Hall v. Cooper

United States District Court for the Southern District of Alabama, Southern Division
January 19, 1999, Decided ; January 19, 1999, Filed
CIVIL ACTION 78-0552-P-C

Reporter: 1999 U.S. Dist. LEXIS 9219
CARL HALL, a/k/a, LORD DIVINE ALLAH, Plaintiff, vs. ANDREW COOPER, et al., Defendants.

Subsequent History: [*1] Adopting as Modified Order of June 1, 1999, Reported at: 1999 U.S. Dist. LEXIS 8765.

Disposition: Recommended that defendants' motion to terminate prospective relief be granted and that plaintiff's motion to cite for contempt be denied.

Judges: WILLIAM E. CASSADY, UNITED STATES MAGISTRATE JUDGE.

Opinion by: WILLIAM E. CASSADY

Opinion

REPORT AND RECOMMENDATION

This action is before the Court on plaintiff's motion to cite for contempt filed against Warden Arnold Holt for his alleged failure to allow plaintiff to receive and to use incense from 1991 to 1993 (Doc. 208) and on defendants' motion to terminate prospective relief pursuant to the Prison Litigation Reform Act of 1996 ("PLRA") (Doc. 213). These motions have been referred to the undersigned for report and recommendation pursuant to *28 U.S.C. § 636(b)(1)(B)* and Local Rule 72.2(c)(4). After an evidentiary hearing, and upon careful consideration of the issues raised and of the record in this action, it is recommended that defendants' motion to terminate prospective relief be granted and that plaintiff's motion to cite for contempt be denied.

I. Findings of Fact.

A. Procedural History.

In the present action on March 31, 1982, Judge [*2] Pittman entered an injunctive decree for plaintiff, which states, inter alia: "Hall may use incense during religious services, if purchased at his own expense. Defendants shall let Hall receive mail containing incense, subject to usual security rules concerning inspection." (Exhibit A) This decree was ordered to be in effect at all ADOC institutions. This decree was based on the magistrate's recommendation entered March 28, 1980, (Exhibit B), which employed the balancing test from Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969), a Muslim free exercise action. The test from Walker required that "in order to continue such a policy of deprivation, the government must show a compelling and substantial public interest requiring the subjugation of the right." Id. at 25 (emphasis added). The magistrate observed that the United States Supreme Court at that time had not made clear a test for plaintiff's situation, but this Circuit had adopted the stringent test from Walker, supra. (Exhibit B, p. 6)

Defendants filed their objections to the magistrate's recommendation, contending that "(1) the issues were not properly before the magistrate, and (2) that no evidence supports [*3] his finding that the practices do not constitute a security risk." (Doc. 85, order of May 30, 1980, p. 3 - Exhibit C)) Judge Pittman overruled these objections in his order of May 30, 1980, stating that plaintiff's allegations fairly raise the incense issue as plaintiff was not required to provide details of his claim, and finding that incense poses no more a security risk than incense at Catholic services, which is permitted by ADOC. (Id.) Judge Pittman entered judgment on May 30, 1980, adopting the recommendation of the magistrate. (Doc. 86 - Exhibit D)

Plaintiff Hall appealed the judgment of the Court's denial of his other claims, and defendants appealed the judgment against them. (Doc. 92) The Eleventh Circuit Court of Appeals affirmed Judge Pittman's order on February 17, 1982. (Doc. 86) Thereafter, the magistrate entered a recommendation with a proposed decree on March 11, 1982, and Judge Pittman entered the decree on March 31, 1982. (Exhibit A)

After the injunctive decree was entered for plaintiff, plaintiff filed several motions for contempt, none of which resulted in a person being held in contempt. (Docket Sheet) Plaintiff ceased filing contempt motions in this action [*4] on November 7, 1984 (Docket Sheet), until plaintiff filed his present motion to cite for contempt on February 26, 1997.

B. Plaintiff's Motion to Cite for Contempt and Defendants' Motion to Terminate Prospective Relief Pursuant to the PLRA.

An evidentiary hearing was held on June 9, 1998, on plaintiff's motion to cite for contempt and on defendants'

motion to terminate prospective relief pursuant to the PLRA. (Docs. 226, 233 & 234) Present at the hearing were Andrew Redd, general counsel for ADOC, and plaintiff and his witnesses.

