1989 WL 75446
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United States District Court, N.D. Illinois, Eastern Division.

SHANGO, (Cleve Heidelberg, Jr., et al., Plaintiffs,
v.
Mary JURICH, et al., Defendants.
James L. SIMS, Plaintiff,
v.
Mary JURICH, et al., Defendants.
Steve NICHOLS, et al., Plaintiffs,
v.
Mary JURICH, et al., Defendants.

Nos. 74 C 3598, 76 C 3068, 76 C 3379, 77 C 103, 75 C 3388 and 76 C 3600. | June 27, 1989.

Opinion

MEMORANDUM OPINION AND ORDER

ANN ELAIRE WILLIAMS, District Judge.

***1** On July 15, 1988, this court entered its findings of fact and conclusions of law concerning this civil rights litigation which is comprised of four consolidated cases and two related but formally unconsolidated cases brought by inmates of the Stateville Correctional Center in Joliet, Illinois. See Shango (Cleve Heidelberg, Jr.) v. Jurich, 74 C 3598, Slip op. (N.D.Ill. July 15, 1988) (Williams, J.). This matter is before the court for the purpose of devising an appropriate remedy for the defendants' violation of the parties' August 28, 1981 partial Consent Decree and to resolve the parties' post-trial motions. The court grants relief as follows.

I

Remedy for the Violation of the Consent Decree

On August 28, 1981, the court entered a partial Consent Decree that the parties agreed to in order to resolve some of the issues regarding the operation of the Stateville law library. In its July 15, 1988 opinion, this court entered judgment for the defendants on all of the plaintiffs' law library claims with the exception of the plaintiffs' claim that the defendants were not sufficiently complying with the Decree's requirement of an accurate accounting of library use. Shango, Slip op. at 32, 69. Specifically, the court found that there are

> no complete records . . . that would enable this court to determine with any certainty the number of days the law library has actually been open for inmate use, the number of inates who have requested and used the library and study cells on a daily basis, or the exact times the inmates typically arrive and depart from the library and study cells.

Id. at 32. The court ordered further briefing to address the question of an appropriate remedy for this violation.

After consideration of the parties' respective positions, the court will grant relief as follows. The defendants are given ten (10) days from the entry of this order to develop a record-keeping system that will allow the pertinent data to be accurately collected. Within thirty-one (31) days of the entry of this order, the defendants are ordered to submit copies of the records kept for the first fourteen (14) days of the new systems' implementation to the plaintiffs' counsel and to the court. The defendants are further ordered to make all subsequent records available for inspection by the plaintiffs' counsel. The court will enter this order to carry out the terms of the Decree rather than making a finding of contempt because the defendants have complied with the remainder of the substantive provisions of the Decree. See Shango, Slip op. at 26, 69; see also Securities and Exchange Commission v. Hermil, Inc., 838 F.2d 1151, 1153 (11th Cir. 1988) ('A district court has the power to issue an order requiring the parties to carry out the terms of an earlier order.') Moreover, the court has concluded that the 'inmates are, as a matter of law and fact, being provided with meaningful access to the courts.' Shango, Slip op. at 68. Nevertheless, the court will not hesitate to enter a finding of contempt if such a finding is warranted by party's conduct.

II

Rule 59(e): Motion to Alter Judgment

***2** The defendants move the court to alter or amend its judgment pursuant to Federal Rule of Civil Procedure 59(e).[1] Rule 59(e) '[m]otions for reconsideration serve a limited function: To correct manifest errors of law or fact or to present newly discovered evidence.' Keene Corp. v.

International Fidelity Insurance Co., 561 F. Supp. 656, 665 (N.D.Ill. 1976) (Shadue, J.), aff'd, 736 F.2d 388 (7th Cir. 1984); Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251 (7th Cir. 1987) (same). The defendants move the court to alter three aspects of its judgment. First, the defendants contend that the August 28, 1981 Decree was not violated. In support of their argument, the defendants cite to evidence previously considered and found wanting by the court. This approach is not favored. See Quaker Alloy Casting Co. v. Gulfco Industries, Inc., 123 F.R.D. 282, 288 (N.D.Ill. 1988) (Shadur, J.). The court is unpersuaded and will not alter this portion of its ruling.

