

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JUN 24 2002

CLERK

Michael N. Milby, Clerk

DAVID RUIZ, ET AL.,)
Plaintiffs,)
UNITED STATES OF AMERICA,) CIVIL ACTION NO.
Plaintiff-Intervenor,) H-78-987
V.)
GARY JOHNSON, Director TDCJ-ID,) Austin, Texas
et al.,) June 7, 2002
Defendants.) 2:00 p.m.

TRANSCRIPT OF IN-CHAMBERS STATUS CONFERENCE
BEFORE THE HONORABLE WILLIAM WAYNE JUSTICE
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:

Ms. Donna Brorby
Ms. Gail Saliterman
Law Office of Donna Brorby
660 Market St., Ste. 300
San Francisco, CA 94104

For the Defendants:

Mr. Carl Reynolds
Ms. Sharon Felfe
Assistant Attorney General
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711

Mr. Gregory Coleman
Weil, Gotshal & Manges
111 Congress Avenue
4th Floor
Austin, Texas 78701

Court Reporter:

Ms. Kathy Carroll, CSR
903 San Jacinto Blvd.
Suite 310
Austin, Texas 78701
(512) 236-0998

ORIGINAL

(Proceedings recorded by mechanical stenography, transcript
produced by computer).

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P R O C E E D I N G S

THE COURT: Let the record reflect that this is an in-chambers conference convened at 2:22 p.m. on June 7th, 2002. The attorneys for both the plaintiff and the defendants are present.

Do you want to announce your presence for the record?

MS. BRORBY: Sure.

THE COURT: Go ahead.

MS. BRORBY: I'm Donna Brorby with Gail Saliterman representing the plaintiffs David Ruiz and the class.

MR. COLEMAN: Greg Coleman with Sharon Felfe and Carl Reynolds on behalf of the defendants.

THE COURT: I understand that the parties have some kind of an announcement to make to me for the record, so proceed.

MS. BRORBY: I'll start?

MR. COLEMAN: Go ahead.

MS. BRORBY: Your Honor, as you're well aware, the last remedial order in this case of October 12, 2001 set up a process of an exchange of information among the parties and a filing of information with the Court. And I think it's apparent from the record that that involved some site visits that the parties did together at eight prison units. All of this was looking forward toward the possibility of jurisdiction in the case terminating on July 1st if there were no motion to continue

1 jurisdiction as a result of the evidence that was adduced during
2 the course of the year.

3 And at the end of the production site visit exchange
4 of information, I concluded and informed counsel for the
5 defendants that I observed that there were still continuing
6 extremely serious violations in the areas under court
7 jurisdiction and I thought that I did have grounds for a motion
8 to continue jurisdiction, but I thought that the parties might
9 best be served by negotiating something that could avoid such a
10 motion and permit jurisdiction in the case to terminate, and the
11 parties have engaged in that negotiation.

12 In the course of the negotiation the parties reviewed
13 the evidence and found broad areas of agreement about problem
14 areas. We will never agree about what's constitutional and
15 what's not constitutional, but we had broad areas of agreements
16 about directions that would be a good thing for TDCJ to take.
17 And, essentially, at this point we have made agreements about a
18 few things. And I should say that the greatest reason that
19 we're here is that I represent a class and I think it's
20 important for the Court to be advised of what's going on in the
21 course of the class representation in the end. As I'll explain
22 later, I think it's not necessary to have a Rule 23 procedure,
23 but I thought the Court should be aware of what the parties were
24 doing and exercise its own judgment in the course of, you know,
25 being conscious of the obligations of class counsel to a class.

1 In terms of the sort of negotiations about the
2 substance of conditions and practices in the prison, the parties
3 have come to some areas of agreement as to things that TDCJ is
4 intending to do in the immediate future and over the course of
5 the next couple of years that were really the product of TDCJ's
6 proposal for an alternative to the continuation of jurisdiction
7 in the case.

