Terry Goddard
Attorney General

Darrin J. DeLange (#015699)
Assistant Attorney General
1275 W. Washington
Phoenix, Arizona 85007-2997
Telephone: (602) 542-7693
Fax: (602) 542-7670
E-mail: Darrin.DeLange@azag.gov

Attorneys for Defendant Cardwell

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

MUNI FRED HARRIS, et al., Plaintiffs, v. HAROLD J. CARDWELL, et al., Defendants.	NO. CIV75-185 PHX SRB **DEFENDANTS' MOTION TO TERMINATE PROSPECTIVE RELIEF AS OUTLINED IN THIS COURT'S "AMENDED JUDGMENT" DATED MAY 25, 1982, PURSUANT TO RULE 60(B) AND 18 U.S.C. § 3626, et seq.**

Defendants, in addition to the Status Letter also filed this date of January 22, 2006, file this "Motion To Terminate Prospective Relief As Outlined In This Court's "Amended Judgment" Dated May 25, 1982, Pursuant To 18 U.S.C. § 3626" ("Defendants' Motion to Terminate"). Despite this case's troubled procedural history, and actual lack of some pleadings or orders before 1982, there is enough to allow modern statutory and case law to require termination of further prospective relief arising out of the 1982 Amended Judgment/Consent Decree ("Amended Judgment"). This Motion is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATUS -- PROCEDURAL HISTORY

This case started as a class action filed in 1975. The earliest document that Defendants' counsel has is a copy of the Amended Judgment dated May 25, 1982, which was signed by Judge C.A. Muecke. It was also signed, approving it as to form by Thomas Prose, Attorney for Defendants, Frank Lewis, attorney for Plaintiffs; and Paul A. Katz, Assistant United States Attorney, for Amicus Curiae. So, the Amended Judgment and the "Consent Decree" seem to be merged into the same document, the Amended Judgment of 1982. Therefore, in this motion, Defendants will refer to the Amended Judgment as the document from which prospective relief should be terminated. After 1982, Defendants have no filings in this case until 1989. Many of the filings were by inmates seeking to "enforce the judgment." Those filings were stricken by the Court because the case was marked as being terminated. Undersigned counsel has no idea how that procedural development occurred, nor where the missing parts of the file are. However, the file contains the Amended Judgment of 1982 and enough of the substantive filings in order for this Court to consider Defendants' Motion to Terminate of 2007.

One of the problems of this case is that a great deal of the filing is, well, missing – both from the files of the Clerk of the Court and the parties. Defendants only possess a file beginning with 1989. Defendants do have a copy of the Amended Judgment filed May 26, 1982. However, a former Assistant Attorney General brought Defendants' files from the case and conferred with a law clerk for almost an entire day in an attempt to rebuild the file before 1989. Unfortunately, they were unsuccessful. The good news is that this Court and the parties have a copy of the most relevant document in this case: The Amended Judgment of 1982. The Amended Judgment states that it incorporated all prior court orders including those of September 1, 1977, October 6, 1977, December 12, 1978, March 8, 1979, May 23, 1979, and September 24, 1979. The Court remarked that "those orders

are hereby merged into this Judgment in their entirety." (See Amended Judgment at p.1, l.22-26).

Before the Amended Judgment was filed, there had been ongoing negotiations between the parties to settle the issues raised in the original underlying class action a Consent Decree was finally agreed to between the parties regarding a wide range of prison conditions. The Amended Judgment granted prospective relief to a class of plaintiff inmates concerning a wide range of prison policies, including educational and work programs, recreation, the Arizona Department of Corrections ("ADC") health care services, and issues regarding the housing of inmates at Central Unit. (See Amended Judgment, at p.2-5). [Doc. 812].

Today, fifteen years after the "Amended Judgment" of 1982 was signed and agreed to by the parties, the facts and law surrounding the Amended Judgment changed significantly. Over ten years ago, undersigned counsel attempted to utilize the Prison Litigation Reform Act's ("PLRA") Termination Provision by filing a motion titled "Motion to Terminate Consent Decree Order" ("Motion to Terminate, 1996") on September 3, 1996, pursuant to 18 U.S.C. § 3626. [Doc. No. 868]

This Court stayed the Motion to Terminate 1996 pending a decision by the Arizona Supreme Court regarding the Constitutional Defense Council's attempt to intervene in this (and other) action on behalf of the State of Arizona in an Order dated October 22, 1996. [Doc. No. 870] The Attorney General's Office vigorously opposed this and took the issue to the Arizona Supreme Court. The Arizona Supreme Court ruled that the so called Constituional Defense Council "is unconstitutional because it violates the article III separation of powers clause of the Arizona Constitution." *State ex rel. Woods v. Block*, 189 Ariz. 269, (Ariz. 1997).