Plaintiff's motion to cite for contempt (Doc. 208) was filed against Arnold Holt for denying plaintiff his right to use incense at the Five-Percenters' parliaments and ciphers and to receive incense through the mail while Holt was the warden at Fountain Correctional Center ("FCC") from 1991 to 1993. In plaintiff's motion to cite for contempt (Doc. 208), he advises that he filed his motion to cite for contempt because in Civil Action No. 92-0013-RV-M on the day of trial, he was informed by the district judge that his claim against Holt for these denials in Civil Action No. 92-0013-RV-M must be brought as a motion to cite for contempt in plaintiff's [*5] prior action, Civil Action No. 78-0552-P-C. Thereupon, plaintiff filed the present contempt motion on February 26, 1997 (Doc. 208).

In response to plaintiff's motion to cite for contempt (Doc. 213), defendants state that Holt has not been the warden at FCC for several years and therefore, does not have supervisory control over the prison, which precludes him from denying plaintiff's requests. Defendants also assert that Holt did not willfully disregard the injunctive order. See also Doc. 231. Defendants further maintain that the March 31, 1982, order is terminable under the PLRA because it was issued fifteen years ago and the PLRA authorizes the termination of prospective relief two years after the relief is granted. (Doc. 213) Defendants move the Court to terminate the relief or to undertake a review to determine if the order is necessary to protect plaintiff's constitutional rights.

At the evidentiary hearing, when plaintiff was asked by the Court what action he wanted the Court to take, plaintiff initially gave an unresponsive answer, [1] and when questioned again, plaintiff stated that he was not concerned with the actions that Holt took five years ago, indicating that the [*6] matter was old. Plaintiff indicated to the Court that ADOC general counsel Redd and he had spoken before the evidentiary hearing about plaintiff's position. Redd advised the Court that ADOC and plaintiff had reached an agreement regarding the issue of incense, subject to Redd taking appropriate action to ensure that the present regulation which authorizes the use of incense is being enforced at ADOC's institutions. Redd informed the Court that there is presently in place a statewide regulation that requires that inmates be allowed to use incense, and advised that he would contact John Shaver, who is a deputy commissioner and the head of religious activities, to be sure that the regulation is being enforced and to have Shaver reinforce to the chaplains that the regulation is to be applied and inform him of any violations. Plaintiff affirmed to the Court that this was the agreement [2] and advised the Court that he is still retaining his claim directed to the constitutionality of the statute governing the termination of the prospective relief and that he wants this claim held in abeyance. [3] [*7]

The Court asked plaintiff how many times he filed for contempt since the injunctive order was issued in 1982; plaintiff estimated that he filed about three motions because he remembers that number of hearings being conducted and that his present motion is his fourth. The Court observed that instead of enforcing the injunction, plaintiff has previously filed separate civil actions. Plaintiff stated that since 1990 while at FCC, he had filed at least four actions concerning [*8] religious exercise, which included actions for approval to the hold the "son of man" dinner and to receive certain food mandated by his religion for the dinner, for the use of the prayer room, and for the confiscation of Islamic materials. Plaintiff did not recall how many actions he filed since the injunctive decree was entered as they were innumerable, possibly one hundred or more, or any of the actions that he filed in the 1980s. Plaintiff claimed that during the time when he did not file any contempt motions he was satisfied.

At the hearing, the Court was advised that for approximately one year plaintiff has been assigned to St. Clair where he is allowed to have incense, [4] that Holt is at Bullock County Correctional Facility ("Bullock"), and that there are no plans to transfer plaintiff to Bullock. The Court asked plaintiff if he has been able to exercise his religion; plaintiff gave no response.

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[1] Plaintiff's response to the Court was that he wanted his handcuffs removed because they affected his mental processes and gave him an emotional problem.

[2] In particular, Redd would take steps to ensure that plaintiff would be allowed to use incense at the treatment dorm at St. Clair Correctional Facility ("St. Clair") as plaintiff had no other problems at St. Clair. Plaintiff expressed that because of this agreement, he was not interested in pursuing his old contempt motion against Holt.

[3] The file in this action does not contain a document filed by plaintiff prior to the evidentiary hearing challenging the constitutionality of 18 U.S.C. § 3626(b)(2) even though plaintiff represented to the Court at the hearing that he believed that he had filed such a document.

[4] Presently, plaintiff appears to be located at St. Clair. Based on plaintiff's filing of document 255 indicating that plaintiff was at Kilby, the Court contacted ADOC and discovered that plaintiff was returned to St. Clair on December 16, 1998, from Kilby.