8 This might seem slightly odd, but we would like not to
9 go into the specifics of those things on the record here out of
10 what is defendants' concern that somehow will be federalizing
11 something at a time when really what we're trying to do is let
12 federal jurisdiction in Ruiz end and move on in the future with
13 TDCJ following some of its own initiatives to address,
14 particularly the problems that are a subject of the Court's
15 jurisdiction at this time.

16 So the -- you know, basically the parties went back
17 and forth about some proposals for how to continue in a
18 post-Ruiz environment having to continue to evaluate the
19 situation on the individual units. As the Court will remember,
20 the issue is not really central policies, but the implementation
21 and enforcement of policies on the units. And, you know, at the
22 end of the process of going back with a few ideas, we basically
23 adopted one that TDCJ is enthusiastic about carrying out and
24 really owns as its own plan for moving on into the future.

25 These -- the commitments that TDCJ has made about its

1 plan to move on in the future are not going to be enforceable as
2 a federal court order. They are not going to be enforceable as
3 any kind of court order, and we haven't even tried to make them
4 an enforceable contract partly because of the impracticality
5 and, in my view, relative meaningless of that anyway.

6 So the agreement under which we will continue to have
7 some opportunity to have input and provide some feedback will be
8 fully public. It won't be a secret. We just don't want to make
9 it a part of any federal court proceedings.

10 As a part of the resolution of issues in the case, the
11 parties have come to a more formal agreement and proposed
12 judgment on the issues of attorneys' fees and costs and expenses
13 in the case. And I have a copy of that here which I would give
14 to the Court.

15 THE COURT: Hand it to Margarita.

16 MR. COLEMAN: This is our only copy. We have not
17 officially filed it with the Court separately yet.

18 MS. BRORBY: That's correct, we just finished printing
19 it.

20 THE COURT: Why don't you go make -- how many copies?

21 MR. BRORBY: We don't have any copies of the
22 signature. I do have extra copies of the document without
23 signatures.

24 COURT CLERK: Would you like for me to file this,
25 Judge?

1 THE COURT: Yes.

2 MS. BRORBY: Basically, the stipulation of the parties
3 on attorneys' fees and costs lays out some of the basic facts
4 contained in the motion that has been pending before the Court
5 and brings them up-to-date. At this point, at market rates
6 plaintiffs' counsel fees, cost and expenses are approximately
7 \$4.9 million. At PLRA rates, plaintiffs' counsel fees are
8 approximately \$2.9 million. And the stipulation for entry of
9 judgment on counsel fees provides the entry of the judgment for
10 counsel fees, costs and expenses through May 31st, 2002, in the
11 amount of \$1,930,000, so that it's just under two million in
12 fees, costs and expenses as against the PLRA rate figure of just
13 under three million.

14 THE COURT: Just under what?

15 MS. BRORBY: The PLRA rate figure is just under three
16 million, so it's \$2.9 million as through -- for the bills
17 through May 31, 2002.

18 You know, I lay out all of those facts and figures
19 just so the Court can be aware of what's happening in the
20 counsel fees issue. I think it's apparent from the figures that
21 as we tried to keep the attorneys' fees issue just a matter of
22 money about fees and separate from the class interests, I think
23 we succeeded in doing so. And I think the figure for which
24 class counsel settled would not indicate that there was in any
25 way a class interest sold in settlement of fees, but I just

1 thought the Court would want to be clear on the specifics of our
2 agreement.

3 And then, finally, as I said before, Counsel have
4 discussed whether Rule 23 proceedings were necessary at this
5 time. And after some consideration of the issue, I have come to
6 agree with counsel for the defendants that they aren't that
7 necessary.

8 I should probably mention, since I haven't made it
9 clear yet, that part of the parties' settlement also settles the
10 appeals and the appeals will be dismissed. So the case will be
11 entirely gone, settled, and resolved as a result of what the
12 parties have done.