In part because of these intervening complexities, The Motion to Terminate 1996 was never ruled on. Finally, the Judge previously presiding over this case signed an Order

holding that because so much time had passed, that the Defendants' would be permitted to file a "Renewed Motion to Terminate Consent Decree." As described below, when this case rose its head again, counsel for Defendants chose not to style a "Re-Newed" Motion to Terminate with the same argument as the Motion to Terminate 1996 because by then it would not follow the legal standard set forth by the Ninth Circuit in *Gilmore v. California*, 220 F.3d 987 (9th Cir. 2000) for properly terminating prospective relief pursuant to 18 U.S.C. § 3626.

II. LEGAL ARGUMENT

A. FEDERAL RULE 60(B)(5) OF CIVIL PROCEDURE

Federal Rule 60(b)(5) of Civil Procedure provides the gateway to termination of all prospective relief in this case by operation of the PLRA. The PLRA is new law that did not exist at the time the Amended Judgment was signed on May 25, 1982. The pertinent part of Rule 60(b)(5) allows relief from a judgment or injunction if "it is no longer equitable that the judgment should have prospective application."

The Supreme Court has held that a change in legislative or decisional law, or a change in critical facts would render continued enforcement of a judgment or injunction inequitable. *See Agostini v. Felton*, 521 U.S. 203 (1997) (allowing relief under Rule 60(b)(5) to alter permanent injunction in light of Supreme Court's decision to overrule earlier constitutional precedent on which injunction was based); *Maraziti v. Thorpe*, 52 F.3d 252, 254 (9th Cir. 1995) (holding that the standard for Rule 60(b)(5) is whether judgment is "executory" or implicates "supervision of changing conduct or conditions.")

The significant change in the law that that justifies consideration of termination of prospective relief from the Amended Judgment is the enactment of the Prison Litigation Reform Act ("PLRA"). 18 U.S.C. § 3626, et seq.

B. THE PRISON LITIGATION REFORM ACT REQUIRES TERMINATION OF FURTHER PROSPECTIVE RELIEF.

1. The Law Supporting Termination of Prospective Relief.

The Prison Litigation Reform Act (PLRA) mandates Termination of prospective relief arising out of the Amended Judgment. 18 U.S.C. § 3626, et. seq. Under 18 U.S.C. § 3626(b)(2), any prospective relief must be terminated upon motion if the original decree did not include a finding by the court that the decree was "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 of the Federal right." In this case, such a finding was not necessary in 1982 because the Court specifically stated in the Amended Judgment that:

> The practices, procedures and standards prescribed below are such as have been negotiated by the parties and approved by the Court and in no way represent a judicial determination of practices, procedures or standards required by the Constitution of the United States and of the State of Arizona.

(See Amended Judgment at p.2, l.1-5).

Such a finding was not made at the time of the signing of the 1982 Amended Judgment because there were no violations of any federal or state constitutional rights. Logically, this precludes making any type of finding now that there is any "ongoing" constitutional violation today. It only follows that such a hypothetical claim today would have to be made in another lawsuit. The pertinent text of the PLRA provision:

> (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 of the Federal right.

18 U.S.C. § 3626(b)(2). Therefore, there were no such findings made because the Amended Judgment was not based on any federal or state constitutional violation. The Amended Judgment was simply an agreement between the parties, and signed by the Judge, regarding the modification of many prison conditions.

2. The Procedure for this Court to Terminate Prospective Relief

Before terminating further prospective relief in this case, according to *Gilmore*, this Court must first carefully consider the Motion to Termination; second, review for itself the Amended Judgment and the file; and third, determine if the Amended Judgment of 1982 was initially based on a constitutional violation; and fourth if it was, whether there are any ongoing constitutional violations at the time the Court considers the present Motion to Terminate of 2007. *Gilmore*, 220 F.3d 987, 1008-09.

