93-5305

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO. 93-5305

HAROLD STAPLETON, et al.,

Appellants,

vs.

HARRY K. SINGLETARY, JR.,

Appellee.

REPLY AND ANSWER BRIEF OF APPELLANTS / CROSS APPELLEES

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

Appeal:

Whether the defendant's voluntary cessation of illegal conduct, after years of operating a punitive and obviously unconstitutional protective confinement system, and after a prolonged, and still incomplete elimination of all the aspects of that punitive system, satisfies the defendant's heavy burden to demonstrate that it is absolutely clear there is no reasonable expectation that its allegedly wrongful behavior could be expected to recur?

Whether the district court's finding that protective management inmates and general population inmates earn comparable amounts of gaintime is clearly erroneous?

Cross Appeal:

Whether an appeal from an injunction is moot when the appealing party has made no request for a stay, has complied with the injunction, and the matter in controversy is over?

Whether, if the issue of the window screens and shields is not moot, the district court was fully justified in ordering their removal as remnants of the former obviously unconstitutional and punitive protective confinement system?

Whether the district court abused its discretion by ordering injunctive relief designed to insure that protective management inmates have actual religious services?

ARGUMENT -- APPEAL

I.

BECAUSE THE DEFENDANT FAILED TO MEET HIS HEAVY BURDEN TO CLEARLY PROVE THE ABSENCE OF ANY REASONABLE EXPECTATION THAT THE WRONG WOULD BE REPEATED, THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO GRANT RELIEF DESIGNED TO PREVENT THE DEFENDANT FROM RETURNING TO THE OBVIOUSLY UNCONSTITUTIONAL CONDITIONS FORMERLY IMPOSED ON INMATES IN NEED OF PROTECTION

Appellee's argument asserts that "Appellants' miscast the Court's ruling as it nowhere determines the case is moot." Appellee's Brief, p. 29. In making this claim, Appellee places form over substance -- and plays fast and loose with his own litigation posture. For, beginning in November, 1990, when defendant first gave notice of the change from the protective confinement system, with its obviously unconstitutional conditions, R6-212-12, to the protective management system, defendant has insisted that its practices over the years were no longer relevant. Yet, it is those practices which demonstrate not only how far the system has come, but also how far the system still needs to come to eliminate the adverse affects of the obviously unconstitutional and intentionally punitive conditions imposed on those in need of protection.

This lawsuit was filed in September, 1988. R1-1. The Department aggressively defended its system for more than two years. Then, when it became clear that its position was not supportable, it changed the system in an attempt to moot this lawsuit. On February

14, 1991, almost before the ink was dry, the Defendant filed a Motion for Summary Judgment, alleging that it had corrected all the problems which gave rise to this litigation and, therefore, was entitled to summary judgment on the grounds of mootness. R3-86. After a review of Protective Management Units at several prisons, the Defendant withdrew his motion in the face of overwhelming evidence of lack of compliance with the new PM Rule. R3-90. The Defendant did the same thing six months later, filing another Motion for Summary Judgment on August 12, 1991. R3-97. After further discovery, the Defendant withdrew that motion on October 9, 1991. R4-105. Although the district court did not specifically find that the case was moot, its denial of any general relief -- even simple declaratory relief, was tantamount to such a finding. Indeed, the district court specifically disclaimed an obligation to address the conditions which gave rise to this litigation and which were in existence over the course of more than two years of litigation. R6-212-56.

Having argued the absence of a mootness finding, Appellee reverses position and argues that he has met his heavy burden to demonstrate mootness. In a quote without attribution, and not from any finding by the District Court, Appellee states "this is not a case in which 'the defendant is free to return to his old ways.'" Appellee's Brief, p. 29. In fact, absolutely nothing, except perhaps the threat of another lawsuit, prevents the defendant from returning to his old ways.

Although the system has changed, defendant has never admitted that any aspect of the Protective Confinement system was unconstitutional. If nothing else, his cross appeal demonstrates that, if left to his own devices, the defendant would consider himself entitled to

place PM inmates in housing units meant for inmates in need of confinement, thereby continuing the previous punitive conditions inflicted on those in need of protection.

