDITIONS DOES NOT VIOLATE SEPARATION OF POWERS PRINCIPLES.

From any reasoned perspective, the PLRA standards and decree termination criteria can, consistent with separation of powers principles, be applied to ongoing, prospective consent decrees governing local jail operations. Application of the PLRA to the future construction, operation and enforcement of the prospective consent decree literally is not "retroactive." Nothing that occurred in the past in this case will be changed. Only the future of a consent decree, which even under pre-PLRA law is subject to future modification, is at stake. Moreover, the PLRA does not legislate a result, but instead leaves to the judiciary the application of PLRA criteria to the facts and circumstances of each particular case. As a consequence, application of the PLRA to the consent decree in this case does not violate separation of powers principles.

A. The PLRA Does Not Violate The Separation Of Powers Principles Announced In Plaut.

The Taylor panel erroneously concluded that Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 115 S.Ct. 1447 (1995), precluded application of the PLRA's decree termination standards and periodic review requirements to existing consent decrees. In so holding, the panel disregarded the difference -- recognized as critical by

other circuits upholding the PLRA against constitutional challenge -- between final money judgments that are not subject to any future modification and prospective injunctions that are inherently subject to future modification or termination. As the Eighth Circuit explained, "the nature of the remedy to be applied in the future is not established in perpetuity upon the approval of the consent decree, and it is this issue to which Congress has spoken in the PLRA. We cannot conclude that the Constitution forbids Congress to do so." Gavin v. Branstad, 122 F.3d 1081, 1088 (8th Cir. 1997).

Plaut involved a statute that would have allowed plaintiffs to revive civil actions that had been previously dismissed pursuant to a statute of limitations rule announced and applied by the Supreme Court in Petigrow v. Gilbertson, 501 U.S. 350, 111 S.Ct. 2773 (1991) and subsequently changed by Congress. The statute constituted an impermissible attempt by Congress to "set aside the final judgment of an Article III court by retroactive legislation." Plaut, 514 U.S. at 230, 115 S.Ct. at 1458. The Court explained: "[h]aving achieved finality, * * * a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was." Plaut, 514 U.S. at 227, 115 S.Ct. at 1457. Nothing in Plaut, however, suggests that Congress may not direct federal courts to modify prospective relief to the extent such relief fails

to conform to new legal standards. To the contrary, Plaut explicitly distinguished and implicitly approved Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856), upholding the power of Congress to "alter the prospective effect of injunctions entered by Article III courts." Plaut, 514 U.S. at 232, 115 S.Ct. 1459.

While a final judgment on a claim for monetary relief represents "the last word of the judicial department with regard to a particular case or controversy," Plaut, 514 U.S. at 227, 115 S.Ct. at 1457, issuance of a prospective order does not end the district court's role once the appeal rights of the parties are exhausted or expire. An injunction is always subject to modification or termination in light of a "significant change either in factual conditions or in law." Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384, 112 S.Ct. 748, 760 (1992). Congress may require courts to examine prospective orders in accordance with a change in the "applicable law." See Robertson v. Seattle Audubon Society, 503 U.S. 429, 441, 112 S.Ct. 1407 (1992). Accord: Landgraf v. USI Film Products, 511 U.S. 244, 273-274, 114 S.Ct. 1483, 1501 (1994) ("[w]hen the intervening statute authorizes or affects the propriety of prospective relief," a court must apply the newly enacted law). Similarly, the Court in Agostini v. Felton, 521 U.S. 203, 117 S. Ct. 1997 (1997), relying on Rufo, supra, observed:

> [I]t is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show 'a significant change in factual conditions or in law.' A court may recognize subsequent

> changes in either statutory or decisional law. * * * A court errs when it refuses to modify an injunction or consent decree in light of such changes."

117 S. Ct. at 2006 (emphasis supplied).

Thus, a court always possesses the power to revisit continuing prospective orders in light of the evolving factual or legal landscape, and to modify or terminate relief accordingly. See Plaut v. Spendthrift Farms, Inc., 1 F.3d 1487, 1495 (6th Cir. 1993), aff'd., 514 U.S. 211, 115 S.Ct. 1447 (1995). See also James v. Lash, 965 F. Supp. 1190, 1196 (N.D. Ind. 1997) ("even where a consent decree has become final in terms of the appeal process, the relief ordered is subject to the court's continuing supervision, and may be terminated or modified where it is 'no longer equitable that the judgment have prospective application.'").