[*9] On June 9, 1998, the Court entered an order memorializing the events that transpired at the evidentiary hearing. (Doc. 234) The order states:

> Mr. Redd and Mr. Allah advised the Court that an agreement had been reached, which was articulated, rendering the motions for citing Arnold Holt with contempt moot. They also suggested that the Court take the motion to terminate the existing permanent injunction, filed pursuant to the Prison Litigation Reform Act of 1996, under submission on the present record.
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> The undersigned agreed with suggestion of the parties and therefore, shall enter a report and recommendation on both issues after waiting thirty days for the preparation and filing of a report by attorneys for the Commissioner of the Department of Corrections which details the actions taken to ensure the plaintiff's right to exercise his religion in a manner ordered by this Court. Upon receipt of this report, plaintiff shall have two weeks in which to file any objections to the report or to seek a renewal of the motions to hold particular persons in contempt. After that period of time, the undersigned will then enter a report and recommendation regarding plaintiff's request [*10] for contempt citations, as well as the State's request for termination of the injunction issued in 1982.(Doc. 234)

On July 13, 1998, Redd filed the ordered report in which he states that he sent a memorandum to Deputy Commissioner John Shaver, who is responsible for chaplaincy and inmate religious activities. (Doc. 241) In the memorandum to Shaver, which is attached to the report, Redd advises Shaver that ADOC's policies permit that the use of incense based on the Hall and Ayler cases, that plaintiff Hall complained that he was not allowed to use incense during religious services at Kilby Correctional Facility ("Kilby") and the T.C. Dorm at St. Clair, that he (Redd) is required to submit to the Court a report concerning plaintiff's claim, and that Shaver needs to reaffirm with the chaplains that ADOC's policies regarding the practice of religion need to be followed unless there is a legitimate penological reason not to do so. (Doc. 241, attachment) Redd requested Shaver to contact the chaplains at Kilby and at St. Clair to ascertain whether or not plaintiff Hall was permitted to use incense for religious services and that if there was a denial, to provide the reason [*11] for the denial. (Id.)

Redd informs the Court that Shaver advised him that plaintiff had not requested to use incense at Kilby, but was allowed to receive and use incense at St. Clair. (Id.) Counsel verified this information by contacting both chaplains who were aware that the use of incense is permitted during bona fide religious services. (Id.) Attached to the report (id.) are the program services administrative memorandum dated March 31, 1997, which sets out that the burning of incense is allowed (P 3 (F)); administrative regulation 303, which governs visitation and correspondence procedures; administrative regulation 308, which governs visiting clergy; and administrative regulation 313, which governs chaplain services and religious activities.

Redd concludes the report by stating ADOC's position:

> There is an appropriate policy and procedure in place which, if followed, insures the Plaintiff's ability to utilize incense in bona fide religious services. As an aside, this policy and procedure is dependent upon the Plaintiff's cooperation in making his requests through the proper channels, i.e. the chaplain, and proceeding in an appropriate manner. It also depends [*12] upon correctional officials following the policies and guidelines created for such matters.(Doc. 241)

Prior to the filing of defendants' report, plaintiff filed on July 9, 1998, plaintiff's withdrawal of offer of settlement (Doc. 239), in which he withdraws his offer of settlement because Redd has refused to answer plaintiff's letters or to return plaintiff's telephone calls to discuss the terms of settlement and contends other state officials have denied plaintiff the benefit of the decree. [5]

In response to defendants' report, on August [*13] 17, 1998, plaintiff filed his affirmation in opposition to report (Doc. 250, p. 1), wherein he affirms that ADOC has guidelines in place, which, if followed, ensure that plaintiff can use incense during Islamic services or

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[5] The agreement was complete at the evidentiary hearing with only three subsequent actions to be performed pursuant to the agreement: Redd would take steps to ensure that the regulation was being enforced statewide; defendants would file a report reflecting their steps; and plaintiff would have an opportunity to file any objections to defendants' report or to renew his contempt motions. There were no further "terms of settlement" needed to complete the agreement.

ciphers. Plaintiff, however, contends that he does not enjoy the benefit of the Court's decree as evidenced by his motions for contempt filed against Chaplain Smith and Mr. Derrick of St. Clair and Chaplain Chestnut of Kilby for their failures to use the notification of rejected mail procedure properly. Plaintiff disputes the defendants' assertion that he did not seek to use incense at Kilby and maintains that during a meeting with Chaplain Chestnut and Warden Hightower when he requested to receive incense through the mail, he was told that he could not receive incense because the Five-Percenters do not have religious services at Kilby. Lastly, plaintiff reasserts his motion to withdraw his offer of settlement. Nevertheless, plaintiff did not renew the contempt motions that he filed prior to the evidentiary hearing.