The defendants' second reason for altering the court's judgment is well-founded. In its ruling of July 15, 1988, the court found that the plaintiffs Shango and James Sims were not provided with the due process required by Ill.Rev.Stat. ch. 38, ¶1003–8–7 prior to their removal for disciplinary reasons from assignments as resident legal-clerks.[2] Shango, Slip op. at 74–75. The defendants contend that the provisions of ¶1003–8–7 are inapplicable to the situation at hand because the action taken against the plaintiffs was not disciplinary in nature. See Durso v. Rowe, 579 F.2d 1365, 1370 (7th Cir. 1978), cert. denied, 439 U.S. 1121 (1979) ('A fair reading of the statute (¶1003–8–7) indicates it applies only when the change in program assignment is for disciplinary purposes.') The question of whether an action 'is administrative or disciplinary is an issue of fact to be decided by the jury.' Mathews v. Fairman, 779 F.2d 109, 416 n.4 (7th Cir. 1985). The Seventy Circuit has 'distinguished between 'what is essentially a predictive decision based on an assessment of a prisoner's entire institutional record and a decision in response to a specific rule infraction'' when determining whether a prison official's action is disciplinary in nature. Id. at 416, quoting Shango v. Jurich, 681 F.2d 1091, 1103 n.3 (7th Cir. 1982). The plaintiffs have the burden of showing the disciplinary nature of the action taken. Id. Accordingly, the court must determine whether Shango and Sims have produced enough evidence to allow it to determine that the defendants' action in removing them from their jobs was 'a decision in response to a specific rule infraction.'

Upon reconsideration, the court finds that the plaintiffs have not met their burden. The defendant Mary Jurich, the Stateville law librarian, supervised the plaintiffs. She triggered Shango's termination by writing a letter to the Stateville Assignment Committee. In her letter, Jurich requested Shango's termination for his insubordination, open defiance of her orders, and his failure to perform work assignments. Shango, Slip op. at 73. The Assignment Committee has no disciplinary functions. See Mathews, 779 F.2d at 416. Shango appeared before the Assignment Committee in November of 1974 and was summarily terminated on the basis of Jurich's complaint. Shango, Slip op. at 73. After considering the testimony, this court found that Shango had a long-standing record of insubordination and hostility toward Jurich. Id. 73–74. The Assignment Committee discharged Sims in November 1975 on the basis of a complaint by Arthur Moen, his supervisor. Moen testified that Sims failed to perform his assigned duties and would spend time talking with other inmates. Moen's testimony was corroborated by Jurich. Id. at 74. Neither Shango nor Sims received disciplinary tickets charging them with rule violations.

***3** The plaintiffs' long-standing records of insubordinate and disruptive behavior along with the defendants' failure to take any formal disciplinary action against them leads the court to conclude that the plaintiffs have failed to meet their burden of establishing that the action taken against them was disciplinary in nature. Consequently, the defendants were not required to provide the procedural protections of Ill.Rev.Stat. ch. 38, ¶1003–8–7. The court further notes that the plaintiffs 'have no liberty or property interests in receiving or retaining a job while in prison.' Harris v. Fleming, 839 F.2d 1232, 1237 n.5 (7th Cir. 1988); Garza v. Miller, 688 F.2d 480, 485 (7th Cir. 1982), cert. denied, 459 U.S. 1150 (1983); see also Watts v. Morgan, 572 F. Supp. 1385, 1388 (N.D.Ill. 1983) (Hart, J.) ('the expectation of keeping a particular job is not a property interest entitled to due process protection.') Thus, there was no Fourteenth Amendment violation because the provisions of ¶1003–8–7 were inapplicable and because the plaintiffs were not otherwise deprived of any cognizable liberty or property interest. Accordingly, the court will amend its findings in 74 C 3598 and 75 C 3388 to enter judgment for the defendants on this issue.

Finally, the defendants move this court to enter judgment for them on Court IV of the amended supplemental complaint in 74 C 3598. The defendants contend that Shango must exhaust his state remedies before proceeding in federal court because his claim sounds in habeas corpus. Shango counters by asserting that the state has waived any exhaustion of remedies argument that it might have had by failing to assert it at an earlier stage in the proceedings. Shango further argues that although a portion of his claim is cognizable in habeas corpus, the remainder of his claim can be brought pursuant to 42 U.S.C. § 1983 and is not subject to the exhaustion doctrine. The court finds some merit in the positions of both parties.