Similarly, when Congress enacts a statute that changes the result in a case in which an appeal is pending (and, therefore, the judicial branch's final word has necessarily not been rendered even though the judgment obviously is "final" for purposes of appeal), the appellate court "must alter the outcome accordingly." Plaut, 514 U.S. at 226, 115 S.Ct. at 1457. Applying the PLRA to consent decrees that are by their nature subject to future modification is no different. In both situations, the judicial branch has not issued its "last word" on the subject and application of the new statute to the ongoing case does not violate separation of powers principles.

As the Eighth Circuit explained in Gavin v. Branstad, while upholding the constitutionality of the PLRA:

> [W]hat Plaut protects is 'the last word of the judicial department with regard to a particular case or controversy.' Plaut, 514 U.S. at 227. In a continuing case, a consent decree is not the 'last word' of the courts in the case, even after the decree itself has become final for purposes of appeal. Rather, a consent decree is an executory form of relief that remains subject to later developments.

Gavin, 122 F.3d at 1087.

B. Wheeling And Its Progeny Establish That The PLRA Does Not Violate Separation Of Powers Principles.

The rule announced more than 140 years ago in Wheeling & Belmont Bridge Co., supra, and implicitly approved in Plaut, supra, is dispositive. Wheeling established that when Congress alters the applicable law, courts have a responsibility to prospectively modify an injunctive order to take into account the changed legal circumstances. See Mount Graham Coalition v. Thomas, 89 F.3d 554, 556-57 (9th Cir. 1996). That rule was reaffirmed in Landgraf v. USI Film Products, 511 U.S. 244, 273-74, 114 S.Ct. 1483, 1501 (1994), where the Court explained, "[w]hen the intervening statute authorizes or affects the propriety of prospective relief," a court must apply the newly enacted law and the "application of the new provision [to a prospective order] is not [considered] retroactive." 511 U.S. at 273-74, 114 S.Ct. at 1501.

In Mount Graham Coalition, supra, this Court rejected separation of powers arguments against legislation that declared lawful certain actions the district court previously enjoined as illegal,

even though the legislation required termination of the decree in that case. This Court explained that "Plaut was careful * * * to point out that cases like * * * Wheeling & Belmont Bridge Co. * * * in which congressional legislation 'altered the prospective effect of injunctions entered by Article III courts' were different" from the attempt in Plaut to reopen a final judgment that dismissed a case with prejudice. 89 F.3d at 556.

Pre-PLRA consent decrees, such as the Amended Judgment in this case, are inherently subject to future modification, and even termination, as circumstances or the applicable law change. Consent decree provisions "unrelated to remedying the underlying constitutional violation" can readily be modified under pre-PLRA law so long as a "reasonable basis" for modification exists. Rufo, 502 U.S. at 383-84 n.7, 112 S.Ct. at 760 n.7. Even with respect to consent decree provisions vindicating a constitutional right, pre-PLRA law allows liberal modification standards in the context of institutional reform litigation:

> The upsurge in institutional reform litigation . . . has made the ability of a district court to modify a decree in response to changed circumstances all the more important. Because such decrees often remain in place for extended periods of time, the likelihood of significant changes occurring during the life of the decree is increased.

Rufo, 502 U.S. at 380, 112 S.Ct. at 758. The Rufo Court also observed that a "flexible modification standard" favoring modification of consent decrees was required in institutional reform cases because such decrees "impact on the public's right to the

sound and efficient operation of its institutions." Id. at 381, 112 S.Ct. at 759. Manifestly, an institutional reform consent decree is always subject to future change. Other circuits reviewing the PLRA have reached this conclusion. As "[a] judgment providing for injunctive relief * * * [the decree here] remains subject to subsequent changes in the law." Plyler, 100 F.3d at 371.

The fact that the PLRA involves a restriction on the remedial powers of the courts rather than a change in the underlying substantive law that was a predicate for the claim for relief is of no constitutional significance. See Gavin, 122 F.3d at 1087 ("the difference between this case and Wheeling II -- that is, the difference between altering the court's remedial powers and altering the substantive law defining the rights of the parties -- is [not] of constitutional significance"); Jensen v. County of Lake, 958 F. Supp. at 403 (concluding that this is not a "meaningful distinction").

