IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

LAWRENCE J. KRUG,

Plaintiff,

v.

TERRY STEWART, et al.,

Defendants.

No. CV 99-362-TUC-RCC

ORDER

Pending before the Court are State Defendants' Motion to Dismiss Count I, Plaintiff's Motion for Summary Judgment on Count I and Plaintiff's Petition for Injunctive Relief on Count I. Plaintiff filed a motion requesting oral argument on his Motion for Summary Judgment, which Defendants opposed. The Court finds that oral argument is not necessary due to the significant written briefing on these issues.

Plaintiff's Count I alleges that Arizona Department of Corrections ("ADOC") policy violates his right to Due Process because, as of 1997, the prison official who determines that an incoming magazine is contraband due to obscenity, is the same and

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only person ADOC allows an inmate to ask to review that decision.[1] Plaintiff names the following Defendants on this count: Director Stewart, Warden Gonzales, Warden Flanagan, Deputy Warden Cattel, CO IV Taylor, Deputy Warden Dunn, Deputy Warden Spargur, Deputy Warden Martinez, and Assistant Director Ryan. In their Motion to Dismiss, Defendants made three arguments. In its May 4, 2000 Order, the Court ruled that the res judicata argument based on Plaintiff's prior case, CIV 97-738-TUC-RCC, was without merit, therefore, dismissal will not be granted on that basis. The Court did not address the other two arguments, but requested supplemental briefing on them. First, Defendants argue that Plaintiff's claim is barred by the *Hook* consent decree, which was entered into between ten ADOC inmates and the state of Arizona in the Phoenix division of this Court, *Hook v. State of Arizona*, CIV73-97-PHX-CAM. Second, Defendants argue that they are entitled to qualified immunity from Plaintiff's claim for money damages. Plaintiff opposes the motion to dismiss, and asks the Court to grant him summary judgment on Count I and allow him to proceed to a jury trial on damages.

***Hook* consent decree**

Defendants argue that the 1973 *Hook* consent decree governs the procedures for the confiscation of publications sent to ADOC inmates. Because the Phoenix division

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[1] Although Plaintiff's Complaint also characterized this as a First Amendment claim, the Court indicated in its May 4, 2000 Order that it would be treated solely as a Due Process claim. That was because Plaintiff is challenging the procedures used to restrict the publications he receives, not that fact that there are restrictions.

of this Court has continuing jurisdiction over *Hook*, Defendants argue that it has jurisdiction over all issues related to the confiscation of publications, including Plaintiff's Due Process claim. The 1973 consent decree provided that publications would be excluded from the prison,

> if they contain any material which is deemed obscene under applicable constitutional standards. Prompt written notice will be given a resident if any publications are excluded for the above reasons. Upon request, the resident will be given an opportunity to discuss the reasons for the exclusion with the Deputy Superintendent for Programs, whose decision shall be final.

(Motion to Dismiss, Ex. C.)

First, the Court disagrees with Defendants' sweeping argument that *Hook* controls all issues related to the exclusion of publications. The plain language of the decree, which was drafted by attorneys, does not address inmate appeal rights. A consent decree amounts to an injunction, which can only be enforced to the extent it clearly prohibits or requires certain conduct. *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996); *see also Hook v. State of Arizona*, 120 F.3d 921, 925 (9th Cir. 1997)(holding that district court should not modify the consent decree to include a term when there is no evidence that the original parties intended to include such a provision). The *Hook* decree provides only that an inmate may have the initial exclusion decision reviewed by the Deputy Superintendent. In full compliance with *Hook*, ADOC officials could provide review of publication exclusion decisions by either the same person who made the original decision or a second person. Neither option is clearly required or

prohibited by *Hook*. In fact, Plaintiff contends that prior to 1997, ADOC provided review by a second person but now they do not. Further, there are at least two methods by which ADOC could provide a two-person review process within the parameters of the *Hook* decree. First, the Deputy Superintendent of Programs could be assigned to review someone else's exclusion decision, or second, ADOC could allow an appeal from the Deputy's "final" decision.[2] The Court finds that whether an ADOC inmate should receive a two-person review when his publication is excluded was not decided in the *Hook* case. Under the Court's reading of *Hook*, the plaintiff's counsel in the *Hook* case would not be entitled to raise the issue of appeal because the original decree did not bind the parties with respect to that issue. Therefore, it is proper for an inmate, such as Plaintiff Krug, to bring a separate action regarding this issue. *See Hiser v. Franklin*, 94 F.3d 1287, 1290-91 (9th Cir. 1996).

