IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 02-cv-001239-MSK-KLM

MARK JORDAN,

Plaintiff,

v.

MICHAEL PUGH, et al.,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO STAY THE JUDGMENT

Plaintiff, Mark Jordan, through counsel, submits the following Response to Defendants' Motion to Stay the Judgment (Doc. #368).

I. PLAINTIFF SEEKS CLARIFICATION OF THE COURT'S ORDER STAYING THE INJUNCTION PROHIBITING THE BOP FROM PUNISHING HIM FOR VIOLATION OF THE "BYLINE REGULATION."

As an initial matter, Plaintiff seeks clarification of this Court's Order granting a stay of the injunction pending resolution of Defendants' Motion to Stay the Judgment (Doc. 369). The Court's Order appears to stay the injunction prohibiting the BOP from enforcing the "Byline Regulation" not only against other federal prisoners but also against Plaintiff Jordan himself. *See id*. Such an interpretation is at odds with both the relief requested by Defendants and the issue raised by Defendant's Motion to Amend the Judgment (Doc. 358).

First, in their Motion to Stay the Judgment, Defendants never asked this Court to stay its injunction as to Mr. Jordan; in fact, they expressly excluded Plaintiff from their request. *See*

Doc. 368 at 1, fn. 1 ("By way of this motion, Defendants are not seeking to stay the judgment with respect to Plaintiff Mark Jordan himself."). Similarly, in their Motion to Amend Judgment, Defendants do not seek relief from the Judgment as it applies to Mr. Jordan. *See* Doc. 358 at 2 (requesting modification of the judgment to "reflect that the nationwide injunction applies only to Plaintiff, Mark Jordan"). Defendants have not offered any factual or legal basis for the injunction to be stayed as it relates to Plaintiff Jordan. There is no challenge that the injunction was improperly issued as it relates to the BOP's enforcement of the regulation against Mr. Jordan and there is no justification for extending the stay to Defendants' treatment of him. Plaintiff therefore requests that the Court's order be clarified to reflect that the stay of the injunction does not apply to the BOP's treatment of Mr. Jordan himself.

II. BECAUSE DEFENDANTS HAVE MADE NO SHOWING THAT A STAY OF THE JUDGMENT IS NECESSARY, THEIR MOTION SHOULD BE DENIED.

The granting of a stay of the Judgment in this matter pending resolution of the parties' Rule 59(e) motions is discretionary with this Court. Rule 62(b), Fed.R.Civ.P. Caselaw interpreting Rule 62(b) is scant; however, courts considering Rule 62 motions have looked to "the factors that traditionally inform the exercise of a court's discretion with respect to the issuance or denial of a stay—likelihood of success, the threat of irreparable harm to either side, and the public interest." *Frankel v. ICD Holdings S.A.*, 168 F.R.D. 19 (S.D.N.Y. 1996). Thus, in exercising its discretion, this Court should be guided by the following criteria:

> "(1) whether the petitioner is likely to prevail on the merits of his appeal, (2) whether, without a stay, the petitioner will be irreparably injured, (3) whether issuance of a stay will substantially harm other parties interested in the proceedings, and (4) wherein lies the public interest." Furthermore, the Second Circuit has held that the district court may grant a stay pending appeal with no supersedeas bond "if doing so does not unduly endanger the judgment creditor's

> interest in ultimate recovery." *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1155 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987).

River Oaks Marine, Inc. v. Town of Grand Island, 1992 WL 406813, *2 (W.D.N.Y. 1992), *see attached* Exhibit 1. When these criteria are considered, Defendants have failed to establish that they are entitled to a stay.

As to the first criteria, it is unlikely that Defendants will prevail on this issue on appeal. For the reasons explained in Plaintiff's Response to Defendants' Motion to Amend Judgment, Defendants' claim that this Court does not have the authority to issue a nationwide injunction in this matter is unpersuasive. (*See* Doc. 365.)