Defendant's assertion that inmates can use the grievance process to correct any problems which might occur in the future, and that the existence of the grievance process will help to insure that there is no return to the PC system, is a hollow suggestion. If anything, the method of implementation of the grievance process demonstrates the Defendant's continuing refusal to recognize the full range of problems of those inmates who need protection. As the district court noted, this case is not about the "admission or transfer of PM inmates."[1] R6-212-56. Yet, these are the only types of PM problems tracked by the grievance system. R13-930-7. Although Defendant argues that inmates should use the grievance system, the system does not track complaints about PM conditions -- the very core of the instant case -- such as lack of work opportunities, lack of gaintime, lack of educational opportunities, absence of religious services, limited visits, unnecessary lock-downs, etc., etc. R13-930-21; R13-1032-20. Even as to those matters it tracks, PM admissions and transfers, the periodic grievance reports do not provide any real information, just numbers. See Def. Exs. 7 - 10.

Defendant disclaims responsibility for the misdeeds of his subordinates. Appellee's Brief, p. 34. Yet, neither he nor his designated manager, former Assistant Secretary Jones,[2]

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1. The district court was partially correct. One of the punitive aspects of the PC system, corrected by the PM system, was the refusal to transfer inmates as a way of eliminating their need for protection and, therefore, returning them to general population status.

2. Subsequent to trial in this matter, Assistant Secretary Jones was demoted to Director of (continued...)

the individual charged with the overall responsibility for implementation of the protective management rule, necessarily see the grievances. R13-941-12. That is a decision left to the discretion of the grievance administrator. R13-1065-4. If the defendant is unwilling to engage in the necessary hands-on management, then it is not unfair to charge him with the misdeeds of his subordinates.

As the record demonstrates, like the Burger King Corporation,[3] the Department is unable to control the actions of individual prison officials. Both Secretary Singletary and Assistant Secretary Jones spent much of their time on the stand confessing error and advising the Court of corrective actions being taken in response to testimony in this case. Indeed, Appellee's own argument concerning why Defendant Singletary should not be responsible by way of injunctive relief for the use of videos and cartoons in place of religious services, Appellee's Brief, pp. 48-49, demonstrates his lack of control.

Defendant also asserts that programmatic limitations are the result of limited and diminished funding, and not the result of any deliberate indifference. *Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991), does not validate such a defense, the Court noting a "cost" defense was not before it and that where such a defense had been raised in the lower courts, it was unavailing. 111 S.Ct. at 2326. When a defendant is sued in his official capacity, this Circuit does not recognize a cost defense as an excuse for unconstitutional conditions of confinement; it is a commonplace to reject lack of funds as a

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2. (...continued)
Adult Services Programs. Apparently, however, he retains his role as defendant's point man for protective management issues.

3. *Secretary of Labor v. Burger King Corp*, 955 F.2d 681 (11th Cir. 1992).

defense in injunctive actions alleging constitutional deprivation. *Gates v. Collier*, 501 F.2d 1291, 1319 (5th Cir. 1974). *See also Battle v. Anderson*, 564 F.2d 388, 396 (10th Cir. 1977); *Smith v. Sullivan*, 611 F.2d 1039, 1043-44 (5th Cir. 1980); *Ramos v. Lamm*, 639 F.2d 559, 573, n. 19 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981); *Wellman v. Faulkner*, 715 F.2d 269, 274 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217, 104 S.Ct. 3587, 82 L.Ed.2d 885 (1984); *Monmouth County Correctional Institution Inmates v. Lanzaro*, 834 F.2d 326, 336-37 (3d Cir.), *cert. denied*, 486 U.S. 1066, 108 S.Ct. 1731, 100 L.Ed.2d (1987).

And, assuming a cost defense to be permissible, it is hard to understand how, after reducing the number of prisons with units actually housing inmates in need of protection from twenty-five to eight as of November 9, 1992 (Pl. Ex. 1404), and decreasing the number of inmates in protective status by more than half, the Department would need additional funds to achieve a comparable system. If anything, the real costs have decreased.