13 And, you know, in my analysis, which I think is sort
14 of similar to defense counsel's analysis, the Court's order of
15 October 12, 2001 essentially set up a structure under which
16 plaintiffs' counsel would have to make a judgment before June
17 1st about whether a motion to extend -- a motion -- an objection
18 to termination of jurisdiction would be appropriate. And within
19 the terms of that order, class counsel is making a judgment that
20 it's not appropriate and what will happen -- the termination of
21 the case will be by operation of the Court's October 12, 2001
22 order.

23 In terms of the mutual dismissal of appeals as part of
24 a resolution of all the issues, you know, it was the judgment
25 that I made as class counsel to file the appeal for the class on

1 the issues on which Your Honor ruled against us. So I think
2 that I'm able to make the judgment in the context of what we're
3 doing here, that the appeal is appropriately dismissed as part
4 of this resolution.

5 Oh, I'm sorry, I did forget one other matter. The
6 parties have actually resolved all but one issue between them.
7 And there is going to be one issue that will be presented by the
8 defendants on which we have just agreed at this point we will
9 just disagree and let the courts resolve it, and that is whether
10 as a result of this settlement here the Court's findings of
11 March 1st, 1999 should be vacated. We have our different
12 positions on that and we're not able to reach agreement on that
13 issue, so we have agreed that we will present that issue to
14 the -- first to Your Honor, and then possibly in the Fifth
15 Circuit.

16 THE COURT: And then what?

17 MS. BRORBY: And then the defendants have reserved the
18 right in the terms of all our agreements that they may present
19 the issue in the Fifth Circuit. And, you know, defendants'
20 counsel may want to speak to that issue.

21 MR. COLEMAN: I'm happy to, Your Honor. As Ms. Brorby
22 has stated, we have worked very diligently and hard over the
23 past month or so to come up with a set of actions that TDCJ will
24 take on initiative in order to convince class counsel that
25 filing an objection to termination is not in the class's best

1 interest. And I'm thrilled and excited that we have reached
2 that point.

3 We have made a separate agreement on the attorneys'
4 fees. I know that our conversation last week, that you -- that
5 you had known that we would be mediating that, and that
6 mediation started at 9:00 that morning. I think we ended up
7 leaving somewhere close to 9:00 that evening, but we were
8 successful in doing that.

9 We have also mutually agreed to dismiss the appeals.
10 And as Ms. Brorby just stated, the one issue that we have had
11 some concern about is there is an old case called *McDuffy* from
12 the Fifth Circuit in which assertion was made in a prison
13 conditions case that because of Your Honor's prior findings from
14 20 years ago, that the department should be stopped from
15 defending itself against certain claims of unconstitutionality.
16 That's obviously a concern to us with respect to the most recent
17 findings, and we would --

18 THE COURT: Now, I don't quite understand what you're
19 saying --

20 MR. COLEMAN: Well, let me give you an example.

21 THE COURT: -- about *McDuffy*. I don't remember it.

22 MR. COLEMAN: Yeah, it's an old case that just
23 addressed whether an inmate could use collateral estoppel
24 defensively against the department and say you have already been
25 judicially determined to have unconstitutional policies and

1 practices, and therefore I shouldn't have to -- as a member of
2 the class it's been held against you, and, therefore, I
3 shouldn't have to prove that up.

4 MS. FELFE: If I could interrupt for just a second.

5 MR. COLEMAN: Of course.

6 MS. FELFE: He claims that he was assaulted by
7 building tenders and the case was quite old by the time it was
8 decided. In 1991, I believe the offender claimed that he was
9 assaulted in 1976, which would have been around the time that
10 the Court was making some findings. So I don't know if that
11 helps the Court at all, but it was a building tender case.

12 MR. COLEMAN: And then ultimately I think the second
13 aspect of that is as a result of our discussions and
14 Ms. Brorby's decision that she can for the sake of the class not
15 oppose termination, the appeals will end and we will be unable
16 to carry out the appeals that we sought, and so we had made a
17 decision based on our concerns about collateral estoppel and
18 some case law that we would ask the Court to vacate those
19 opinions. And, obviously, that's an issue under which we have
20 not reached agreement and we thought it's simply a matter --
21 it's not something that should be a sticking point in the whole
22 matter and that what we hoped to do is ask you to vacate those
23 opinions and dismiss the case, and then hopefully the dismissal
24 part won't be a sticking point, and then we'll also dismiss the
25 Fifth Circuit -- all of the Fifth Circuit appeals.