Second, Defendants' argument relies on the assumption that Plaintiff Krug is bound by the 1973 *Hook* consent decree, however, Defendants have not sufficiently supported that assumption. The original 1973 *Hook* suit was not a class action, and in 1992 the Ninth Circuit explicitly held that current ADOC inmates were not parties to

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[2] Defendants argue that because *Hook* provides that the Deputy Superintendent's decision is final, allowing an additional review would violate *Hook*. Language that provides for a final decision does not preclude a subsequent appeal, in contrast, appeals are generally taken only from decisions that are deemed "final." For example, when a trial judge denies a claim, the litigant may ask the judge to reconsider his decision, but if reconsideration is denied, the judge's decision is final. The litigant is then entitled to appeal the trial judge's "final" decision, which remains binding unless overturned by a higher authority.

the consent decree but third-party beneficiaries who had the right to seek enforcement of it. *Hook v. State of Arizona*, 972 F.2d 1012, 1013, 1015 (9th Cir. 1992); *see also Frost v. Symington*, 197 F.3d 348, 350 (9th Cir. 1999). It is clear from subsequent case law that in 1994 there was some type of class certification in *Hook*, but the extent of that certification is unknown and has not been presented to the Court. *See Frost*, 197 F.3d at 350 n.2, 359. There is no evidence before this Court that the 1994 class certification could or did bind all inmates to the terms of the original consent decree.

Finally, individual claims for damages and injunctive relief are not barred by prior class action suits, even if the plaintiff is a class member, particularly if the claim did not accrue until after the consent decree was entered. *Hiser*, 94 F.3d at 1291. Plaintiff's claim did not accrue until 1997, when he alleges that ADOC changed its policy to assign the same person to do the initial and second stage review of incoming publications. The Court rejects Defendants' argument that *Hiser* is distinguishable from the instant case because a ruling in favor of Plaintiff would require a modification of the *Hook* consent decree. As in *Hiser*, this Court has determined that the issue of an appeal was never litigated in *Hook* and is not part of the consent decree. Therefore, a ruling in favor of Plaintiff would not modify the decree, rather it would address a new issue not included in the decree. Because *Hook* did not require or prohibit an appeal from the exclusion of publications, and because Defendants have not established that Plaintiff Krug is bound by *Hook*, Defendants' Motion to Dismiss will be denied to the extent it relies on *Hook's* preclusive effect.

Qualified Immunity from Money Damages

Defendants argue that Plaintiff's request for money damages on Count I should be dismissed because they are entitled to qualified immunity. "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The crucial determination is the "'objective legal reasonableness' of the action assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)(quoting *Harlow*, 457 U.S. at 819, 818). To give relevance to the "clearly established" standard, the right must be defined at a level of specificity such that the official in question would know that his actions violated that right. *See Anderson*, 483 U.S. at 639-40. The unlawfulness must be clear, although the specific action does not have to previously have been found unlawful. *See id.* at 640 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985); *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986)). Qualified immunity is a broad defense which the Supreme Court describes as protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

The relevant inquiry is "1) Was the law governing the official's conduct clearly established? 2) Under the law, could a reasonable officer have believed the conduct was lawful?" *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). To

determine if the right asserted by the Plaintiff was clearly defined, the court "must 'survey the legal landscape'" as it existed at the time of the conduct in question. *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir.1989)(quoting *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986)). Absent controlling precedent on point, courts look to all available decisional law. *See Wood*, 879 F.2d at 591 (citing *Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985)).