Appellee also attempts to escape responsibility by arguing that with the "changing of the guard," injunctive relief is no longer appropriate, citing *American Civil Liberties U. of Miss. v. Finch, 638 F.2d 1336 (5th Cir. Unit A, 1981)* and *Mayor of City of Phila. v. Educational Equality League*, 415 U.S. 605, 39 L.Ed.2d 630, 94 S.Ct. 1323 (1974). In doing that, Appellee looses sight of the fact that this is an official capacity lawsuit. His argument that "anecdotal employee misconduct and departures from his policy, practice and procedure and from the PM rule [should not] suffice to sustain a claim against him" (Appellee's Brief, p. 39) would, if adopted, put an end to official capacity lawsuits. The same argument was repudiated in *LaMarca v. Turner, 995 F.2d 1526 (11th Cir. 1993)*, *cert.*

denied, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994), also involving a request for injunctive relief after a changing of the guard. There, relying on the district court's observation that the new superintendent "appears to be a dedicated public servant who is trying very hard to make GCI an efficient and effective correctional institution," the new superintendent argued that the district court erred in ordering injunctive relief, contending that the district court "should have focused on his deliberate indifference, instead of the institution's historical indifference." Rejecting the argument, this Court held:

> The Supreme Court in *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), explained the significance of suits against state officials in their official capacities:
>
> > Official-capacity suits ... "generally represent only another way of pleading an action against an entity of which an officer is an agent." As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity.
>
> *Id.* at 165-66, 105 S.Ct. at 3105 (citations omitted); *see also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2311, 105 L.Ed.2d 45 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." (citing *Brandon v. Holt*, 469 U.S. 464, 471, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985))); *Owens v. Fulton County*, 877 F.2d 947, 951 n. 5 (11th Cir.1989). Thus, while changes in circumstances may change the nature of, or necessity for, injunctive relief, substitution of Lambdin as the named official does not bar such relief. See *Graham*, 473 U.S. at 166 n. 11, 105 S.Ct. at 3105 n. 11.

955 F.2d at 1542 (emphasis in original).

LaMarca also addressed the propriety of entering some form of injunctive relief. The decision began by noting that, at the time of trial, Glades Correctional Institution provided

inmates with reasonable, and constitutionally adequate, protection from violence. 955 F.2d at 1542. The Court then, nevertheless, affirmed the entry of injunctive relief, holding that:

> Absent an existing constitutional violation, the district court's power to grant equitable relief was limited to ensuring that GCI continued to provide inmates with adequate protection. *Cf. Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971) ("[T]he nature of the violation determines the scope of the remedy.") While district courts have broad discretion to fashion equitable relief, such relief must target the existing wrong. *Milliken v. Bradley*, 433 U.S. 267, 282, 97 S.Ct. 2749, 2758, 53 L.Ed.2d 745 (1977) ("[F]ederal--court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation...."). *Here, the wrong was the risk that GCI would once again disregard the safety of its inmates.*

955 F.2d at 1543 (emphasis added).

Citing *Jones v. Diamond*, 636 F.2d 1364 (5th Cir.), *cert. dis'd*, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981), which considered the appropriate form of relief when, during the pendency of the court's proceedings, the defendants cured the constitutionally infirm conditions alleged by inmates, in *LaMarca*, this Court affirmed relief which ordered the new Superintendent "to maintain policies requiring (1) that the dorms and confinement areas be regularly patrolled and that patrols have clear views of the relevant areas, (2) the use and maintenance of metal detectors, (3) regular shakedowns, and (4) the disciplining of prisoners found in possession of contraband" on the basis that "[t]hese aspects of the court's order, while not comprehensive, target GCI's potential to slacken its efforts to protect its inmates." 955 F.2d at 1543.

The district court abused its discretion in our case by failing to afford similar relief, tailored to prevent a return to the old, punitive PC system. There is a long history of

mistreatment of inmates in need of protection. The Appellee contends that his current policy, governed by a new rule on protective management, insures that the prior practices cannot be repeated. However, absolutely nothing prevents the Appellee from again amending Chapter 33-3.0082 or again taking a hands-off management approach to the decision-making of individual prison superintendents.