The court first finds that the defendants have not necessarily waived their exhaustion argument by asserting it in their post-trial motion. As an initial matter, the court notes that the Seventh Circuit decision which provides support for their exhaustion argument was not decided until after the conclusion of this trial. See Hanson v. Heckel, 791 F.2d 93 (7th Cir. 1986). More fundamentally, the Supreme Court has held that the state's failure assert the exhaustion of remedies argument during the entire proceedings before a district court does not compel an

appellate court to find that the state has waived the defense. See Granberry v. Greer, 481 U.S. 129, 133–35 (1987). Thus, it necessarily follows from Granberry that the state's failure to assert its exhaustion of remedies defense at an earlier stage of the proceedings before this court does not compel this court to find that the state has waived the defense at this latter stage. See Henderson v. Thieret, 859 F.2d 492, 498 (7th Cir. 1988), cert. denied, 109 S.Ct. 1648 (1989) ('a district court is permitted, under Granberry and its progeny, to consider a waiver defense belatedly raised by the state, even to raise that defense sua sponte.') When the state belatedly raises an exhaustion defense, '[t]he court should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state . . . court proceedings before reviewing the merits of the petitioner's claim.' Granberry, 481 U.S. at 134.

***4** In this case, the exhaustion of remedies defense is potentially applicable to a portion of Shango's claim. In Count IV of his amended supplemental complaint, Shango seeks various types of relief for the harm caused by the deprivation of his procedural due process rights during a disciplinary haring held on July 26, 1980. The factual basis of his claim is thoroughly outlined in this court's earlier opinion. See Shango, Slip op. at 78–86. Judge Shadur has previously found that Shango's procedural due process rights were violated as a matter of law. See Shango v. Jurich, 608 F. Supp. 931, 941 (N.D.Ill. 1985) (Shadur, J.). This court granted Shango a hearing to determine what, if any, damages that he was entitled to as a consequence of the defendants' violation. Shango sought to 1) make permanent the preliminary injunction entered on July 13, 1981 by Judge Shadur, 2) to order the expunction of disciplinary violations from his record, 3) to restore the good time he forfeited and to grant him the good time that he would have received while in segregation, and 4) to grant him $100 compensatory damages and $100 punitive damages for each day that he spent in segregation. Id. at 640. The court awarded him nominal damages of $1.00.[3]

The parties dispute the extent to which Shango's claim can be characterized as a habeas corpus action. As the Seventh Circuit has held, 'when a state prisoner brings a civil rights action and raises constitutional issues that directly relate to the fact or duration of his confinement and are cognizable in habeas corpus, the competing interests underlying habeas relief, including the exhaustion requirement, must prevail.' Hanson, 791 F.2d at 95. The court further noted that claims relating to 'the conditions of confinement' may be simultaneously litigated in federal court under § 1983 even if the prisoner is also attacking the fact or length of his or her confinement through a habeas action. Id. at 95 n.5 (citing to Preiser v. Rodriguez, 411 U.S. 475, 499 N.14 (1973)); see also Crump v. Lane, 807 F.2d 1394, 1400 (7th Cir. 1986) ('Claims properly brought under § 1983 include those seeking a damages award, or an injunction against future misconduct.') In this case, the portion of Shango's claim that relates to the forfeiture of his good time credits, as he quite candidly concedes, sounds in habeas corpus. Consequently, this portion of his claim is subject to the exhaustion requirements.

However, the remainder of his claim, which seeks damages for the time he spent in segregation, is properly cognizable under § 1983.[4] See Wolff v. McDonnell, 418 U.S. 539, 547 (1974) (confinement in a disciplinary cell relates to the conditions of confinement); see also Del Raine v. Carlson, 826 F.2d 698, 702 (7th Cir. 1987). The Seventh Circuit decisions in Hanson and Crump are distinguishable from this case. In Hanson, the plaintiff's injury was the 'loss or deprivation of meritorious good time' for which he sought damages and a declaratory judgment. Hanson, 791 F.2d at 96. Thus, there was 'an undeniably direct and specific relationship between the challenged conduct and a change in the prisoner's release date.' Id. Similarly, in Crump the core of the plaintiff's claim concerned the 'fact or duration of his confinement, and any award of damages would be entirely dependent upon a favorable resolution of that issue.' Crump, 807 F.2d at 1401. By contrast, Shango was injured when his procedural due process rights were violated. The placement in segregation and forfeiture of good time credits are distinct elements of damage. Thus, unlike in the Hanson and Crump cases, this court need not make a determination as to whether the good time credits should have been forfeited before reaching the issue of damages. Accordingly, the exhaustion of remedies argument is inapplicable to this portion of his claim.

***5** Given the above, the court must now determine whether an application of the exhaustion of remedies doctrine is warranted. The court finds that the application of the doctrine in this case would be pointless. The relitigation of whether Shango was denied his procedural due process rights as well as whether the defendants would have taken disciplinary action against Shango even if his hearing had complied with procedural due process would seemingly be barred by the doctrine of collateral estoppel. See Wolff, 418 U.S. at 554 n.12. Under Illinois law, the doctrine of

> collateral estoppel precludes relitigation of issues in a subsequent proceeding when (1) the party against whom the estoppel is asserted was a party to the prior adjudication, (2) the issues which form the basis of the estoppel were actually litigated and decided on the merits of the prior suit, (3) the resolution of the

> particular issues was necessary to the court's judgment, and (4) those issues are identical to issues raised in the subsequent suit.

