IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WILLIAM MIZE, et al.,	*	
	*	
Plaintiffs,	*	
	*	
vs.	*	5:00-CV-80 (WDO)
	*	
WALTER ZANT, et al.,	*	
	*	
Defendants.	*	

REPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR CONTEMPT

Come now Defendants by and through counsel, Thurbert Baker, Attorney General for the State of Georgia and file this Reply in opposition to Plaintiffs' motion for contempt. Plaintiffs' motion should be denied for two reasons:

1) This Court does not have jurisdiction over Plaintiffs' motion as the consent order has been terminated for years; and
2) Defendants would not be in contempt even if the consent order were in effect.

PROCEDURAL HISTORY

This case was originally brought in 1979. A limited consent decree was entered on June 5, 1981. The class includes all present and future inmates at under a Death Sentence and incarcerated at the Georgia Diagnostic and Classification Center (hereinafter Jackson). The consent decree had an automatic sunset clause which was never extended. William Mize filed his second motion for contempt, the first being denied in 1999. Defendants have been ordered to respond.

ARGUMENT AND CITATION OF AUTHORITY

A. THE COURT TERMINATED THE CONSENT DECREE IN 1983 AND IS THUS WITHOUT JURISDICTION TO RULE ON PLAINTIFFS' MOTION FOR CONTEMPT

This Court no longer has jurisdiction of the consent decree entered in 79-110-MAC and Plaintiffs' attempts to resurrect a dead consent decree should not be tolerated. In order for Plaintiffs to show contempt they must demonstrate that 1) Defendants violated the Court Order; 2) the Court order is valid and lawful; 3) the order is clear, definite and unambiguous; and 4) the respondent has the ability to comply with the order. McGregor v. Chierico, 206 F.3d 1378, 1383 (11th Cir. 2000). The consent decree automatically terminated eighteen months after its inception. The order specifically stated, "Jurisdiction of the Court shall terminate one year subsequent to the date this

decree is entered unless at such time a motion has been filed challenging Defendants' compliance with this decree and the Court has ruled to extend its jurisdiction for purposes of hearing and disposing of said motion. If the jurisdiction is continued by this Court and no order disposing of the issues raised by the motion has been entered within eighteen months of this Consent Decree and Order, the jurisdiction of the Court will automatically terminate." (see attached order dated 6/5/81 attachment 1). Subsequent to this order the Court failed to extend its jurisdiction and specifically directed that, "the clerk is directed to close the file of this civil action. If any individual member of the plaintiff class desires to file an individual complaint that his rights arising from the consent decree in this case have been violated he may do so; any such complaint is to be filed as a new, specific civil action." (order attached as attachment 2). In fact, as indicated by the new case number Plaintiff has filed a new civil action which was dismissed on Summary Judgment. Plaintiff appears to be attempting to resurrect a consent decree that no longer exists instead of going through the appropriate screening process as required by the Prison Litigation Reform Act.

Assuming that Plaintiffs' argument is that the Court's order of May 13, 1999 somehow re-incarnated the old consent decree,

this argument is without merit. Subsequent to the closure of the 1979 case but prior to the initiation of the new 1999 case, Congress passed The Prison Litigation Reform Act. The Act (18 U.S.C. § 3626) limits a court's authority to grant prospective injunctive relief. Clearly the Act applies to this case. "The PLRA, in part, sought "to oust the federal judiciary from day-to-day prison management" and serve as a "last rite" for many consent decrees." Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 655 (1st Cir. 1997)(citing 141 Cong.Rec. 14,419 (1995)).

The PLRA provides that: "Prospective injunctive relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular Plaintiff or Plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no farther 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. The Court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief."

In the case at bar the Court made no such determinations in its 1999 order. Quite the contrary, Defendants were granted

summary judgment. Moreover, any attempt to re-activate a terminated consent decree after over 15 years would have to be considered an attempt to bring a new case. It appears that the Court interpreted Plaintiffs' filing as a new case in accordance with its 6/27/83 order in that it was assigned a new case number and was disposed of at Summary Judgment. Since this "new case" was filed after the passage of the PLRA and the Court failed to make the requisite finding for prospective injunctive relief it cannot be said that there is any order currently in effect. The Court is thus, without jurisdiction to hold Defendants in contempt.