In 1974, the Supreme Court held that when a prison withholds delivery of an inmate's outgoing or incoming letter that it must accompany that decision with minimal procedural safeguards. *Procunier v. Martinez*, 416 U.S. 396, 417 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989). One of the safeguards required by *Martinez* is that when a letter to or from an inmate is rejected, he be "given a reasonable opportunity to protest that decision, and that complaints be referred to a prison official other than the person who originally disapproved the correspondence." 416 U.S. at 418-19. The subsequent *Thornburgh* case, which dealt with subscription magazines sent to inmates, did not overrule *Martinez* regarding the procedural safeguards applicable to the exclusion of an inmate's mail.[3] Additionally, although the majority of the *Martinez* opinion focused on outgoing mail, the Supreme Court explicitly stated that the procedural protections were applicable to an inmate's outgoing

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[3] *Thornburgh* overruled *Martinez* in that it limited its holding regarding the standard of review applicable to prison regulations implicating the First Amendment. 490 U.S. at 413-14. *Thornburgh* held that a uniform standard was applicable to regulations governing material mailed into the prison, regardless of the origin, and that the *Martinez* standard was limited to regulations governing outgoing inmate mail. *Id.* at 413.

and incoming mail. 416 U.S. at 418. Although dicta, the Supreme Court made a point in *Thornburgh* of noting that the publication regulations at issue provided procedural safeguards when an incoming publication was rejected, including the right to appeal to a person other than the warden who issued the original rejection. 490 U.S. 406, n.7.[4]

Martinez held that due process protections were required because the interest of inmates and their correspondents in uncensored communication arises from the First Amendment and "is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment." *Id.* at 418. Defendants argue that First Amendment protections do not apply to obscene publications. While true, *see Miller v. California*, 413 U.S. 15, 23 (1973), Plaintiff is not contesting the fact that magazines lawfully determined to be obscene under constitutional standards may be excluded, rather, he is trying to ensure that due process protections are applied during the obscenity determination process. "[T]here is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners." *Thornburgh*, 490 U.S. at 408. Because inmates have a liberty interest arising from the First Amendment in receiving subscription publications, due process protections also apply to such correspondence when it is excluded. Other courts have found the procedural safeguards enumerated in *Martinez* to be required when publications mailed to inmates are excluded. *See e.g.*

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[4] This contradicts Defendants argument that in *Thornburgh* the warden could reject publications and there was no indication that the decision could be appealed to another person.

Hopkins v. Collins, 548 F.2d 503, 504 (4th Cir. 1977); *Aikens v. Jenkins*, 534 F.2d 751, 755 (7th Cir. 1974).

Defendants have cited no case law and the Court is not aware of any, in which a court held that the procedural protections delineated in *Martinez* and *Thornburgh* are not applicable to publications sent to inmates and excluded by prison officials. In 1999, the Ninth Circuit cited *Thornburgh* for the proposition that inmates are entitled to due process when publications are excluded. *Frost*, 197 F.3d at 353 (finding that notification of publication exclusion is constitutionally required). Although *Frost* was not published at the time the procedures Plaintiff complains of were enacted in 1997, it illustrates that the Ninth Circuit believes such procedural protections have been mandated since at least 1989 when the Supreme Court issued *Thornburgh*. Further, the ADOC regulations that Plaintiff complains of are still in effect today. The Court finds that during the time period relevant to Plaintiff's Count I, Plaintiff had a clearly established constitutional right to a two-person review when his publications were excluded.

The Court must next consider whether, in light of the clearly established law, a reasonable official could have believed he acted lawfully in not allowing Plaintiff an appeal to a person other than the one who originally excluded his incoming publications. Although the right to an appeal was not decided in *Hook*, the provisions of the consent decree are relevant to determining whether a reasonable ADOC employee could have believed his actions were lawful. All of the Defendants are

employees of ADOC who are required to comply with the *Hook* consent decree when processing incoming publications for inmates. The *Hook* decree, which has been in effect longer than either the *Martinez* or *Thornburgh* opinions, does not require an appeal to a person different than the one who makes an initial exclusion decision. It requires only that an inmate be allowed to seek review with the Deputy Superintendent of Programs, regardless of whether he also does the initial review. *Hook* is a binding federal court judgment, and a reasonable official could rely on that as guidance regarding the process to which Plaintiff is entitled. A reasonable ADOC official could have believed he acted lawfully by fully complying with the longstanding *Hook* decree, despite the subsequent cases requiring additional procedures. Therefore, the Court will grant Defendants qualified immunity on Plaintiff's request for money damages on Count I. Plaintiff's Motion for Summary Judgment will be denied to the extent that it requests money damages on Count I.