Farmer v. Lane, 864 F.2d 473, 477 (7th Cir. 1988), quoting County of Cook v. MidCon Corp., 773 F.2d 892, 898 (7th Cir. 1985). All of the elements of collateral estoppel are satisfied with regard to the above two issues.

Even if the doctrine of collaterlal estoppel was, for some reason, inapplicable, requiring the exhaustion of remedies on Shango's habeas claim would still be unwarranted. The defendants' actions are clearly supported by the required quantum of evidence. See Shango, Slip op. at 92–94; see also Granberry, 481 U.S. at 133 ('if the court of appeals is convinced that the petition has no merit, a belated application of the exhaustion rule might simply require useless litigation in the state court.') Therefore, it is extremely unlikely that Shango would receive the relief that he seeks. Thus, in its discretion, this court will decline to apply the doctrine of exhaustion of remedies. The court's judgment on Count IV of the amended supplemental complaint will stand as stated in the July 15, 1988 opinion.

III

Rule 59(a): Motion for a New Trial

The plaintiffs move for a new trial or to alter or amend the court's judgment pursuant to Federal Rule of Civil Procedure 59. 'A motion for a new trial in a nonjury case . . . should be based upon manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons.' Wright & Miller, Federal Practice and Procedure: § 2804, at 37 (1973). The decision whether to grant a new trial is entrusted to this court's broad discretion. See, e.g., Cygnar v. City of Chicago, 865 F.2d 827, 835 (7th Cir. 1989). The plaintiffs put forth numerous reasons in support of this motion. Their concerns relate to the court's rulings regarding the conditions of Shango's cell, Shango and Sims' termination, Shango's July 26, 1980 disciplinary hearing, and the law library. The court will address each of these concerns.

a. The Conditions of Shango's Cell

***6** The plaintiffs contend that the court overlooked Shango's testimony that he personally complained to the defendants DeRobertis and Franzen regarding his cell conditions at Stateville. The court did not overlook Shango's testimony; rather, the court simply did not credit it. This court repeatedly found Shango's testimony to be incredible and unworthy of belief. See Shango, Slip op. at 84, 85–86, 88, 93.

b. The Termination of Shango and Sims

The plaintiffs Shango and Sims contend that they are entitled to back pay because the court initially held that they were terminated in violation of their Fourteenth Amendment due process rights. Given the court's holding that Sims and Shango were not terminated in an unconstitutional manner, their unsupported claim for back pay is patently without merit.

c. Shango's July 26, 1980 Disciplinary Hearing

Shango lodges several objections to the court's ruling regarding his July 6, 1980 hearing. First, he contends the court erred in relying on the polygraph examination of Stephen Edwards because the results of polygraph exams are not admissible under Illinois law. People v. Baynes, 88 Ill.2d 225, 430 N.E.2d 1070, 1079 (Ill. 1981) (the results of polygraph exams are not admissible in Illinois criminal trials). While Shango correctly states Illinois law, '[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply.' Wolff, 418 U.S. at 556. Department of Corrections Administrative Regulation 804.II.G8, which was cited by Shango, allows the Adjustment Committee to 'admit all evidence which is relevant to the issue of whether or not the resident committed the chargeable offense.' The results of Edwards polygraph exam results, though of admittedly uncertain reliability, were relevant to whether Shango committed the offense in question. See Shango, Slip op. at 93. Moreover, contrary to Shango's contentions, the court relied on other evidence, namely Edward's in-court testimony, to establish Shango's guilt. Id. The results of Edward's polygraph examination were merely relied upon to bolster his credibility. See Zimmerlee v. Keeney, 831 F.2d 183, 187 (9th Cir. 1987), cert. denied, 108 S.Ct. 2851 (1988) (polygraph results appropriately used to corroborate testimony).