II. Discussion.

At the evidentiary hearing plaintiff claimed that he was reserving his right to challenge the constitutionality of the PLRA's [*14] termination of prospective relief provision, 28 U.S.C. § 3626(b)(2), notwithstanding his agreement with ADOC. Plaintiff was advised at the hearing by the undersigned that other courts have been terminating longstanding injunctions pursuant to this statute as though the statute was constitutional. Specifically, the Eleventh Circuit Court of Appeals has found § 3626(b)(2) to be constitutional, and has commented that other circuits have found the provision to be constitutional as well. Dougan v. Singletary, 129 F.3d 1424, 1426 (11th Cir. 1997)[6] (citing *Gavin v. Branstad, 122 F.3d 1081, 1085-87 (8th Cir. 1997)*, cert. denied,*524 U.S. 955, 118 S. Ct. 2374, 141 L. Ed. 2d 741 (1998)*, and Plyler v. Moore, 100 F.3d 365, 370-72 (4th Cir. 1996), cert. denied,*520 U.S. 1277, 117 S. Ct. 2460, 138 L. Ed. 2d 217 (1997))*, cert. denied, *524 U.S. 956, 118 S. Ct. 2375, 141 L. Ed. 2d 743 (1998)*. Inasmuch as plaintiff presented no specific grounds challenging 18 U.S.C. § 3626(b)(2), the Court, relying on the decision in Dougan, finds 18 U.S.C. § 3626(b)(2) to be constitutional.

[*15] The termination of prospective relief is provided for under 18 U.S.C. § 3626(b)(2).

> Immediate termination of prospective relief.--In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation.18 U.S.C. § 3626(b)(2). It is only when there is evidence of a "current and ongoing" violation of a federal right that the Court is obligated to review a prior injunctive order under 18 U.S.C. § 3626(b)(3).
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> Limitation.--Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.18 U.S.C. [*16] § 3626(b)(3).

"The term 'federal right' as used in § 3626(b)(2) does not include rights conferred by consent decrees providing relief greater than that required by federal law." Plyler, 100 F.3d at 370. To "construe the term 'federal right' to include prospective relief contained in a consent decree. . . is at odds with Congress' purpose in enacting the PLRA, namely, to relieve states of the onerous burden of complying with consent decrees that often reach far beyond the dictates of federal law." Id.

The reasoning that a "federal right" is distinct from a provision in an order for injunctive relief is sound. The correctness of this reasoning is amplified by the situation presented in this action. A different legal standard was employed by the Court when it entered its injunctive decree on March 31, 1982, than the "reasonably related" standard from the decisions in Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) and O'Lone v. Estate of Shabazz, 482 U.S. 342, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987), which is in effect today when a court rules on a free exercise claim. At the time the injunctive decree was entered, the United States Supreme [*17] Court had not made clear the standard to be utilized by the courts in reviewing prisoners' claims for a violation of the right to exercise freely their religion due to officials' actions or regulations. (Recommendation of Magistrate, March 28, 1980, p. 6 - Exhibit B) Thus, this Court in entering the injunctive decree relied upon circuit precedent when it used "the most stringent test," a "compelling interest" standard, to find that there was a violation of plaintiff's right to exercise freely his religion. (Id. (citing Walker, 411 F.2d at 25))

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[6] In Dougan. the constitutionality of § 3626(b)(2) was challenged on the grounds that it violated the separation-of-powers doctrine, due process, and equal protection.

Prior to the Turner and O'Lone decisions, a "compelling interest" standard was applied to free exercise claims. Lawson v. Singletary, 85 F.3d 502, 508-09 (11th Cir. 1996). [7] After the O'Lone decision which established a "reasonably related" standard for adjudicating free exercise claims, and other decisions which departed from the "compelling interest" standard, see Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), Congress sought to restore the "compelling interest" standard for reviewing free exercise claims by enacting the RFRA. [8] However, [*18] RFRA was struck down by the United States Supreme Court in City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), as being unconstitutional. Thus, the present standard of review for free exercise claims is the "reasonably related" standard of Turner/O'Lone. Hines v. South Carolina Dept. of Corrections, 148 F.3d 353, 358 (4th Cir. 1998); Freeman v. Arpaio, 125 F.3d 732, 736 (9th Cir. 1997); Anderson v. Angelone, 123 F.3d 1197, 1198 (9th Cir. 1997).