Although Secretary Singletary now asserts that the Department will never return to the practices which led to this litigation, the record indicates that prior to November, 1990, he did support the PC system. In 1985 the Department's General Counsel advised then Assistant Secretary Singletary that the "cases evidence a trend toward requiring 'equal' treatment for inmates requiring placement in a protective custody unit." Pl. Ex. 1217. Rather than act on the General Counsel's analysis, he signed-off on the rule and practice in force at the time this litigation commenced.[4] R13-1041-10. In September, 1989, a year after this litigation was filed, the Department's General Counsel presented still Assistant Secretary Singletary with a draft of minor amendments to Rule 33-3.0082. Again, Assistant Secretary Singletary did not seize the opportunity to suggest the type of changes that he now suggests demonstrate his commitment to permanent change. R13-878-15; Pl. Ex. 160. Instead, in 1989 he reaffirmed that the intent of the Department was to treat inmates in protective confinement in the same way it treated inmates in administrative confinement, *i.e.*, to continue all the unnecessary and punitive restrictions admitted in the Joint Pretrial Stipulation. Pl. Ex. 287. When his deposition was taken later in 1989, he continued to defend the

4. While not in control, as Assistant Secretary, Singletary clearly had the power to make recommendations. R13-948-11.

punitive restrictions imposed on PC inmates. R13-885-15; R13-913-17; R13-915-17; R13-916-23. These factors, combined with the Department's history of violating the Constitutional rights of those in need of protection, indicate the defendant has not met his "heavy burden" of showing that there is no reasonable expectation that these violations will recur. A new governor, a more hard-line legislature, even more public outcry about crime, and Appellee may find it politically expedient to return to the old system.

II.

THE DISTRICT COURT'S FINDING THAT GAINTIME AWARDS FOR PM AND OTHER INMATES ARE COMPARABLE IS CLEARLY ERRONEOUS

While the parties disagree over the significance of the statistics, and although the disparity in gaintime awards as alleged by the plaintiffs and as admitted by the defendant are quite different, the bottom line, even using the defendant's position, demonstrated that PM inmates, as a group, earned less incentive gaintime than general population inmates, as a group. Def. Ex. 47.

Defendant asserts that the statistical data used by the plaintiffs is flawed. If so, the flaw is one of over-inclusiveness. The disclaimer, so heavily relied upon by the defendant, states: "Inmates who are ineligible to earn Incentive Gaintime are included in these figures; i.e., full Waldrup Cases, mandatory sentences, life sentences, and new admissions." Pl. Ex. 1406. If anything, this disclaimer proves the case. The fact is that taking into account all the inmates, even the ineligible ones, *no* PM inmate at Florida State Prison was able to earn

the maximum amount of available incentive gaintime while 11.9% of the general population inmates did earn the maximum. Pl. Ex. 1406.[5] Removing those inmates identified in the disclaimer, full Waldrup cases, mandatory sentences, life sentences, and new admissions, can't change the zero for PM inmates. The removal of ineligible general population inmates would, however, as a matter of simple mathematics, serve to increase the percentage of general population inmates earning the maximum amount of incentive gaintime, thereby making the disparity in gaintime between protective management and general population inmates even more pronounced.

The importance of Florida State Prison to these calculations is that the protective management population at Florida State Prison, at the time of trial, accounted for nearly one third of the state-wide protective management population. As of the week of November 9, 1992, of a state-wide total of 315 PM inmates, 98 were at Florida State Prison. Pl. Ex. 1404. Plaintiffs amply demonstrated that at Florida State Prison there existed a clear and significant disparity between gaintime earned by those in protection and gaintime earned by those in general population. That other prisons may have achieved comparability does not absolve the Defendant of responsibility when nearly one third of the protective management population is housed in a prison where gaintime awards are not comparable. The disparity continues to punish those in need of protection. In order to obtain the protection to which they were constitutionally entitled, they are forced to forfeit their entitlement to the normal prison programs and activities.

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5. This exhibit was erroneously identified as Plaintiffs' Exhibit 1426 in Appellants' Initial Brief, at p. 17.

ARGUMENT -- CROSS APPEAL

I.

THE SCREENS AND SHIELDS ISSUE IS MOOT -- AS TO THOSE ISSUES THE CROSS APPEAL SHOULD BE DISMISSED

The district court ordered the defendant to remove window screens and shields that served no penological purpose and it enjoined the use of cartoons or video tapes as the sole method of providing religious services. R6-214. Defendant's Motion to Alter or Amend, addressed solely to the cartoon or video tapes issue, R7-226, was denied. R7-229. The issues with respect to the screens and shields are moot. Defendant has relocated the protective management inmates at Martin Correctional Institution to a building without shields.[6] The screens at Florida State Prison have been removed. Defendant has fully complied with the order of the district court.