Shango further contends that the court erred by holding Shango's refusal to take a polygraph examination after initially consenting to take the exam against him. Shango correctly notes that the Adjustment Committee is barred from taking disciplinary action against an inmate who refuses to take a polygraph examination after appropriate safeguards of his constitutional rights. Department of Corrections Administration Regulation 17.II.C.5.c. HoweverThe above finding does not lead to a conclusion that Shango's Fifth Amendment privilege against

self-incrimination was violated. As stated above, prison disciplinary proceedings are not criminal prosecutions. Furthermore, even if Shango's refusal to take a polygraph exam in not considered, there is still some 'evidence in the record that could support the conclusion reached by the Disciplinary Board.' Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 455–56 (1985); see also Shango, 608 F. Supp. at 940 (Judge Shadur's analysis foreshadows the result reached here). Accordingly, the court reaffirms its finding that Shango would have been disciplined even if the July 26, 1980 hearing had comported with the requirements of due process.[5]

d. Law Library

***7** The plaintiffs' next contentions concern the court's rulings with respect to the adequacy of the law library. First, they assert that the defendants' failure to keep complete law library records as required by the Consent Decree precludes them from meeting their burden of showing that the plaintiffs had meaningful access to the courts. This contention is without merit. Needless to say, the inclusion of the record-keeping requirement in the Decree did not somehow append this requirement to the defendants' constitutionally required burden of proof. The court made its findings and held that the plaintiffs received meaningful access to the courts as a matter of law and fact notwithstanding the defendants' failure to keep adequate records. Shango, Slip op. at 68. The plaintiffs' quibbles with the court's credibility determinations are insufficient to warrant a new trial.

The plaintiffs further contend that the court effectively rewrote the terms of the parties' Decree relating to Stateville's legal collection by finding that the defendants did not violate the Decree with respect to this issue. The parties' Decree requires the defendants to maintain the legal collection 'at its present level of quality and at a level that conforms to the standards set by the American Correctional Association/American Library Assocation.' Shango, Slip op. at 51. The court acknowledged the problems noted by the plaintiffs. Namely, that Burr Oak discontinued a number of Stateville subscriptions due to a shortage of funds and that some volumes of the existing legal collection are missing and others have been defaced. However, using its inherent power to construe the Decree, the court found that the defendants had in good faith taken sufficient steps to ensure that the 'quality of Stateville's legal collection remained at an acceptable level within the terms of the Decree.'[6] Shango, Slip op. at 29–31, 51–52; see Hermil, 838 F.2d at 1153 (11th Cir. 1988) ('Included in a district court power to administer its decrees is the power to construe and interpret the language of the original order.') Consequently, this contention is also insufficient to warrant a new trial or to compel an amendment of the court's findings.

e. Meaningful Access to the Courts

The plaintiffs' remaining objections are directed to the court's findings regarding the inmates' access to the courts. The plaintiffs first argue that the court erroneously shouldered them with the burden of showing that they did not receive meaningful access to the courts. Contrary to these contentions, this court clearly recognized that the state bears the burden of demonstrating that the means it chose to ensure the right of access to the courts are adequate, effective, and meaningful. See Shango, Slip op. at 49. However, recent Seventh Circuit cases have also reaffirmed the corollary principle that inmates must make a showing of prejudice unless there is a substantial, 'direct and continuous limitation on access to legal materials or counsel.' See, e.g., DeMallory v. Cullen, 855 F.2d 442, 448–49 (7th Cir. 1988); Bruscino v. Carlson, 854 F.2d 162, 167 (7th Cir. 1988) ('a showing [of prejudice] is required in a case alleging a denial of access to the courts.')[7] There was no direct, continuous, and substantial limitation on the plaintiffs' right to meaningful access to the courts in this case.[8] Consequently, the plaintiffs, as this court previously held, had to make a showing of prejudice to prevail on their claim. All of the plaintiffs failed to make this requisite showing. Shango, Slip op. at 55, 63, 64.

***8** Moreover, the evidence adduced at trial demonstrated that the plaintiffs have had a reasonably adequate opportunity to present their claims. See Martin v. Tyson, 845 F.2d 1451, 1456 (7th Cir.), cert. denied, 109 S.Ct. 162 (1988), quoting Bounds v. Smith, 430 U.S. 817, 825 (1977) ('the relevant inquiry is whether the inmate[s] ha[ve] been given a 'reasonably adequate opportunity' to present [their] claim[s].') These plaintiffs have proven themselves to be prolific litigators notwithstanding the restrictions imposed by the defendants. See Shango, Slip op. at 18.

The plaintiffs further assert that the court's ruling with respect to the inmates in protective custody is contrary to the opinions of Judge Shadur and the Seventh Circuit in Williams v. Lane, 646 F. Supp. 1379 (N.D.Ill. 1986) (Shadur, J.), aff'd, 851 F.2d 867 (7th Cir. 1988), cert. denied, 109 S.Ct. 879 (1989). The Williams case was a § 1983 class action brought by Stateville protective custody inmates in 1981. The inmates asserted that the defendants violated their rights under the First, Eighth, and Fourteenth Amendments to the Constitution and under state law. Williams, 646 F. Supp. at 1381. The Seventh Circuit affirmed Judge Shadur's finding that the defendants, among other things, violated the plaintiffs' Fourteenth Amendment due process rights to meaningful access to the courts. Williams, 851 F.2d at 878–79. The plaintiffs contend that the doctrines of collateral estoppel and stare decisis require the results in this case to be the

same as the results in Williams. The defendants inexplicably fail to address these arguments. The court will first consider the applicability of collateral estoppel.