[*19] Because the standard for evaluating a free exercise claim has changed from 1982 when the Court's injunctive decree was entered, the Court's finding in 1982 that there was a violation of plaintiff's right to exercise freely his religion may or may not be supported by the current law. Compare Doty v. Lewis, 995 F. Supp. 1081 (D. Ariz. 1998) (dismissing an action for a permanent injunction brought by a satanist challenging the ban on incense in a high security area), with Howard v. United States, 864 F. Supp. 1019 (D. Colo. 1994) (granting a preliminary injunction enjoining officials from purchasing religious implements for other groups, i.e., incense, if they did not provide the same for the satanist and from prohibiting the satanist from purchasing religious implements that other religious groups were allowed to purchase). Therefore, an argument that plaintiff has a federal right created by the injunctive decree is not well founded because the decree's prescription ostensibly could be greater than that to which plaintiff is entitled under the constitutional standard of Turner/O'Lone. In order to avoid termination of the March 31, 1982, decree, plaintiff is required to [*20] establish that there is a "current and ongoing" violation of his federal right to exercise freely his religion under the Turner/O'Lone standard by depriving him of his ability to receive and to use incense in addition to a finding by the Court that the other requirements of § 3626(b)(3) are met by the March 3 1, 1982, decree.

Plaintiff was asked by the undersigned at the evidentiary hearing if he was able to exercise his religion. Plaintiff did not respond to the question. Thus, having been provided an opportunity at the evidentiary hearing to put on evidence that plaintiff's *first amendment* right to exercise freely his religion was violated, plaintiff elected not to do so. During the evidentiary hearing, the only information provided by plaintiff which can be connected to the issue of presently being able to exercise his religion was plaintiff's statement that he was not allowed to receive incense at Kilby while he was in transit. This evidence is directed to a violation of the injunctive decree, and without more evidence, is not probative of a "current and ongoing" violation of a federal right.

Since the evidentiary hearing, plaintiff has filed numerous motions [9] alleging, [*21] inter alia, that he has been deprived of his religious materials, which include incense, at St. Clair and at Kilby. These contempt motions are not entirely germane to a violation of a federal right, as they are presented as violations of the injunctive decree. The

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[7] In Lawson, the Eleventh Circuit Court of Appeals determined the legal standard to be applied to claims under the RFRA. 85 F.3d at 511. Additionally, the Lawson court recounted pre-RFRA case law.

[8] One of RFRA's stated purposes was "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963) and Wisconsin v. Yoder, 406 U.S. 205, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972). . . ." 28 U.S.C. § 2000bb(b). To further this objective, RFRA provided that "government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person -- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

[9] Plaintiff has filed numerous contempt motions for depriving him of his religious materials and for retaliating against him for his legal and religious activities, most of which were filed subsequent to the evidentiary hearing. The following is a description of plaintiff's motions which concern the deprivation of his religious materials.

On March 19, 1998, plaintiff requested a hearing because a St. Clair correctional officer, Massey, ordered plaintiff to remove his white kufi from his head during a cipher under threat of disciplinary action (Docs. 224 & 225), and sought a contempt citation for Massey's action (Doc. 227) and for her failure to make a copy for plaintiff of his response to the Court's order (Doc. 247).

On July 9, 1998, plaintiff filed a motion to cite additional defendants for contempt (behind Doc. 239) in which he complains that Chaplain Smith of St. Clair sent a package addressed to plaintiff back to plaintiff's religious sponsors because the box contained the religious materials as well as a key lock. Plaintiff states that upon his sponsors' receipt of the package, they re-sent it to plaintiff without the key lock, but plaintiff had been transferred for the hearing in this action when the package arrived. Chaplain Chestnut of Kilby called Chaplain Smith at plaintiff's request and plaintiff was told that Chaplain Smith would retain the religious materials until plaintiff returned. Plaintiff alleges that upon his return to St. Clair on June 18, 1998, Chaplain Smith told

apparent reasoning for filing these complaints in this action is that plaintiff's actions filed after the PLRA's enactment have been determined, in this Court, to be governed by *28 U.S.C. § 1915(g)*'s "three strikes" provision. See, e.g., Hall v. Johnson, et al., Civil Action No. 97-0004-RV-C. Plaintiff is, therefore, generally precluded from preceding on any new claims in a new action because the types of claims generally brought by plaintiff prohibit plaintiff from availing himself of the exception under *§ 1915(g)*, "imminent danger of serious physical injury," and because plaintiff is indigent. Consequently, the route remaining to plaintiff to litigate his new claims is to bring them in a pending action.