An appeal from an injunction is moot when the appealing party has made no request for a stay, has complied with the injunction, and the matter in controversy is over. *Southern Bell Tel. & Tel. Co. (Southern Bell) v. U. S.*, 541 F.2d 1151 (5th Cir. 1976). The Final Judgment required the defendant to "immediately remove, from the PM units, all bullet

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6. Defendant asserts that the protective management inmates at Martin Correctional Institution were moved to a building without the window shields prior to the Court's issuance of the injunction. The defendant, however, never advised the Court of this move despite the fact that the existence of the shields, and the adverse impact on the inmates, was clearly at issue during the trial.

screens at Florida State Prison and solid window shields at Martin Correctional Institution." R6-214.

In *Newman v. State of Ala.*, 683 F.2d 1312 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083, 103 S.Ct. 1773, 76 L.Ed.2d 346 (1983), the district court ordered the release of several hundred prisoners to reduce overcrowding. The prisoners were released. The state appealed. In dismissing the appeal as moot, this Court stated:

> The defendants have fully complied with the order directing release of specifically named inmates and accelerating parole eligibility for others. The July order was not a continuing injunction; it merely required the State to perform certain discrete acts, which it did. No action by this court could change what has been done, and "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them."

683 F.2d at 1317 (citation omitted).

Similarly, in *Burnett v. Kindt*, 780 F.2d 952 (11th Cir. 1986), the warden was ordered to produce a prisoner for a parole hearing. He did, the hearing took place, and the Parole Commission set a future parole date, a date on which the prisoner was released. Nevertheless, the warden appealed. In dismissing the appeal as moot, this Court pointed out that there were two ways for the warden to keep the controversy alive, either seek and obtain a stay, or violate the order and contest its validity during contempt proceedings. Having chosen "not to pursue either alternative" he "thereby lost his opportunity to obtain appellate review of the district court's injunctive order." 780 F.2d at 955. Defendant Singletary is in

the same position as the warden. His appeal on the issues of the screens and shields should be dismissed as moot.[7]

II.

IF THE SCREENS AND SHIELDS ISSUE IS NOT MOOT, THE DISTRICT COURT WAS FULLY JUSTIFIED IN ORDERING THEIR REMOVAL AS REMNANTS OF THE FORMER OBVIOUSLY UNCONSTITUTIONAL AND PUNITIVE PROTECTIVE CONFINEMENT SYSTEM

At Florida State Prison and Martin Correctional Institution, the housing units used for protective management were once used as confinement units.

Unlike the general population wings at Florida State Prison, on the protective management wing, there are steel security screens welded over the windows. R10-455-9. They make it extremely difficult for inmates to open and close their windows; they reduced sunlight and air flow. R9-355-14; R10-506-16. When it rains, the rain comes in. R10-507-22. When it gets cold, the cold comes in. R10-507-25. Staff come around twice a year, they open the windows in the spring and close them in the winter. R-10-508. Inmates still feel as if they were in a confinement unit. R9-355-12.

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7. This is not a case which falls within the "capable of repetition, yet evading review" exception to the mootness doctrine, [*See NBC v. Communications Workers of America, AFL-CIO,* 860 F.2d 1022 (11th Cir. 1988)], at least not unless the Defendant proposes to again impose punishment on those in need of protection.

Defendant's asserts that the so-called "bullet-hole" screening was used to fix any broken window at Florida State Prison. Appellee's Brief, p. 17. The record citations, however, only establish that the bullet-hole screening was used on V-Wing, which prior to be used for protective management was used for administrative confinement.

At Martin Correctional Institution, fiberglass shields cover the windows, severely restricting airflow and ventilation, R8-157-4, creating very hot conditions in the summer, R9-302-16, and resulting in an adverse psychological effects on inmates in the cells. R10-482-5. Although the Department admitted the shields serve no purpose now that the unit was used for protective management, it did not plan to remove them, R13-947-4; R14-1149-24, despite the fact that removal appeared to require nothing more than a stepladder and a screwdriver. R14-1204-6. The screens at Martin have a direct, deleterious impact on mental health; in addition to making the quality of life much worse, the inmate perceives himself as being singled out for unusual and unnecessary punishment. R10-482-12. The screens also interfere with ventilation and increase the temperature in the unit. R10-497-1; R10-499-8.