Defendants also have not made a showing that the second criterion—irreparable injury to the BOP—is met. Indeed, Defendants have failed to allege, let alone offer proof, that "without a stay ... [they] will be irreparably injured." In its *Memorandum Opinion and Order*, this Court found that Defendants had failed to offer any support for their claim that the Byline Regulation was justified based upon the good order and security of the prison (Doc. 354). Because Defendants have articulated no harm to their interests if the Court's injunction remains in force, they have not demonstrated that they will suffer irreparable injury.

The third criterion directs courts to consider whether issuance of a stay will substantially harm other parties interested in the proceedings. *River Oaks Marine, Inc. v. Town of Grand Island*, 1992 WL 406813 at *2. Here, the granting of a stay pending determination of the Rule 59(e) motions will significant harm tens, if not hundreds, of other prisoners who have an interest in being allowed to send out their writings without fear of being punished under the Byline Regulation. As the United States Supreme Court has recognized, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."

Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality), citing *New York Times Co. v. United States*, 403 U.S. 713 (1971). Every day that the judgment is stayed will serve to compound the serious harm to prisoners and the press caused by the regulation's infringement of their First Amendment rights.[1]

Analysis of the final criterion—the public interest—also shows that a stay of the judgment should be denied. Again here, Defendants have articulated no harm to the public interest if the Court's judgment is not stayed pending determination of the Rule 59(e) motions. If, however, the judgment is stayed, the public will be denied access to information written by prisoners and published by the press, including—and perhaps especially—information regarding the operation of the prisons themselves. The public has an interest in knowing what happens inside its prisons.[2] As this Court found, "[e]ven when a proffered writing is not published, it may inform the news media of facts to be investigated or the perspective of an inmate or inmates generally. It could disclose an abuse or a particularly effective program or technique." Doc. 354 at 15, n. 21. The federal prisons do not belong to the Defendants but are owned by the public. The best government is a government that permits knowledge of its operations to be provided to the public. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (First Amendment

[1] Rule 62(b) requires that for a stay to be granted, "adequate provisions shall be made for the security of the adverse party." *River Oaks Marine* at *1; *see also Donellon Jerome, Inc. v. Trylon Metals*, 270 F.Supp. 996, 999 (D. Ohio 1967) (finding that under the circumstances of this case, the Court believes that a stay should be granted only on condition that debtor file a supersedeas bond in the amount of twice the judgment with interest and costs). Here, Defendants assert that "because the only relief granted to Plaintiff is declaratory and injunctive, Plaintiff's judgment is adequately secured." (Doc. 368 at 2.) While this may be true for the period following the Court's decision on the parties' Rule 59(e) motions, it offers nothing in the way of protection during the period in which the Court is considering those motions. If the judgment is stayed pending a ruling on the Rule 59(e) motions, there is no way to adequately secure the rights of Plaintiff, other prisoners and the press whose rights may be violated by the BOP during the period of the stay.

[2] There is already a dearth of such information. As Justice Kennedy articulated at his 2003 address to the American Bar Association, "When the prisoner is taken way, our attention turns to the next case. When the door is locked against the prisoner, we do not think about what is behind it." *See* www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

freedoms are essential to the maintenance of our democratic polity, which depends upon an informed citizenry to hold government officials accountable for error and abuse and to seek redress and change by lawful means).

In sum, Defendants had an obligation to address the need for a stay of the Judgment. They have not met this burden. Presumably, if there existed good reasons for granting a stay, Defendants would have provided them. Their failure to do so demonstrates that a stay is not warranted and should be denied.

CONCLUSION

WHEREFORE, for the reasons stated above, Plaintiff requests that the Court clarify its order to reflect that the stay of the injunction pending determination of Defendants' Motion to Stay the Judgment (Doc. 368) does not apply to Plaintiff Jordan, and requests that the Court deny Defendants' Motion to Stay the Judgment in its entirety.

DATED: September 24, 2007

Respectfully submitted,

STUDENT LAW OFFICE

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on this 24th day of September, 2007, a true and correct copy of the above and foregoing **Plaintiff's Response to Defendants' Motion to Stay the Judgment** was delivered via the electronic case filing procedure for civil cases in the United States District Court District of Colorado to the following addresses:

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s/ Laura L. Rovner

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