Injunctive Relief

In his Complaint, Plaintiff requested both injunctive relief and money damages. Defendants were informed in the Court's May 4, 2000 Order that the Court would be addressing the substance of Plaintiff's request for both money damages and injunctive relief on the motion to dismiss and motion for summary judgment. Defendants submitted no statement of facts in response to Plaintiff's Motion for Summary Judgment. Below, the Court recites the undisputed facts relevant to Plaintiff's request for injunctive relief. Plaintiff attests that in 1997, at ASPC-Douglas, the person who

initially determined that a magazine should be excluded based on obscenity was the only person from whom the inmate could seek review of that decision. On November 10, 1998, Defendant Stewart issued Director's Instruction 95 ("DI 95"), which superseded subsection 1.6 through 1.6.2 of Department Order 909, Inmate Mail and Property, Section 909.02, Incoming Mail. The revised policy on incoming mail provided that one person, the Operations Officer for Programs, was assigned to do both the initial review of all incoming publications for obscenity and the only review allowed of his exclusions decisions. A revised policy was adopted October 11, 1999, but the relevant provisions are substantively unchanged from DI 95. During this time period, Plaintiff had magazines excluded and his only right of review for the exclusion decision was to request review by the same official who originally determined the publications should be excluded.

As discussed at length in the above section on qualified immunity, when an incoming publication for an inmate is excluded, prison officials are constitutionally required to provide the inmate a reasonable opportunity to protest the decision to a different prison official than the one who made the original exclusion decision. *Thornburgh v. Abbott*, 490 U.S. 401, 406 (1989); *Procunier v. Martinez*, 416 U.S. 396, 418-19 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989). ADOC's current policy precludes an inmate from having a publication exclusion decision reviewed by a different official than the one who made the initial exclusion decision. The Court determines that the policy directly violates the

constitutional requirements set forth by the Supreme Court. Therefore, Plaintiff is entitled to summary judgment on his request for injunctive relief.

Plaintiff filed a separate petition requesting temporary or preliminary injunctive relief. Because the Court rules today that Plaintiff is entitled to a permanent injunctive relief based on his motion for summary judgment, his request for temporary injunctive relief is moot and will be denied as such.

Accordingly, IT IS **ORDERED** that:

(1) Defendants' March 8, 2000 Motion to Dismiss Count One [Doc. #45] is **GRANTED IN PART**, in that Defendants are granted qualified immunity from Plaintiff's request for money damages on Count I, and **DENIED IN PART**, with respect to injunctive relief;

(2) Plaintiff's May 4, 2000 Motion for Summary Judgment on Count One [Doc. #100] is **GRANTED IN PART**, with respect to his request for injunctive relief, and **DENIED IN PART**, with respect to his request for money damages;

(3) Plaintiff's March 24, 2000 Petition for Injunctive Relief, pursuant to Federal Rule 65 [Doc. #64-1, 64-2] is **DENIED AS MOOT**;

(4) Plaintiff's September 13, 2000 Motion for Oral Argument [Doc. #170] is **DENIED**;

(5) Defendants' policy 909 violates the constitutional requirement that when a publication is excluded, inmates must be allowed a review of that decision by a person other than the one who made the original decision; and

(6) Defendants shall retract any internal procedures that are inconsistent with Plaintiff's due process right to appeal the exclusion of incoming publications to a prison official other than the one who made the original exclusion decision.

Dated this 30th day of March, 2001.

RANER C. COLLINS
United States District Judge