1 And we simply reserved and ask that we be allowed to
2 ask the Fifth Circuit to vacate those opinions because of our
3 collateral estoppel appeals -- excuse me, collateral estoppel
4 concerns, and that we will live with whatever decisions come out
5 of those. It's not intended to be something that is a deal
6 breaker for us or anything else. We just thought that given
7 those concerns about, for instance, an offender coming in and
8 saying, I was denied a -- I had requested a transfer or
9 safekeeping, I was denied that, and I don't want to sue the
10 individual officer necessarily or maybe do, but I also want to
11 sue the system because of a policy that has already been found
12 to be unconstitutional, and, therefore, you know, this matter of
13 summary judgment or what have you, you know, I want a summary
14 judgment on liability against -- against TDCJ because of this
15 policy that's already been found to be unconstitutional. And I
16 think that is the heart of our concern and we wanted to raise
17 it.

18 THE COURT: Well, just how substantial do you think
19 those concerns are?

20 MR. COLEMAN: It is unclear to me. I have looked at
21 some case law - I haven't spent a lot of time - and I frankly
22 don't see a lot of instances in which it has been asserted. And
23 I don't know that there will be others or how many. If there
24 are, how many. So I can't say that I stand -- or sit before
25 you, Judge, and say that I think that this is an absolute

1 concern and it's going to multiply itself hundreds of times. I
2 think that there's an argument that someone may make and we
3 would like to -- or that many could make, and that we would like
4 to be able to avoid that.

5 THE COURT: I won't consider that very hard. I will
6 tell you frankly, I'm very reluctant to set aside those findings
7 because they took so much time and effort to come to the
8 conclusion.

9 But is there any precatory language we could insert to
10 say that this is not to be considered as a basis for a
11 collateral estoppel?

12 MR. COLEMAN: That would be acceptable to us, Your
13 Honor.

14 THE COURT: I don't know whether you can do that or
15 not.

16 MR. COLEMAN: We could try.

17 MS. BRORBY: I don't know, either, Your Honor, but I'm
18 certainly willing to look into it.

19 THE COURT: See what you can find out.

20 MS. BRORBY: Our view, of course, is very -- is
21 different in a lot of ways in terms of the posture of things
22 that I think affects the applicable legal rules. The parties
23 have jointly reached a conclusion that has produced a situation
24 where we have agreed that will dismiss appeals and I don't think
25 that the defendants have a basis to ask for vacating of the

1 underlying findings and orders, but additionally I think it's
2 not a large concern. Of course, it's easier for me to say that
3 sitting in my shoes.

4 As Your Honor will recall, most of the evidence was
5 about the facts of practices on the units, and not -- you know,
6 there wasn't -- the Court didn't find that there was a --

7 THE COURT: Systemwide.

8 MS. BRORBY: -- policy that applied to everybody that
9 denied transfers to safekeeping, just that too many people were
10 involved. But for an individual who came forward, the issue
11 would be whether he was -- whether his constitutional rights
12 were violated. I don't think the findings of a court will apply
13 to that situation. But Your Honor has a new idea that we didn't
14 think about and we could certainly try to figure out where it
15 sits legally.

16 MR. COLEMAN: For obvious reasons, I understood that
17 there might be some reluctance to that, but your idea, Your
18 Honor, of injecting some language would certainly be a big help
19 and we might have to test that later whether it's effective, and
20 we hope that we never would have to and that our concerns are
21 unfounded. I simply don't know that they are and would be
22 willing to test that later on.