Dr. Seymour Halleck, a psychiatrist with extensive prison experience, could not see what purpose the window screens served other than to make conditions of confinement more punitive. R10-482-5. Assistant Secretary Jones agreed that the window shields were not necessary for the PM inmates. R14-1149-24. It defies understanding why they were not removed. R10-497-21. Even Cloid Schuler, defendant's expert, did not suggest that the screens served any legitimate penological purpose. R16-1567-1.

The Eighth Amendment entitles plaintiffs to be free from cruel and unusual punishment. Inherent in this constitutional guarantee is the right to be free from bodily harm and

unreasonable threats to safety and security at the hands of other inmates. *Farmer v. Brennan*, 62 USLW 4446 (June 6, 1994). Conduct by the Department that unnecessarily burdens plaintiffs' exercise of this right violates the Eighth Amendment. *Rudolph v. Locke*, 594 F.2d 1076, 1078 (5th Cir. 1979); *Little v. Walker*, 552 F.2d 193, 197 (7th Cir. 1977). *Wojtczak v. Cuyler*, 480 F. Supp. 1288, 1303 (E.D. Pa. 1979). The screens and shield, which served to continue the punitive aspects of protection, and which caused adverse psychological harm, were properly ordered removed.

III.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ORDERING INJUNCTIVE RELIEF TO INSURE THAT PROTECTIVE MANAGEMENT INMATES WOULD HAVE ACTUAL RELIGIOUS SERVICES

The parties stipulated that at the time the Complaint was filed, most protective confinement inmates were not permitted to attend religious services or otherwise participate in group religious activities. R4-129. The PC rule provided that the Chaplain should make a personal visit to each protective confinement inmate weekly, "if possible" and more frequently upon inmate request, "if the Chaplain's schedule permits." Rule 33-3.0082(6)(d)(4), F.A.C. (1985). The PM rule provides:

> Religious activities - a weekly non-denominational service *shall* be held for protective management inmates in the chapel. This service may be held at the protective management housing unit if security reasons prevent chapel service. The chaplain *shall* arrange for religious consultations between inmates and outside volunteers, counsel with clergy and the opportunity to receive religious sacraments similar to that afforded to the general population when requested.

Rule 33-3.0082(6)(b), F.A.C. (1990) (emphasis supplied).

Despite the mandate of the PM Rule, at some prisons cartoons and video tapes were the sum and substance of religious services.

Appellee acknowledged at trial that the use of cartoons and video tapes as religious services would be contrary to his policy. But, none of the control mechanisms the Department suggests will prevent a return to the punitive PC system worked to enforce Appellee's policy. Neither the critical incident system, R13-979-1, the management information system, R13-979-6, the complaint letter logging system, R13-979-9, or the Inspector General able to investigate complaints, R13-979-12, served to insure compliance. Nor, for that matter, did placing Assistant Secretary for Operations Jones in charge of the PM system, or the existence of five Regional Directors, prevent the violation of Appellee's policy.

This Court's decision in *LaMarca v. Turner, supra*, 995 F.2d 1526, furnishes ample support for the district court's judgment. The analysis of that case, beginning at page 6 of this brief is fully applicable here. Again, like the Burger King Corporation, Appellee either can not or will not control his subordinates.

CONCLUSION

Defendant did not carry its heavy burden to demonstrate that it is absolutely clear there is no reasonable expectation that the wrong will be repeated. Therefore, the decision of the district court not to award any form of relief designed to insure against back-sliding should be reversed and remanded for the entry of appropriate injunctive, declaratory and monitoring relief. Appellee's cross appeal should be rejected; the screen and shield issues

are moot, the barring of video tapes and cartoons as religious services was well within the discretionary authority of the district court in an official capacity lawsuit.

Respectfully submitted,

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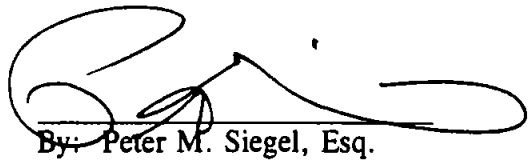
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to James A. Peters, Esq., Florida Department of Legal Affairs, The Capitol, PL-01, Tallahassee, Florida 32399-1050, by United States Mail on June 20, 1994.



By: Peter M. Siegel, Esq.