[*22] At the evidentiary hearing and in plaintiff's other motions filed in this action, plaintiff has not established that he is being deprived of his *first amendment* right to exercise freely his religion. Parrish v. Alabama Dept. of Corrections, 156 F.3d 1128, 1129 (11th Cir. 1998) (ruling that the district court's reliance on a newspaper article about the prison commissioner's statements and on prior contempt orders to find that there was a "current and ongoing" violation was clear error). Plaintiff's assertions of a deprivation of his right to receive incense are for violations of the Court's order, and not for a violation of a federal right. See Plyler, 100 F.3d at 370. Because there has not been presented credible and sufficient evidence of a "current and ongoing" violation of a federal right, the Court finds that there is not a "current and ongoing" violation of a federal right. The injunctive decree entered on March 31, 1982, is therefore to be reviewed under § 3626(b)(2).

III. Conclusion.

An examination of the injunction entered in this action does not reflect that the Court found in its injunctive decree of March 31, 1982, that the injunctive relief was narrowly [*23] drawn, did not extend any further than necessary to correct the violation of a federal right, and was the least intrusive means necessary to correct the violation of a federal right. See Id. The injunction entered in this action is almost seventeen years old, and no action had taken place in this action for almost fifteen years until plaintiff filed his motion to cite for contempt (Doc. 208). This injunction appears to the Court to be the type of injunction that the PLRA was designed to correct. Due to the facts that plaintiff has not established that there is a "current and ongoing" violation of a federal right, that the statutorily required findings are not contained in the injunctive decree, and that there was no activity for almost fifteen years in this action, it is recommended that the injunction entered in this action be terminated. Parrish, 156 F.3d at 1129; [10]Dougan, 129 F.3d at 1425.

[*24] Furthermore, it is recommended that plaintiff's motion to cite for contempt filed against Arnold Holt (Doc.

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plaintiff that he had not received the package which contained incense. Plaintiff further complains that while at Kilby from May 27, 1998, to June 18, 1998, Chaplain Chestnut told plaintiff that incense was not allowed at Kilby because there were no services for Five Percenters and that his action was sanctioned by Shaver and Redd because the injunction had no effect at Kilby. Plaintiff also seeks to hold Redd in contempt because he has circumvented the Court's orders by advising Shaver to tell Chestnut that Kilby does not have to comply with the Court's orders because Kilby is not plaintiff's assigned institution.

Received by the Court on July 9, 1998, is plaintiff's "notice of motionis & motion to cite for contempt [sic]" (Doc. 240), in which plaintiff advises that at the evidentiary hearing scheduled for June 9, 1998, plaintiff will move to have previously identified defendants cited for contempt as well as Officer Massey and will present evidence thereon.

On July 27, 1998, plaintiff filed his second motion to cite additional defendants for contempt in support of plaintiff's opposition to motion to vacate decree (Doc. 242) asserting that Officer Kelly Derrick stopped plaintiff's package containing incense in the mail room and returned it to the sender without notice and justification. When plaintiff received the package, eleven pounds of fragrances were missing and Chaplain Smith told plaintiff that he had never seen the package even though it had been sent to plaintiff in care of Chaplain Smith. A second package containing incense was sent to plaintiff in care of the chaplain, but plaintiff was prevented from receiving the package or having the chaplain review it because Derrick has refused to release it and has not returned it to the sender.

On August 21, 1998, plaintiff filed a motion to cite for contempt of court against plaintiff's new warden Ron Jones and Chaplain Smith (Doc. 252), claiming that a package containing court-approved Islamic materials was mailed to plaintiff in care of Chaplain Smith on August 14, 1998, and has been withheld from him by the new warden. When plaintiff asked Chaplain Smith about the materials on August 17 and 18, 1998, plaintiff was told that the package was in the warden's office and that no inquiries should be made.

