93-5305

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

HAROLD STAPLETON, et al.,

Appellants/Cross-
Appellees,

v.

CASE NO. 93-5305

HARRY K. SINGLETARY, JR.,

Appellee/Cross-
Appellant.
_____/

REPLY BRIEF OF CROSS-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NUMBER 88-14178-CIV-PAINE

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STATEMENT OF THE ISSUES

(1) Whether Secretary Singletary's appeal of the Final Judgment requiring that he immediately remove from the PM units all bullet screens at Florida State Prison and solid window shields at Martin Correctional Institution is moot?

(2) Whether the District Court had authority under the Eighth or Fourteenth Amendments to order bullet screen removal on the FSP PM wing when (a) the bullet hole screening was on 10 of PM's 97 cells; was installed because it was the material available; allowed sight, light and ventilation; there was no objective measurement of light and ventilation; windows could be opened or closed upon request; and inmates were freely assigned to other PM cells?

(3) Whether 42 U.S.C. §1983 affords authority for an injunction against Secretary Singletary from using cartoons or videotapes as religious services for PM at Marion, Polk and Union Correctional Institutions when there was no evidence that this use was the practice, pattern or custom of Secretary Singletary, he was unaware of this use until trial, he condemned the use at trial, and inmates had not grieved it to him?

REPLY ARGUMENT - CROSS APPEAL

I.

THE WINDOW SHIELDS ISSUE AT MARTIN CORRECTIONAL INSTITUTION IS MOOT. THE WINDOW SCREEN ISSUE AT FSP IS NOT.

A. The inmates argue that Singletary should have sought a stay or risked contempt to avoid mootness. Because PM inmates were removed from building H-5 at Martin Correctional Institution prior to issuance of the trial court's injunction - a removal contemplated prior to trial and promised at trial, R-17-1684 - Singletary could not have responsibly sought a stay of the judgment in this cause. Similarly, because H-5 was not a PM unit when the injunction issued, a stay request was not feasible. The window shields have not been removed from building H-5, because it is no longer a PM unit. The Secretary does not contemplate the return of PM inmates to building H-5, absent emergency circumstances such as riot, fire or other unanticipated destruction of the PM inmates' present housing unit. Accordingly, Singletary concedes this issue is, for practical purposes, not an issue which is "capable of repetition yet evading review."

B. The window screen issue at Florida State Prison is not moot. It is capable of repetition yet evading review. The injunction was issued on behalf of a class of inmates in excess of 300, inmates who continue to be

incarcerated at FSP or subject to transfer there. Accordingly, the type of window screening which may be constitutionally used at FSP, either as installed today or as may be used from FSP's inventory for routine repairs in the future, continues to present a live controversy. This issue can only fester and present unwarranted tension between the class of Plaintiffs and Secretary Singletary unless resolved by this Court.

Federal court resources will be disserved, as will counsel resources and those of the Department of Corrections certified grievance system, if resolution of this issue escapes review by this Court on appeal. The facts and reasons underlying the decisions in Southern Bell Tel. & Tel. Co. v. U.S., 541 F.2d 1151 (5th Cir. 1976); Newman v. State of Alabama, 683 F.2d 1312 (11th Cir. 1982) and Burnett v. Kindt, 780 F.2d 952 (11th Cir. 1986), are all distinguishable. None of those cases concern daily conditions of housing of a currently incarcerated class of inmates in an aged prison building in which the allocation of scant resources for maintenance and repair is a source of daily concern. The determination whether the use of these window screens violates the Constitution should now be decided to conserve legal resources and because of the continuing practical value of resolution of this issue.

II.

THERE WAS NO LEGAL OR FACT BASIS FOR THE DISTRICT COURT TO ORDER REMOVAL OF BULLET SCREENS AT FSP. THE USE OF THE SCREENS WAS JUSTIFIED AS A DISCRETIONARY MATTER OF ALLOCATION OF RESOURCES AND CAUSED NO CONSTITUTIONALLY COGNIZABLE HARM TO THE INMATES. THEIR USE WAS NOT PUNITIVE AND WAS JUSTIFIED AS A DISCRETIONARY MATTER OF ALLOCATION OF RECOURSES.

The circumstances underlying Singletary's use of bullet hole screens at FSP are succinctly stated in Singletary's Answer Brief. The record demonstrates that: all of the windows at FSP were and are in bad shape, R-17-1615; light passes through the bullet hole screening, Def. Ex. 30; inmates in PM cells with this type of screening were reassigned upon request to other PM cells, R-9-364; R-10-460; R-10-510; that this type of screen can be opened and closed with a coat hanger when staff and crews do not immediately respond to inmate requests for assistance to open and close the windows, R-10-456; R-17-1615, 1616, 1629. There was no objective measurement of air flow or lighting to compare this type of window screen under ACA or other objective standards. Similarly, evidence of these scant resources to run FSP and other prisons abounds in the record.