23 MS. BRORBY: I forgot to say I would echo that it was
24 a lot of work.

25 THE COURT: Well, let me express my delight that you

1 have reached this much of a settlement in the matter, and I'm
2 particularly grateful that you settled the matter of attorneys'
3 fees because that was giving me heartburn in the preparation of
4 the findings and conclusions of law.

5 MR. COLEMAN: I'm only sorry we didn't do it earlier,
6 Your Honor.

7 MS. BRORBY: Nobody is as sorry about that as I am.

8 THE COURT: Obviously you chose well as far as a
9 mediator was concerned. Mr. York is a very fine lawyer. He's
10 had a lot of experience in that field. I first encountered him,
11 it must have been about 1976, when he was an Assistant Attorney
12 General representing the State in *Morales against Turman*, a
13 juvenile justice case. Hard one, too. It only lasted six weeks
14 as opposed to eleven months for Ruiz.

15 MS. BRORBY: We were young lawyers then.

16 THE COURT: Yeah, very. Well, I was a younger judge
17 in those days.

18 Is there any other matter that needs to be discussed?

19 MR. COLEMAN: The one other thing I guess we would
20 formally request, Your Honor, and I'm not sure that -- the
21 stipulation that has been filed does -- I think is contingent
22 upon -- I think the language that was used was termination or
23 dismissal of the case or --

24 MS. BRORBY: It's not contingent. The stipulation is
25 that the parties agree that the Court can file the judgment when

1 the case is dismissed or jurisdiction terminates, whichever
2 comes first. I always speak of jurisdiction terminating because
3 that's the concept I'm familiar with. He speaks of dismissal,
4 that's the concept he's familiar. One way or the other, the
5 case is going to end. And contemporaneously with its end, we
6 stipulate that the judgment on fees can be issued -- may be
7 issued.

8 THE COURT: Maybe before you leave I better take a
9 look at what you have presented here.

10 MR. COLEMAN: We have brought with us -- and I don't
11 know if -- you may want to spend some time thinking, but we did
12 bring with us an order of dismissal that we would at least
13 present for your consideration.

14 THE COURT: All right. Give it to Ms. Herrington back
15 over there.

16 MR. COLEMAN: We brought two versions, one with the
17 vacating and one without. I'll give Ms. Herrington one of each
18 of those. (Indicating).

19 THE COURT: Well, this case came in like a lion and
20 it's going out like a lamb.

21 MS. FELFE: That's the way it ought to be.

22 THE COURT: It suits me fine.

23 Excuse me for a moment while I read this. (Reading).

24 (Off-the-record discussion)

25 THE COURT: Back on the record.

1 MS. BRORBY: In our view of the sort of status of the
2 case, the Court's remedial order of October 12 provides a
3 structure that I think it would be just appropriate to follow.
4 And under that order, there's a deadline set for a motion to
5 continue jurisdiction. And if the motion is not filed, then
6 jurisdiction will terminate.

7 And the parties have reached an agreement that
8 includes that the plaintiffs are not filing that motion which
9 now technically is due on Monday. So it is certainly
10 ascertained now and we have a completed agreement now that there
11 will be no motion, but somehow as class counsel I don't have
12 strong feelings about that, but it seems sort of to me
13 inappropriate for the delay that Your Honor built into the order
14 in the first place in October, you know, that the case just be
15 allowed to have jurisdiction terminate that way. But, you know,
16 I think whatever Your Honor considers appropriate will be
17 appropriate.

18 As to the possibility of some specific language in a
19 dismissal going to collateral estoppel, that's something I have
20 told opposing counsel to consider and try to understand, but as
21 I sit here I don't fully understand all the issues and I would
22 like a chance to consider that, too.