On November 30, 1998, plaintiff filed an emergency motion for order (Doc. 255), in which plaintiff avers that on December 13, 1998, he was transferred from St. Clair to Kilby with his white kufi, three boxes of incense, and two plastic bottles of Islamic oils. These religious items were allegedly confiscated upon plaintiff's arrival by defendants Mooney, Evans, and Hardin after they were told by the transfer agent that plaintiff was allowed to have these items pursuant to a court order and a regulation.

[10] In Parrish, the Eleventh Circuit reversed the district court's refusal to terminate the 1982 injunction which prohibited state inmates from being housed at the Lauderdale County Jail for more than thirty days, finding that the evidence did not support a "current

208) be denied because (1) plaintiff and ADOC reached an agreement at the evidentiary hearing on June 9, 1998, on the contempt motion (Doc. 208) and ADOC counsel Redd has complied with the agreement's provision that he ensure that the present regulation which permits the limited use of incense was enforced at ADOC's institutions, see Doc. 241; (2) plaintiff's representation to the Court at the evidentiary hearing that he is no longer interested in pursuing his old contempt motion against his former warden, Arnold Holt; (3) plaintiff's failure to renew his contempt motion against Holt; and (4) the injunction based on the decree of March 31, 1982, is being recommended for termination. [11]

[*25] The attached sheet contains important information regarding objections to the Report and Recommendation.

DONE this 19th day of January, 1999.

WILLIAM E. CASSADY

UNITED STATES MAGISTRATE JUDGE

ATTACHMENT

MAGISTRATE JUDGE'S EXPLANATION OF PROCEDURAL RIGHTS AND RESPONSIBILITIES FOLLOWING RECOMMENDATION, AND FINDINGS CONCERNING NEED FOR TRANSCRIPT

1. ***Objection.*** Any party who objects to this recommendation or anything in it must, within ten days of the date of service of this document, file specific written objections with the Clerk of this court. Failure to do so will bar a *de novo* determination by the district judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the Magistrate Judge. *See 28 U.S.C. § 636(b)(1)(C)*; *Lewis v. Smith,* 855 F.2d 736, 738 (11th Cir. 1988); *Nettles v. Wainwright,* 677 F.2d 404 (5th Cir. Unit B, 1982) *(en banc)*. The procedure for challenging the findings and recommendations of the Magistrate Judge is set out in more detail in SD ALA LR 72.4 (June 1, 1997), which provides that:

> A party may object to a recommendation entered by a magistrate judge in a [*26] dispositive matter, that is, a matter excepted by *28 U.S.C. § 636(b)(1)(A)*, by filing a 'Statement of Objection to Magistrate Judge's Recommendation' within ten days after being served with a copy of the recommendation, unless a different time is established by order. The statement of objection shall specify those portions of the recommendation to which objection is made and the basis for the objection. The objecting party shall submit to the district judge, at the time of filing the objection, a brief setting forth the party's arguments that the magistrate judge's recommendation should be reviewed *de novo* and a different disposition made. It is insufficient to submit only a copy of the original brief submitted to the magistrate judge, although a copy of the original brief may be submitted or referred to and incorporated into the brief in support of the objection. Failure to submit a brief in support of the objection may be deemed an abandonment of the objection.

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and ongoing" violation of a federal right and noting the Supreme Court's admonition that "injunctions are not to stay in place 'in perpetuity.'" 156 F.3d at 1130-31 (quoting Board of Educ. v. Dowell, 498 U.S. 237, 248, 111 S. Ct. 630, 112 L. Ed. 2d 715 (1991)).

[11] Plaintiff has filed numerous motions for contempt and/or sanctions prior to and after the evidentiary hearing. It is recommended that the following motions filed before the evidentiary hearing be denied because plaintiff did not renew them as required by the Court's order of June 9, 1998. (Doc. 234) These motions are: renewed motion for sanctions filed against James Cook and Redd (Doc. 220) and notice of motion and motion to cite for contempt filed against defendants and Officer Massey (Doc. 227).

It is further recommended that plaintiff's "Notice of Motionis & Motion To Cite For Contempt [sic]" (Doc. 240) filed on July 9, 1998, contending that on June 9, 1998, at the evidentiary hearing plaintiff will move to cite defendants, their agents and employees, and Officer Massey for contempt and will present evidence in support of his motion be found moot.