There was no record that Secretary Singletary's use of bullet hole screening at FSP as repair material was so onerous as to jeopardize inmate health, Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854 (4th Cir. 1975). As noted by the trial court, the Fourteenth Amendment does not required absolute equality or precisely equal advantages. Ross v. Moffit, 417 U.S. 600, 612 (1974). Discriminatory intent is an essential element of a Fourteenth Amendment claim. The Eighth Amendment condemns only conduct that "shocks the conscious, offends society's evolving notions of decency or is grossly disproportionate to the offense." Sheely v. Dugger, 833 F.2d 1420, 1428 (11th Cir. 1987). An inmate does not suffer cruel and unusual punishment "simply because he may be deprived of certain privileges available to the general prison population." Shrader v. White, 761 F.2d 975, 981 (4th Cir. 1985); Inmates of Occoquan v. Barry, 844 F.2d 828, 837 (D.C. Cir. 1988). The inmates' attempt at application of the Eighth Amendment in this context trivializes that Amendment.

Contrary to the inmates' arguments in their Brief, Dr. Halleck did not testify about window screens at FSP, his observations concern the "screens" at Martin. R-10-482-5. As is apparent from Def. Exs. 30B and 33, these two type of window coverings are distinctly different. Nor did Ron Jones speak of the FSP screens. R-14-1149-24. Nor did Cloid Schuler. R-16-1567. Particularly in the absence of

any objective measurement of lighting or air flow to demonstrate that use of this type of window screen falls below professional standards, it was a misapplication of controlling constitutional law and a misapprehension of the facts for the trial court to enjoin the use of this type of window covering at FSP

III.

42 U.S.C. §1983 AFFORDS NO LEGAL BASIS FOR THE DISTRICT COURT TO ENJOIN THE USE OF VIDEOTAPES AND CARTOONS BY SECRETARY SINGLETARY AS THAT USE WAS NOT HIS PRACTICE, PATTERN OR CUSTOM AND HE WAS NOT "CAUSALLY LINKED" TO THE INCIDENTS IN WHICH THEY WERE USED.

The inmates misapprehend the appropriate statement of the issue concerning the occasional (and wrong) use of cartoons and videotapes at three of Florida's prisons. Those incidents were contrary to Harry Singletary's rule, 33-3.0082(6)(d)(4). Those incidents occurred without his knowledge, in part, because the inmates had not grieved these wrongs to the level that he should have become aware of them and, in part, because some of the inmates, at least those at Polk, affirmatively voted to watch animation. Injunction against Singletary under these circumstances was unwarranted and contrary to case law construing 42 U.S.C. §1983 as that usage was neither Singletary's practice, pattern or custom.

This Court's decision in Lamarca v. Turner, 995 F.2d 1526 (11th Cir. 1993), does not require the result advocated by the inmates. This controversy concerning incidental use of cartoons and videotapes is a new one, as evidenced by the absence of identification of this issue in the parties' pretrial stipulation. R-4-129. It is not uncorrected continuing misconduct from a prior administration. Lamarca, in fact, "requires proof of an affirmative causal connection between the actions taken by a particular person...and the constitutional deprivation." Lamarca, 995 F.2d at 1538. Singletary's rule, 33-3.0082, was to insure that inmates are permitted to attend religious services and to participate in group religious activities; however, here at issue is the particular type of group religious service. Singletary has, upon notice in the trial court, deemed it to be "wrong." This wrong occurred because the inmates chose to ignore the critical incidents system, the management information system, the complaint letter system and the reporting mechanism to the Inspector General, all intended to help insure compliance with the Secretary's rule and his policy.

The inmates' "wait until trial - Gotcha" tactic is offensive to principles of equity and will undermine appropriate use of the grievance system if countenanced by this Court. Singletary's ability to "control his subordinates" depends, in great part, on the inmates' use of

the monitoring mechanisms, mechanisms praised by the trial court and the inmates' experts alike. At some point the inmates must accept responsibility for their own inaction. This issue in this appeal is a fair point for that responsibility to commence.

This injunction was improperly entered against Harry Singletary.

CONCLUSION

The window shield issue at building H-5 at Martin is moot.

Controversy concerning bullet screen at FSP continues and should not be deferred to another day. Because the bullet screen allows light and ventilation, because movement of inmates from cells with that screen is permitted, and because there was no showing that this screen has an adverse effect on the health of inmates in those few cells, its use does not violate the Constitution.

Section 1983 does not warrant injunction against Singletary and the use of cartoons or videotapes under the facts below.

The Final Judgment enjoining use of cartoons or videotapes and requiring immediate removal from PM units of bullet screens at FSP should be reversed accordingly. Injunctive relief was otherwise properly denied.

Respectfully submitted,

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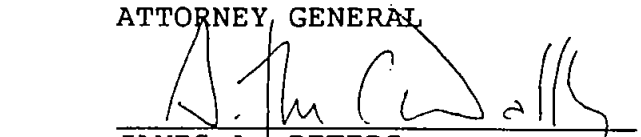
ATTORNEY GENERAL



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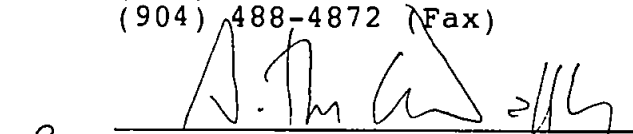

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **REPLY BRIEF OF CROSS-APPELLANT** has been furnished by U.S. Mail to **RANDALL C. BERG, JR.**, Esquire and **PETER M. SIEGEL**, Esquire, Florida Justice Institute, Incorporated, 720 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2309 and **PETER P. SLEASMAN**, Esquire, Florida Institutional Legal Services, Inc., 1110-C Northwest 8th Avenue, Gainesville, Florida 32601 this 11 day of July, 1994.

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