The plaintiffs seek to make offensive use of collateral estoppel to prevent the defendants from relitigating the issues decided in Williams. The 'offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party.' Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n.4 (1979). The party seeking the application of collateral estoppel has the burden of establishing the doctrine's elements. Wright, Miller & Cooper, Federal Practice and Procedure: § 4420, at 185 (1981); S.S. Automotive v. Checker Taxi Co., 166 Ill. App. 3d 6, 520 N.E.2d 929, 931 (1st Dist. 1988). This court has 'broad discretion to determine when [offensive collateral estoppel] should be applied.' Parklane, 439 U.S. at 331. For the following reasons, the court will, in its discretion, decline to apply collateral estoppel.

As an initial matter, the court finds that the application of collateral estoppel under the present circumstances would not serve the primary purposes of the doctrine. As the Supreme Court stated in Parklane, collateral estoppel protects litigants 'from the burden of relitigating an identical issue with the same party or his privy, and of promoting judicial economy by preventing needless litigation.' Id. at 326. The circumstances here are rather unique. This case was tried in September, 1985 and the final judgment was entered on July 15, 1988. The Williams case was tried between January 28 and February 10, 1986 and judgment was entered on October 21, 1986. Thus, the application of collateral estoppel would not serve the purposes stated above. See Mozingo v. Correct Manufacturing Corp., 752 F.2d 168, 172 (5th Cir. 1985) (neither of the purposes articulated in Parklane 'is served by the application of collateral estoppel after a factual issue has been fully developed through a well-contested trial and submitted to the jury for decision'); Davis v. West Community Hospital, 786 F.2d 677, 682 (5th Cir. 1986); Wright, Miller & Cooper, Federal Practice and Procedure: § 4405, at 17 (Supp. 1988) ('Once a final judgment has been entered it is most unlikely that a court could be persuaded to vacate the judgment so as to permit an assertion of preclusion that had not been made earlier.')

***9** The plaintiffs' belated assertion of collateral estoppel, an affirmative defense, also raises the specter of waiver. See Factor v. Carson, Pirie Scott & Co., 393 F.2d 141, 150 (7th Cir.), cert. denied, 393 U.S. 834 (1968) (estoppel is an affirmative defense); Wright, Miller & Cooper, supra, § 4405, at 34 (the 'reference to estoppel in [Fed. R. Civ. P. 8(c)] has been treated as including collateral estoppel'). As an affirmative defense, collateral estoppel must be asserted in a pleading or it is waived. See Mozingo, 752 F.2d at 172; Factor, 393 F.2d at 150; see also Crowder v. Lash, 687 F.2d 996, 1008 (7th Cir. 1982). In this case, the plaintiffs' collateral estoppel defense arose on October 21, 1986 when Judge Shadur entered his judgment in Williams. Thus, while the plaintiffs could not have pled collateral estoppel before this time, they nevertheless failed to file a supplemental pleading setting forth the defense when it became available. See Fed. R. Civ. P. 15(d). Consequently, the court finds that plaintiffs have waived this defense by failing to promptly assert it when it became available. See Davis, 786 F.2d at 682 (the plaintiff's attempt to assert collateral estoppel in a post-trial motion after the case had been tried and the court had ruled against him was rejected).