23 THE COURT: When can I expect a resolution of that?

24 MS. BRORBY: Are you going to make a -- are you going
25 to file a written motion?

1 MR. COLEMAN: I'm not sure that's necessary.

2 THE COURT: No, I don't think it's necessary.

3 MR. COLEMAN: I think the Court has understood my
4 position on that. And with respect to the delay, my personal
5 view on it, again, the Court will need to speak to this, was
6 that the month-long delay was built in to allow the Court to
7 consider something that might be filed. And that even if
8 nothing were filed, just as a technical matter there would need
9 to be at the close something that complies with Rule 58, just a
10 piece of paper. And I obviously would like to have it sooner
11 rather than later, but I understand --

12 MS. BRORBY: I am just now remembering, Your Honor,
13 that as a part of our sort of agreement tidying up details, the
14 parties have agreed that defendants have no objection to certain
15 additional documents be filed in the action before jurisdiction
16 terminates, which we will do next week.

17 THE COURT: What are they?

18 MS. BRORBY: Documents that we think relate to the
19 filing of April 1st that we just thought should be part of the
20 record of the case as it closes.

21 MR. COLEMAN: Our position is they don't need to be
22 filed, but we are not going to make a big fuss and oppose.

23 MS. BRORBY: Or even a little fuss.

24 THE COURT: This is refreshing.

25 MR. COLEMAN: Although I will say, I don't know that

1 there's anything relating to that that would prevent the entry
2 of a Rule 58 judgment. There are frequently things --

3 THE COURT: Oh, I will probably enter some form of a
4 judgment.

5 Can you get me a brief on this matter of additional
6 language that might foreclose possibly the collateral estoppel
7 issue?

8 MR. COLEMAN: I'll be happy to have something here
9 Monday morning with whatever we can find. Ms. Brorby may want
10 some additional time. She's flying back.

11 THE COURT: I'll give you more time than that. She
12 has to fly back to San Francisco, for God's sake.

13 MS. BRORBY: Could we have maybe until Wednesday?

14 THE COURT: Sure.

15 MS. BRORBY: Could we deliver something by fax on
16 Wednesday?

17 THE COURT: That will be fine.

18 MR. COLEMAN: Okay, Wednesday.

19 THE COURT: Well, I want to express my appreciation to
20 counsel on both sides for the very professional manner in which
21 this matter has been resolved. This has been, unfortunately,
22 the highlight of my judicial career, this particular case. It's
23 not that I wanted it to be, it just turned out to be that way.

24 How long has it been? Thirty years?

25 MR. COLEMAN: Thirty years this year.

1 MS. FELFE: Yes, Your Honor, 30 years this year.

2 MS. BRORBY: There were a few-year breaks here and
3 there.

4 THE COURT: I beg your pardon?

5 MS. BRORBY: It wasn't 30 consecutive years.

6 THE COURT: I know. I didn't have to hold hearings
7 every year. It's the longest case I expect that -- have there
8 been any longer cases that you know of?

9 MS. SALITERMAN: Other than in fiction.

10 MS. FELFE: *Guajardo*.

11 THE COURT: They were incorporated in this case,
12 though, weren't they?

13 MS. FELFE: Only portions of them, Your Honor.

14 THE COURT: Yeah, I guess that's right. Were they
15 before Judge Seals?

16 MS. FELFE: I believe that *Guajardo* was, though it was
17 many years ago.

18 THE COURT: No, I remember now, I think Judge
19 Singleton had one of them.

20 MS. FELFE: Judge Singleton had *Guajardo*.

21 THE COURT: Well, any concluding remarks anybody wants
22 to make for the record?

23 MS. BRORBY: Your Honor, I would like to thank you for
24 your courtesy and courage throughout the long years of this
25 litigation. It's been --

1 THE COURT: I'm not asking for compliments.

2 MR. COLEMAN: I would like to add to that. Although
3 you are not asking for it, I appreciate your help all through
4 this process.

5 THE COURT: Well, thank you, Counsel. With that, this
6 hearing will be adjourned.

7 (Proceedings concluded at 2:56 p.m.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a correct transcript
from the stenographic notes of the proceedings in the
above-entitled matter to the best of my ability.

Kathy Carroll
KATHY CARROLL, CSR
Official Court Reporter
State of Texas No.: 2222

6-19-02
Date