As the First Circuit explained in Inmates of Suffolk County v. Rouse, supra, "[t]he relevant underlying law in this case is not the Eighth Amendment * * *. Rather, the relevant underlying law relates to the district court's authority to issue and maintain prospective relief absent a violation of a federal right, and the PLRA has truncated that authority." 129 F.3d at 656. If a consent decree fails to meet the PLRA standards, termination of the decree pursuant to the PLRA, "therefore, merely effectuates Congress' decision to divest district courts of the ability to construct or

perpetuate prospective relief when no violation of a federal right exists." Id.; See also id. at 658 ("the relevant underlying law for present purposes is not the Eighth Amendment, but the power of federal courts to grant prospective relief absent a violation of a federal right"). The "applicable law is not the Eighth Amendment, but rather is the authority of the district court to award relief greater than that required by federal law. * * * [I]t is the authority of the district court to approve relief greater than that required by the Eighth Amendment, not the Eighth Amendment itself, that is at stake. In enacting the PLRA, Congress has deprived district courts of this authority, and in so doing has unquestionably amended the law applicable to this case." Plyler, 100 F.3d at 372.

In sum, Congress has properly exercised its Article I authority to prescribe rules, timetables and standards for federal courts to follow when deciding whether to grant, terminate, or modify a prospective order regarding jail conditions and to require that a court make specific types of findings when issuing such relief. See Section II, supra. Under Wheeling and its progeny, applying current federal law -- the PLRA -- when deciding now or in the future whether to modify, terminate or continue a prospective consent decree fully comports with separation of powers principles.

C. The PLRA Is Not Invalid Under United States v. Klein.

The Taylor panel based its alternative separation of powers holding on United States v. Klein, 80 U.S. 128 (1872). The deci-

sion in that case was based upon a unique set of facts[20] and its significance as precedent is unclear. As the Court explained in Plaut, "[w]hatever the precise scope of Klein, * * * later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" Plaut, 514 U.S. at 218, 115 S.Ct. at 1452 (quoting Robertson, 503 U.S. 429, 441, 112 S.Ct. 1407, 1414 (1992)). Thus, legislation does not prescribe an improper rule of decision within the meaning of Klein when, as in the PLRA, it "amends applicable law" and leaves to the judiciary the task of interpreting that law and applying it to the facts.

Every circuit court of appeals (other than the Taylor panel) that has considered the constitutionality of Section 3626(b) of the PLRA in light of Klein has upheld the statute. See Hadix, 133 F.3d at 943 ("the interpretation and application of law to fact and the ultimate resolution of prison condition cases remain at all times with the judiciary"); Gavin, 122 F.3d at 1089 ("Congress has left

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[20] In Klein, the President pardoned certain individuals for giving aid and comfort to the confederacy during the Civil War on the condition that they take an oath of allegiance. V.F. Wilson took the oath of allegiance and thereafter passed away. Wilson's estate sued the United States under a federal statute permitting loyal citizens to obtain compensation from the United States Treasury for cotton seized or destroyed during the war, and the Court of Claims ruled in the estate's favor. Klein, 80 U.S. at 130-32. While the case was on appeal to the Supreme Court, Congress passed a new statute mandating that presidential pardons could not be considered as evidence of loyalty, but rather were conclusive evidence of disloyalty. Id. at 133-34, 143-44. In Klein, the Supreme Court struck down the new statute, holding that Congress could not compel courts to discount the legal or evidentiary effect of a presidential pardon and impose a rule of decision in a pending case. Id. at 146-48.

the judicial functions of interpreting the law and applying the law to the facts entirely in the hands of the courts. The PLRA leaves the judging to judges, and therefore it does not violate the Klein doctrine"); Inmates of Suffolk County Jail, 129 F.3d at 658 (the PLRA does not run a foul of Klein because it "does not tamper with courts' decisional rules - - that is, courts remain free to interpret and apply the law to the facts as they discern them. Because the PLRA leaves the courts' adjudicatory processes intact, it does not transgress the Klein doctrine"); Plyler, 100 F.3d at 372 (section 3626(b)(2) provides "only the standard to which district courts must adhere, not the result they must reach").