There are additional problems with the application of collateral estoppel in this case. The elements of the doctrine have been stated above. Supra, at 12. As noted collateral estoppel precludes relitigation of issues in subsequent proceedings. Id.; United States v. Green, 735 F.2d 1018, 1027 (7th Cir. 1984) (doctrine applies to 'future law suits'); People v. Stice, 168 Ill. App. 3d 662, 523 N.E.2d 1054, 1055 (4th Dist. 1988) (same). There is some doubt as to whether the proceedings in this case were 'subsequent' to those in Williams due to the unusual chronology of events in this case. Cf. Unger v. Consolidated Foods Corp., 693 F.2d 703, 705 (7th Cir. 1982), cert. denied, 464 U.S. 1017 (1983) (As between two actions pending at the same time, the final judgment in the state proceeding, which preceded the trial in the federal action, would have preclusive effect in the federal proceeding). Moreoever, contrary to the plaintiffs' contentions, the factual findings in the respective cases concerning the law library program for protective custody inmates are not the same. As will be discussed later, the factual findings diverge in several significant respects. These cases appear to 'present similar questions that grow out of a continuing course of conduct that, [presumably] involves new historical facts rather than continuing consequences of acts or consequences of acts or transactions that were complete at the time of the first suit.' Wright, Miller & Cooper, supra, § 4417, at 152. Given this, a question is raised as to whether the 'issues' decided in the cases were identical as is required for the doctrine's application. See Wright, Miller & Cooper, supra, § 4417, at 152 ('It would be possible to conclude that once it is shown that two actions do not involve the self-same facts, issue preclusion is unavailable.') The plaintiffs' failure to adequately deal with these issues supports a finding that they have failed to meet their burden of showing that collateral estoppel is applicable to the circumstances of this case.[9] Consequently, the court finds that the plaintiffs have waived their collateral estoppel defense and have, in any event, failed to meet their burden of showing that the defense is applicable.

***10** The plaintiffs also argue that the doctrine of stare decisis should apply. This doctrine counsels a court to

'decid[e] a case in accordance with what has been decided previously in other, similar cases (similar in the sense of not being legally distinguishable.)' Colby v. J.C. Penny Co., Inc., 811 F.2d 1119, 1122–23 (7th Cir. 1987). The court will not apply stare decisis to reach the same result in this case as in the Williams case because these cases are legally distinguishable. Although much of the testimony in the two cases is similar, there are significantly different facts in these cases which compel different results. Most notably, the name plaintiff in Williams demonstrated that he had been prejudiced when he 'could not obtain the legal research or materials he requested or get his pleadings typed' while attempting to respond to a motion to dismiss his complaint. Williams, 646 F. Supp. at 1389; see, e.g., DeMallory, 855 F.2d at 449 (sufficient prejudice is shown '[w]here limitations on library use prevent filing of briefs in time for the court's consideration.') The plaintiffs' failure to demonstrate any prejudice in this case stands in sharp contrast to the above finding. See Shango, Slip op. at 58–59, 63.

Moreover, some of the arbitrary restrictions noted in Williams were not established by the evidence in this case. For example, there is no indication that these plaintiffs were deprived of lists of legal materials, general library materials and periodicals. Cf. Williams, 646 F. Supp. at 1389. Nor was there any testimony that the resident law clerks must forward the plaintiffs' request for general library materials to a general library clerk before the materials can be retrieved. Cf. Williams, 646 F. Supp. at 1389. Furthermore, in Williams Judge Shadur also found that the defendants denied the resident law clerks access to the galleries housing the protective custody inmates and that the inmates in protective custody would hesitate to use the library cages during the hours when inmates from the more aggressive general population were scheduled for library use. Id. The plaintiffs submitted no evidence that would support such findings in this case.

Furthermore, the record in this case contains additional evidence which supports the conclusion that the plaintiffs received meaningful access to the courts. For example, this court made factual findings which established that certain resident law clerks are granted one month detail passes to visit the inmates in protective custody and segregation. These law clerks have access to the inmates from 7:00 a.m. to 3:00 p.m., seven days a week. Shango, Slip op. at 34–35. This court also found that inmates, including those in protective custody, can discuss their legal problems with jailhouse lawyers during the time that they are in the law library. While the jailhouse lawyers unquestionably operate within the constraints imposed by prison officials, their 'ability to assist inmates with their legal problems or questions has not been hindered significantly.' Id. at 48, 65. Lastly, the court found that inmates can obtain additional library time upon request if they can verify a litigation deadline falling within thirty days. The court notes that the plaintiffs have failed to challenge the correctness of any of the above findings of fact. Consequently, for the reasons stated above, the court finds that this case and the Williams case are legally distinguishable. Accordingly, the court will not apply the doctrine of stare decisis.

***11** The plaintiffs' last contention concerns the defendants' failure to provide trained legal assistance to illiterate inmates. Uneducated and illiterate inmates who are unable to present their own claims in writing to the courts have a "constitutional right to help' . . . [that] require[s] at least allowing assistance from their literate fellows.' Bounds, 430 U.S. at 823–24 (citations omitted). The Court intimated that an illiterate prisoner could be provided with meaningful access to the courts if he or she had access to literate prisoners who themselves had meaningful access to an adequate law library. Id. at 824. The Seventh Circuit, as this court previously noted, has held that inmates have a right to receive assistance from other prisoners 'conditioned upon a showing that the inmates in question did not have adequate access to the court without the help of an inmate writ-writer.' Kunzelman v. Thompson, 799 F.2d 1172, 1179 (7th Cir. 1986) (and cases cited within). The plaintiffs in this case have access to the resident law clerks and jailhouse lawyers even though they do not necessarily have a constitutional right to such access given the court's findings regarding the adequacy of the law library and access plan. See, e.g., Shango, Slip op. at 65.