A basic review of the prospective relief and the explicit statement of the presiding Judge, ordered in the Amended Judgment, conclusively establish that the Amended Judgment and prospective relief awarded were not based on any constitutional violations at the time. A review of the Amended Judgment of 1982 and the file demonstrate (that even though not necessary for Defendants or this Court to establish) that none of the provisions contained within the Amended Judgment were or are based on any past or current constitutional violation. Consequently, this Court may, but need not conduct an analysis of whether the prospective relief ordered in the Amended Judgment was "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 of the Federal right." 18 U.S.C. §

3626(b)(2) (which provision was reserved to Consent or Injunctive Decrees where a constitutional violation had been litigated and established through final judgment or consent decree).

C. TERMINATION PROVISION OF THE PLRA HAS BEEN RULED TO BE CONSTITUTIONAL IN THE NINTH CIRCUIT, AS WELL AS MANY OF ITS SISTER CIRCUITS.

In *Gilmore*, the Ninth Circuit agrees with its sister circuits that the Termination Provision of the PLRA is constitutional (against a myriad of challenges that have attempted to knock it down), as long as the "termination" is only of prospective relief arising out of the consent decree or judgment, and not termination of the actual consent decree order or final judgment. This approach is in fact more logical than the approach taken by the other circuits. *See Berwanger v. Cottey*, 178 F.3d 834 (7th Cir.1999) (termination provisions are constitutional); *accord Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (3d Cir.1999); *Hadix v. Johnson*, 133 F.3d 940 (6th Cir.1998); *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir.1997); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir.1997); *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir.1997), overruled by, 172 F.3d 144 (2d Cir.1999) (en banc); *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir.1997); *Plyler v. Moore*, 100 F.3d 365 (4th Cir.1996).

The reason *Gilmore* stands apart from the other courts is that its decision more accurately follows the plain meaning of the text in the PLRA's Termination Provision. Nowhere in the PLRA does it state that a Defendant can file a motion to terminate the actual consent decree or judgment that grants prospective relief. The PLRA clearly states that "a defendant or intervener shall be entitled to the immediate ***termination of any prospective relief***." 18 U.S.C. § 3626(b)(2) (emphasis added). That is what Defendants seek in this Motion to Terminate: the prospective relief initially granted in 1982 by the Amended Judgment. This Court need not, nor do the Defendants believe this Court should

terminate or dismiss the actual Amended Judgment of 1982 as if it never existed. However, as described above, the applicable law does require that all prospective relief arising out of the Amended Judgment of 1982 must be terminated.

D. Automatic Stay of Injunctive Relief

It is important to note to the Court that a prompt decision on this Motion to Terminate is required by the PLRA. The PLRA makes it clear that a court must "promptly rule on any motion to . . . terminate prospective relief in a civil action with respect to prison conditions." 18 U.S.C. § 3626(e)(1). In addition, if a prompt decision is not forthcoming, the PLRA has a mandatory provision that would stay any further prospective or injunctive relief contained or incorporated in the Amended Judgment in this case if the Motion to Terminate is not ruled on within thirty (30) days. 18 U.S.C. § 3626(e)(2). This point may have been moot in the past because this Court treated the Amended Judgment of 1982 as "stayed" or "terminated" when inmate pleadings were filed and struck. However, the automatic stay provision mandating the stay bears repeating now that the case has become active again.

III. CONCLUSION

Therefore, for the reasons stated above, Defendants respectfully request that this Court terminate all prospective relief granted by the Amended Judgment of 1982.

RESPECTFULLY SUBMITTED January 22, 2007

TERRY GODDARD
Attorney General

By s/ Darrin J. DeLange
DARRIN J. DELANGE
Assistant Attorney General
Attorneys for Defendant Cardwell

CERTIFICATE OF SERVICE

I hereby certify that on the same day, the attached document and Notice of Electronic Filing was served by electronic mail on the following:

Alice Loeb Bendheim
Alice L. Bendheim PC
3626 E. Coolidge St.
Phoenix, AZ 85018

s/Lindi Clapperton
Secretary to Darrin J. DeLange
CIV89-1223
989395