The Taylor panel's misapplication of Klein appears to have resulted from its erroneous reading of the PLRA as mandating that a court terminate all prospective relief afforded in a preexisting consent decree in jail-related institutional reform litigation. See Section II(B), supra. The PLRA provides a structured timetable for termination and provides that relief shall be kept in place only if it continues to meet the remedial criteria established by section 3626(b)(3). Formalizing the timetable for courts to exercise their long-recognized power (and, indeed, obligation) to periodically review the propriety of prospective relief effects no radical reworking of the courts' powers. Similarly, the mandate of sections 3626(b)(2) and (b)(3) -- that termination is required absent appropriate findings that relief currently satisfies the statutory criteria and is necessary to correct current and ongoing

violations -- does not deprive the courts of their equitable powers to redress constitutional violations. Indeed, the opposite is true. Under the PLRA, a court may continue prospective relief if it finds that the relief is "necessary to correct a current or on-going violation of the Federal right" and is narrowly tailored to do so. See 18 U.S.C. § 3626(b)(3).

The core judicial power to decide constitutional claims and to render equitable relief to remedy constitutional violations is unscathed by the PLRA. Gavin, 122 F.3d at 1089 ("Congress has left the judicial functions of interpreting the law and applying the law to the facts entirely in the hands of the courts. The PLRA leaves the judging to judges"); Plyler, 100 F.3d at 372 (same). While Congress has altered the standards, presumptions and procedures for terminating jail management consent decrees, it has not done so in a way that drastically departs from established principles or in any way that subverts the Article III powers of the courts.

Finally, even if the panel were correct that the PLRA's aim was to terminate all consent decrees (neither the statutory language nor its legislative history support such a conclusion), the principles of Klein would not invalidate the PLRA. That the effect of the changed law on a certain case, or class of cases, may be easy to foresee or may even have been intended by Congress is constitutionally insignificant. See Robertson, 503 U.S. at 441, 112 S.Ct. at 1414 (change in applicable law does not violate Klein even when directed at two pending cases); Mount Graham Coalition,

89 F.3d at 554 (no separation of powers violation where the amendment to the applicable law "targeted" a single controversy).

IV. THE PLRA DECREE DETERMINATION PROVISIONS DO NOT VIOLATE DUE PROCESS.

The Taylor panel declined to rule on contentions that the PLRA's decree modification provisions violated due process. Because the court below in this case denied the Appellants' motion to terminate solely upon the basis of the panel decision in Taylor, it is unclear whether the due process concerns are implicated in that ruling. What is manifestly clear is that the PLRA fully comports with due process guarantees, as those circuits that have decided due process challenges to the PLRA have uniformly held. See Gavin, 122 F.3d at 1092; Plyler, 100 F.3d at 374-75.

Those decisions rest on a sound constitutional footing. A prospective decree or order, which is always subject to modification based upon subsequent legislative enactments, changed facts, or other equitable considerations, creates no vested property right. Thus, the plaintiff-class has no vested rights in the prospective relief afforded under the consent decree in this case. See Gavin, 122 F.3d at 1091; Plyler, 100 F.3d at 374-75.

Moreover, the PLRA affords procedural due process. Opponents of termination have an opportunity to contest whether the prospective relief is subject to termination under the standards of subsections (b)(2) and (b)(3). Even where the consent decree does not contain the necessary findings, subsection (b)(3) permits relief to continue prospectively, if the court finds on the record that the

relief granted comports with applicable PLRA standards set forth in 18 U.S.C. § 3626(b)(3). Thus, the PLRA satisfies all due process requirements.

CONCLUSION

For the foregoing reasons, the Appellants respectfully request that this Court declare the PLRA's consent decree termination provision to be valid and constitutional, reverse the decision below and remand for further proceedings on the motion to terminate the Amended Judgment in this case.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6 (c), Appellants note that the pending case of Taylor v. United States (Ninth Circuit Docket Nos. 97-16069 and 97-16071) involves the same or closely related constitutional issues as this case. Both Taylor and the instant case involve the issue of whether the consent decree termination provisions of the PLRA violate separation of powers principles and, therefore, are unconstitutional.

CERTIFICATION PURSUANT TO CIRCUIT RULE 32(e)(3)

Pursuant to Ninth Circuit Rule 32(e)(3), I certify that the Opening Brief of Appellants Maricopa County (Arizona) Board Of Supervisors And Maricopa County Sheriff's Office is monospaced, has 10.5 characters per inch and contains 11,838 words.

DATED this 25th day of January, 1999.

