



PC-CA-0007-0001

Termination

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT O. GILMORE, JR., et al.,

No. 45878 (and consolidated cases) SI

Plaintiffs,

**ORDER GRANTING DEFENDANTS'
MOTION FOR TERMINATION**

v.

STATE OF CALIFORNIA, et al.,

Defendants.

Since 1972, a consent decree in this case has governed the content of the legal collections in prison libraries maintained by the California Department of Corrections (CDC) and prisoners' access to those collections. In 1997, defendants filed a motion under the Prison Litigation Reform Act ("PLRA") to terminate this consent decree. Plaintiffs oppose the motion, arguing that the termination provision of the PLRA is unconstitutional or, in the alternative, that the PLRA's requirements have not been met.

BACKGROUND

A. History of the Case

Plaintiff Robert Gilmore, Jr. commenced this action on October 27, 1966. His case was then consolidated with 25 other cases also filed by prisoners at various facilities administered by the CDC. Plaintiffs alleged that the CDC's regulations concerning access to law libraries, legal materials, and assistance in pursuing litigation violated their constitutional rights. In 1970, a three-judge panel in the Northern District agreed, Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), and the Supreme Court affirmed the decision, Younger v. Gilmore, 404 U.S. 15 (1971).

United States District Court
For the Northern District of California

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1 violates the due process and equal protection clauses as well. Plaintiffs also argue, in the alternative,
2 that the findings required by (b)(2) were in fact made, and that the findings required by (b)(3) can be
3 made: that is, that the Court can find that the 1972 Order remains necessary to correct a current and
4 ongoing violation of the Constitution, extends no further than necessary to correct that violation, and that
5 the 1972 Order is narrowly drawn and the least intrusive means to correct the violation.

6
7 **DISCUSSION**

8 In the recent opinion in Thompson v. Gomez, No. C-79-1630 CAL (N.D. Cal. 1997), Judge
9 Charles A. Legge held that the PLRA's termination provision complies with the Constitution. This
10 Court concurs with Judge Legge's thoughtful opinion, which is consistent with the existing authority
11 from other circuits. There has not as yet been any guidance from the Ninth Circuit on this point.¹

12 Two questions remain: (1) whether the 1972 Order was issued "in the absence of a finding by
13 the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of
14 the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right,"
15 18 U.S.C. § 3626(b)(2); and, if not, (2) whether the Court should now make "written findings based on
16 the record that prospective relief remains necessary to correct a current and ongoing violation of the
17 Federal right, extends no further than necessary to correct the violation of the Federal right, and that the
18 prospective relief is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C.
19 § 3626(b)(3).

20 Plaintiffs argue briefly that the finding required in connection with the issuance of the 1972
21 Order is evident in the following finding, culled from the court's 1972 Order itself: "Plaintiffs have not
22 met the burden of showing that the [regulations proposed by the CDC] are so inadequate that their
23 approval would result in a continued denial to prisoners of their constitutional right to access to the
24 courts." This language is clearly insufficient to meet the requirements of section 3626(b)(2), however.
25 The tightness of the "fit" of the relief to the constitutional violation – the focus of section 3626(b)(2) –

26
27 ¹The Court notes as well that, as in the Thompson v. Gomez case, the Court can find no Article
28 III case or controversy that would allow the plaintiffs to challenge the constitutionality of the PLRA's
distinct "automatic stay" provision. See Thompson v. Gomez Opinion at n.2.

1 is simply not addressed in the 1972 Order, or in any subsequent findings in this case.

2 Plaintiffs ask the Court to make such findings now, in order to trigger section 3626(b)(3)'s
3 "limitation" on termination. To do so, this Court would have to find that (1) the 1972 Order remains
4 necessary to correct a current and ongoing violation of a federal right; (2) the 1972 Order extends no
5 further than necessary to correct the violation of this right; and (3) the 1972 Order is narrowly drawn and
6 the least intrusive means to correct the violation. Based on the record before it, the Court cannot make
7 such findings.

8 Plaintiffs have provided the Court with what is apparently a CDC memorandum dated July 15,
9 1997, describing anticipated changes to the CDC's prison libraries in response to the Supreme Court's
10 decision in Lewis v. Casey, 116 S.Ct. 2174 (1996). The memo interprets that decision as one changing
11 the CDC's constitutional responsibilities: it states that "[o]ne of the changes will be a new law library
12 collection which will be different and smaller than the current collection." The memo goes on to list the
13 volumes in that "different and smaller" collection, and instructs librarians to order updated volumes only
14 for the law books on that list.²

15 Plaintiffs point out that the memo does not include updates for the federal or state case reporters
16 or annotated codes, which are required by the 1972 Order. Plaintiffs argue that a prison law library
17 collection lacking updated case reporters and annotated codes violates the Constitution. Thus, plaintiffs
18

19 ²The list includes:

20 **Unannotated Standard California Codes** (the California Constitution, Compact Penal Code
21 (with Selected Penal Provisions from the California Constitution, Business and Professions Code,
22 Code of Civil Procedure, Health and Safety Code, Vehicle Code, Welfare and Institutions Code, and
23 California Rules of Court), Standard California Codes (with Civil, Civil Procedure, Evidence, Family,
24 Government, Probate, and selected other codes, and Rules of Court));

25 **Unannotated United States Codes** (Federal, Civil, Judicial, Procedures and Rules (which
26 includes Title 28, Judiciary and Judicial Procedure, and the United States Constitution), Federal
27 Criminal Codes and Rules (Title 18) (which includes Criminal Procedure, Habeas Corpus Rules,
28 Motion Attacking Sentence Rules, Evidence, Appellate Procedure, and Supreme Court rules), Title
42, Section 1983, Court Rules for All California and Federal Courts);

Forms (Department Basic Court Forms Set);

Administrative Law (Title 15 (California Code of Regulations (CCR), Division 2, Board of
Prison Terms, Division 3, Department of Corrections, Department of Corrections, Spanish Version),
Department Operations Manual (including Director's Rules Changes and Administrative and
Informational Bulletins);

Secondary Sources (Appeals and Writs in Criminal Cases, California State Prisoners'
Handbook, Federal Habeas Corpus Practice and Procedure, Law Dictionary, California Attorneys'
Directory, and Section 1983 Litigation).

1 contend, the Court can find that the 1972 Order remains necessary to correct a current and ongoing (or
2 at least anticipated) violation of a federal right and refuse defendants' motion to terminate.

3 The federal right in this case is the imprisoned individual's constitutional right of access to the
4 courts, and it is a right that has recently been revisited by the Supreme Court. In Lewis v. Casey, 116
5 S.Ct. 2174 (1996), the Supreme Court emphasized that, to establish an actionable violation of this right,
6 the plaintiff must show an "actual injury." Id. at 2179-80. An attempt to show that the prison's legal
7 resources are abstractly insufficient, without tying that insufficiency to a harm suffered by a particular
8 prisoner in bringing a claim, is not enough, because "prison law libraries and legal assistance programs
9 are not ends in themselves, but only the means for ensuring 'a reasonably adequate opportunity to
10 present claimed violations of fundamental constitutional rights to the courts.'" Id. at 2180 (quoting
11 Bounds v. Smith, 430 U.S. 817, 825 (1977)). "Because Bounds did not create an abstract, free-standing
12 right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by
13 establishing that his prison's law library or legal assistance program is sub-par in some theoretical
14 sense"; rather, an inmate must "must demonstrate that the alleged shortcomings in the library or legal
15 assistance program hindered his efforts to pursue a legal claim." Id.

16 In light of the "actual injury" standard in Lewis v. Casey, this Court cannot make the finding
17 required by section 3626(b)(3) that the CDC's proposed book list constitutes a "current and ongoing"
18 violation of the constitutional right of access to the courts. Plaintiffs ask the Court to decide the
19 constitutionality of the CDC's proposed book list in the abstract.³ Under Lewis v. Casey, the Court
20 cannot do so.

21 Plaintiffs also point out that in the July 15, 1997 memo the CDC interprets Lewis v. Casey as
22 condoning a "paging" system for the delivery of these books. The memo describes paging as "the
23 delivery of requested and available law library materials to either an inmate who does not have physical
24

25 ³Plaintiffs suggest that the Court conduct further hearings to determine whether the 1972 Order
26 remains necessary. As Judge Legge determined in his Thompson v. Gomez decision, 18 U.S.C. §
27 3626(b)(3) "gives the court the power to supplement the record by taking further evidence." Opinion
28 at 8. However, plaintiffs here do not argue that such a hearing would remedy the deficiency noted
above, i.e., the prospect of evaluating whether the CDC's proposed book list violates the
constitutional right of access without allegations of actual injury to actual plaintiffs. Such an
evaluation would be meaningless under Lewis v. Casey.

1 access to the law library, or to any other inmate for whom the institution, for its own convenience,
2 chooses to provide the service.”

3 Plaintiffs ask the Court to find that this interpretation suggests that the CDC will move to a
4 paging system; that this hypothetical paging system, however implemented, will violate the
5 Constitution; and that the 1972 Order remains necessary to prevent this violation. Any such findings
6 would be speculative, and the claim is unsupported by any allegation of the kind of actual injury
7 required by Lewis v. Casey to provide plaintiffs with standing to raise this issue.


8 The questions raised by plaintiffs in this case must be left for decision in the context of an actual
9 injury alleged as a result of actual implementation of a specific policy. This case does not present such
10 a context.

11
12 **CONCLUSION**

13 Under subsection (b)(2) of the Prison Litigation Reform Act, defendants are entitled to
14 termination of the 1972 Order. Defendants' motion to terminate the 1972 Order is therefore
15 GRANTED.

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17 **IT IS SO ORDERED.**

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19 Dated: January 13, 1998

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21 **SUSAN ILLSTON**
22 United States District Judge
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