Moreover, the Bonds decision does not stand for the proposition that '[i]nmates who are not capable of using the law library to prepare their claims. . . are entitled to adequate assistance from persons trained in the law.' Plaintiffs' Motion for a New Trial, at 9; see Hooks v. Wainwright, 775 F.2d 1433, 1434–37 (11th Cir. 1985), cert. denied, 479 U.S. 913 (1986) ('It presses credulity to contend that the Supreme Court in Bounds intended that there would be a constitutional right to legal counsel, if it were found that some prisoners were illiterate and that non-lawyer prisoners could not use the libraries as well as lawyers.') In Bounds, the Court emphasized that 'a legal access program need not include any particular element' and that '[a]ny plan . . . must be evaluated as a whole to ascertain its compliance with constitutional standards.' Bounds, 430 U.S. at 832. The court in this case evaluated the Stateville plan as a whole and found that it satisfied constitutional standards. Accordingly, the plaintiffs' last objection is rejected as well.

Conclusion

For the foregoing reasons, the defendants are ordered to develop a record keeping system that will comply with

the requirements as set forth by the court. The defendants are also required to comply with the further instructions stated in the body of the court's opinion at pages 2 and 3. The defendants' motion to alter or amend the court's opinion is granted as it relates to the termination of Shango and Sims in case numbers 74 C 3598 and 75 C 3388. The defendants' motion is otherwise denied. The plaintiffs' motion for a new trial is denied in its entirety.

Footnotes

1 The court will treat this motion, which the defendants brought as a judgment notwithstanding the verdict pursuant to Federal Rule of Civil Procedure 50, as a Rule 59(e) motion.

2 Shango's legal name is Cleve Heidelberg, Jr. Everyone in the prisoner community, however, refers to him as Shango and that is the name he prefers to be called. Although it is not known, Shango may have drawn his name from Shango, the ancient thunder god of the Yoruba people in Nigeria.

3 The defendants have withdrawn their initial objection to the award of nominal damages to Shango in the event that he prevails on this issue. Defendants' Reply in Support of their Motion for Judgment Notwithstanding the Verdict at 5.

4 As noted in this court's earlier opinion, the preliminary injunction entered on July 13, 1981 was reversed by the Seventh Circuit. See Shango v. Jurich, 681 F.2d 1081 (7th Cir. 1982).

5 Shango's final contention with regard to the hearing concerns the court's purported failure to make note of the testimony of four witnesses who contradicted Edwards' story. Contrary to Shango's contentions the court noted its considerations of 'the witnesses at trial.' Shango, Slip op. at 94. The court found Edwards more credible than Shango.

6 The court notes that 'quality' is an inherently subjective term absent qualification.

7 The Seventh Circuit has yet to precisely define what constitutes 'a direct and continuous limitation on access to legal materials or counsel' as the phrase is used in DeMallory. In that case, the court found such a limitation where the plaintiff's 'meaningful access to the courts . . . rested solely on written correspondence with [untrained] inmate paralegals for assistance on his Eighth Amendment case.' DeMallory, 855 F.2d at 448 (emphasis added). The court held that his 'complaint carrie[d] an inherent allegation of prejudice.' Id. at 449. The court also cited to several other cases where there was a continuous limitation on library access. Id. (and cases cited within); Cf. Shango, Slip op. at 55 n.19 (discussion of circumstances that compel an inference of prejudice).

8 The state's effort to provide the plaintiffs with meaningful access to the courts in this case far surpasses the inadequate attempt made by the defendants in DeMallory. Interestingly, although the court suggested that the plaintiff in DeMallory did not need to make a showing of prejudice, it explicitly found 'that DeMallory ha[d] shown sufficient prejudice to support his access-to-courts claim.' DeMallory, 855 F.2d at 449; Cf. DeMallory, 855 F.2d at 452 (Easterbrook, J., dissenting) ('To say. . . that a prisoner need not show 'prejudice' from a violation of his entitlement not only goes against the law of the circuit but also misunderstands the nature of the right.') The state of the law on this issue in the Seventh Circuit is somewhat unclear. Id. at 451 n.3.

9 The plaintiffs also assert that the defendants from both cases are the same. Their contention is not entirely correct. For example, the defendant Mary Jurich was not sued in Williams.