Andrew L. Pringle
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CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) **ss.**
County of Maricopa)

ANDREW L. PRINGLE, being first duly sworn upon his oath, deposes and says:

On the 25th day of January, 1999, I caused to be mailed by U. S. Mail, First Class, postage prepaid, an original and fifteen (15) copies of the attached Opening Brief Of Appellants Maricopa County (Arizona) Board Of Supervisors and Maricopa County Sheriff's Office to the United States Court of Appeals, Ninth Circuit, P. O. Box 193939, San Francisco, CA 94119-3939, and caused two (2) copies to be mailed by U. S. Mail, postage prepaid to Theodore C. Jarvi, Esq., 4500 South Lakeshore, Suite 550, Tempe, Arizona 85282-705, attorney for the plaintiff-class.

ANDREW L. PRINGLE

The foregoing instrument was acknowledged before me this 25th day of January, 1999, by **ANDREW L. PRINGLE.**

Notary Public

My Commission Expires:

3-9-02

OFFICIAL SEAL
LINDA COMEAU
Notary Public - State of Arizona
MARICOPA COUNTY
My Comm. Expires Mar. 9, 2002

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ADDENDUM TO BRIEF

TEXT OF 18 U.S.C. § 3626

Pursuant to Ninth Circuit Rule 28-2.7, the relevant portions of the PLRA, specifically 18 U.S.C. § 3626, are reproduced below in their entirety:

§ 3626. Appropriate remedies with respect to prison conditions.

(a) Requirements for relief. -

(1) **Prospective relief. - (A)** 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.

(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless --

(i) Federal law requires such relief to be ordered in violation of State or local law;

(ii) the relief is necessary to correct the violation of a Federal right; and

(iii) no other relief will correct the violation of the Federal right.

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

(2) **Preliminary injunctive relief.** -- In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or

the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.

(3) **Prisoner release order. -- (A)** In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless --

(i) a court has previously entered an order for less intrusive relief that has failed to remedy by the deprivation of the Federal right sought to be remedied through the prisoner release order; and

(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that --

(i) crowding is the primary cause of the violation of a Federal right; and

(ii) no other relief will remedy the violation of the Federal right.

(F) Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

(b) **Termination of relief. --**

(1) **Termination of prospective relief. -- (A)** 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.

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

(2) **Immediate termination of prospective relief. --** 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.

(3) **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 and 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.

(4) **Termination or modification of relief.** -- Nothing in this section shall prevent any party or intervener from seeking modification or termination before relief is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise be legally permissible.

(c) **Settlements.** --

(1) **Consent decrees.**-- In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

(2) **Private settlement agreements.**-- **(A)** Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

(d) **State law remedies.**-- The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

(e) Procedure for motions affecting prospective relief. --

(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. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

(2) **Automatic stay.**-- Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay 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); or

(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

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

(3) **Postponement of automatic stay.--** The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court's calendar.

(4) **Order blocking the automatic stay.--** Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.

(f) Special masters. --

(1) **In general. -- (A)** In any civil action in a Federal court with respect to prison conditions, the court may appoint a special master who shall be disinterested and objective and who will give due regard to the public safety, to conduct hearings on the record and prepare proposed findings of fact.

(B) The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

(2) **Appointment.-- (A)** If the court determines that the appointment of a special master is necessary, the court shall request that the defendant institution and the plaintiff each submit a list of not more than 5 persons to serve as a special master.

(B) Each party shall have the opportunity to remove up to 3 persons from the opposing party's list.

(C) The court shall select the master from the persons remaining on the list after the operation of subparagraph (B).

(3) **Interlocutory appeal. --** Any party shall have the right to an interlocutory appeal of the judge's selection of the special master under this subsection, on the ground of partiality.

(4) **Compensation.--** The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such

compensation and costs shall be paid with funds appropriated to the Judiciary.

(5) **Regular review of appointment.**-- In any civil action with respect to prison conditions in which a special master is appointed under this subsection, the court shall review the appointment of the special master every 6 months to determine whether the services of the special master continue to be required under paragraph (1). In no event shall the appointment of a special master extend beyond the termination of relief.

(6) **Limitations on powers and duties.**-- A special master appointed under this subsection --

(A) may be authorized by a court to conduct hearings and prepare proposed findings of fact, which shall be made on the record;

(B) shall not make any findings or communications ex parte;

(C) may be authorized by a court to assist in the development of remedial plans; and

(D) may be removed at any time, but shall be relieved of the appointment upon the termination of relief.

(g) **Definitions.**-- As used in this section --

(1) the term "consent decree" means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

(2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

(3) the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

(4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

(5) the term "prison" means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

(6) the term "private settlement agreement" means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

(7) the term "prospective relief" means all relief other than compensatory monetary damages;

(8) the term "special master" means any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and

(9) the term "relief" means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.