Regarding the contempt motions filed after the evidentiary hearing, it is recommended that they be denied due to this report and recommendation recommending the termination of the injunction entered in this action. These motions are: second motion to cite additional defendants for contempt in support of plaintiff's opposition to motion to vacate decree filed against Kelly Derrick (Doc. 242); motion to cite for contempt for order to show cause and for protective order filed against Officer Massey for failure to photocopy plaintiff's pleading related to the Five-Percenters (Doc. 247); motion to cite for contempt of court filed against Ron Jones and Chaplain Smith (Doc. 252); and emergency motion for order (Doc. 255), albeit a motion for contempt, filed against Officers Moony, Evans, and Hardin and Commissioner Hopper.

Furthermore, it is recommended that plaintiff's withdrawal of offer of settlement (Doc. 239) be denied for the reasons set forth in the report and recommendation entered this date.

A magistrate judge's recommendation cannot be appealed to a Court of Appeals; only the district judge's order or judgment can be appealed.

2. ***Transcript (applicable Where Proceedings Tape Recorded).*** [*27] Pursuant to *28 U.S.C. § 1915* and FED.R.CIV.P. 72(b), the Magistrate Judge finds that the tapes and original records in this case are adequate for purposes of review. Any party planning to object to this recommendation, but unable to pay the fee for a transcript, is advised that a judicial determination that transcription is necessary is required before the United States will pay the cost of the transcript.

William E. Cassady

UNITED STATES MAGISTRATE JUDGE

EXHIBIT A

CARL HALL and DUDLEY GOULDEN, Plaintiffs vs. JOE OLIVER, et al., Defendants.

CIVIL ACTION NO. 78-721-P, 78-552-P, 78-350-P

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

March 31, 1982, Decided

March 31, 1982, Filed and Entered

[EDITOR'S NOTE: THIS DOCUMENT IS REPORTED AT: 1982 U.S. Dist. LEXIS 18362.]

EXHIBIT B

DUDLEY GOULDEN, et al., Plaintiff vs. JOE OLIVER, et al, Defendants. CARL HALL, et al., Plaintiffs vs. ANDREW COOPER, et al., Defendants. FRANK OTIS, et al., Plaintiffs vs. JOE OLIVER, Defendant; CARL HALL, etc., Plaintiff vs. W. L. BULLARD, et al., Defendants.

CIVIL ACTION NO. 78-350-P, CIVIL ACTION NO. 78-552-P, CIVIL ACTION NO. 78-721-P, CIVIL ACTION NO. [*28] 79-0115-P

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

March 28, 1980, Decided

March 28, 1980, Filed

[EDITOR'S NOTE: THIS DOCUMENT IS REPORTED AT: 1980 U.S. Dist. LEXIS 17831.]

EXHIBIT C

DUDLEY GOULDEN, et al., Plaintiff, v. JOE OLIVER, et al, Defendants. CARL HALL, et al., Plaintiffs v. ANDREW COOPER, et al., Defendants. FRANK OTIS, et al., Plaintiffs, v. JOE OLIVER, Defendant. CARL HALL, etc., Plaintiff, v. W. L. BULLARD, et al., Defendants.

CIVIL ACTION No. 78-350-P, CIVIL ACTION No. 78-552-P, CIVIL ACTION No. 78-721-P, CIVIL ACTION No. 79-0115-P

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

May 30, 1980, Decided

May 30, 1980, Filed and Entered

[EDITOR'S NOTE: THIS DOCUMENT IS REPORTED AT: 1980 U.S. Dist. LEXIS 17832.]

EXHIBIT D

DUDLEY GOULDEN, et al., Plaintiff v. JOE OLIVER, et al, Defendants. CARL HALL, et al., Plaintiffs, v. ANDREW COOPER, et al., Defendants. FRANK OTIS, et al., Plaintiffs, v. JOE OLIVER, Defendant. CARL HALL, etc., Plaintiff, v. W. L. BULLARD, et al., Defendants.

CIVIL ACTION No. 78-350-P, CIVIL ACTION No. 78-552-P, CIVIL ACTION No. 78-721-P, CIVIL ACTION No. 79-0115-P

[*29] UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

May 30, 1980, Decided

May 30, 1980, Filed and Entered

[EDITOR'S NOTE: THIS DOCUMENT IS REPORTED AT: 1980 U.S. Dist. LEXIS 17832.]