The Supreme Court has cautioned that injunctions are not to stay in place in perpetuity. Board of Education v. Dowell, 498 U.S. 237, 248 (1991). In the case at bar, there has been virtually no activity on this case since 1981 except for a new lawsuit filed by Plaintiff, Mize wherein he attempted essentially the same thing he is attempting to do now. It is well established that the courts are not to substitute their judgment for that of prison officials on difficult and sensitive matters of institutional administration arising during the course of the formidable task of running the prison. O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987). In the execution of these responsibilities, prison officials have the discretionary

authority to alter the degree of custody to which a prisoner is subjected, so long as the degree and conditions of confinement to which the prisoner is subjected are within the sentenced imposed upon him. Hewitt v. Helms, 459 U.S. 460 (1982). Furthermore, Courts do not generally intervene in the internal operations of prisons. Brown v. Smith, 813 F.2d 1187 (11th Cir. 1987); Pratt v. Rowland, 770 F. Supp. 1399 (N.D. Cal. 1991) (holding that "given the 'highly charged' atmosphere of a prison and the need for swift action, prison authorities had cause at the outset to place [plaintiff] in administrative segregation pending their investigation of the validity of the trafficking offense, even if that charge were based on nothing more than rumor").

In short, inmates do not have a "right" to have a federal Court, rather than the appropriate State or local authorities, supervise the conditions of confinement where prison conditions already comply with applicable Federal law. Indeed, it is constitutional error for a Court to order such relief in a litigated case. Lewis v. Casey, 116 S.Ct. 2174, 2184 n.7 (1996); see also Wylie v. Rizzo, 564 F.2d 126, 149 (3rd Cir. 1997); see, e.g., Columbus Bd. of Educ. v. Penick, 439 U.S. 1348, 1353 (1978) (holding that "Courts have no power to presume and remediate harm that has not been established"). By enacting the PLRA, Congress applied these limits to Orders entered on consent, as well as to

Orders entered over a defendant's opposition. Under the PLRA, plaintiffs no longer have the right to judicial intervention in the management of State prisons in the absence of a violation of federal law -- even with the consent of prior political administrations.

To the extent that § 802 of the PLRA imposes clearer, and hence more stringent limits, on the remedial powers of the Federal Courts in prison-condition cases, these limits are an appropriate means to ensure that the control of State and local prisons is returned to democratically-elected State governments. Congress has thus issued careful protections for State and local governments in accordance with the Constitution's dual system of sovereignty, federalism, and comity. *See* 18 U.S.C. § 3626.

The Constitution establishes a system of "dual sovereignty" where the States surrendered enumerated powers to the federal government but retained a "residual and inviolable sovereignty." Printz v. United States, 117 S.Ct. 2365, 2376 (1997); Gregory v. Ashcroft, 501 U.S. 452, 457 (1991). The Tenth Amendment protects those powers that have not been granted to the federal government by reserving those powers to the States. Printz v. United States, 117 S.Ct. 2365 (1997). "Under our federal system, the States possess the primary authority for . . . enforcing the criminal law." United States v. Lopez, 115 S.Ct. 1624, 1631 n.3

(1995). Consequently, the PLRA protects the States' ability to manage its prisons, a fundamental police power specifically reserved to the States through the Tenth Amendment.

§ 802(b)(1) thus returns the Courts to their proper sphere of remedying actual violations of law and the prison authorities to their proper sphere of managing constitutionally-adequate institutions. At the same time, it preserves the prisoners' rights to a remedy for constitutional violations.

B. PLAINTIFFS HAVE NOT SHOWN BY CLEAR AND CONVINCING EVIDENCE THAT DEFENDANTS ARE IN VIOLATION OF THE CONSENT DECREE

Assuming that the Court finds the consent decree is still in effect, the Plaintiffs bear the burden of proving by clear and convincing evidence that the defendants are in violation of the consent decree. Reynolds v. McInnes, 338 F.3d 1201, 1211 (11th Cir. 2003). Contempt may serve two purposes; it can be either coercive, which is intended to make a recalcitrant party comply, or compensatory, which reimburses injured party for losses and expenses incurred because of adversary's noncompliance. *See* Sizzler Family Steakhouses v. Western Sizzlin Steak House, Inc., 793 F.2d 1529 (11th Cir. 1986). A person who attempts with reasonable diligence to comply with court order should not be held in contempt. Newman v. Graddick, 740 F.2d 1513 (11th Cir 1984). In order to avoid contempt, the contemner may be excused

from non-compliance because of an inability to comply with the terms of the order. Inability as a defense to contempt does not mean that compliance with court order must be totally impossible, but, rather, the inability that will absolve a party from being held in contempt requires only that non-complying party has made in good faith all reasonable efforts to comply with terms of the court order. Chairs v. Burgess, 143 F.3d 1432 (11th Cir. 1998). "If the plaintiff (the party obtaining the writ) believes that the defendant (the enjoined party) is failing to comply with the decree's mandate, the plaintiff moves the court to issue an order to show cause why the defendant should not be adjudged in civil contempt and sanctioned. The plaintiff's motion cites the injunctive provision at issue and alleges that the defendant has refused to obey its mandate. If satisfied that the plaintiff's motion states a case of non-compliance, the court orders the defendant to show cause why he should not be held in contempt and schedules a hearing for that purpose. At the hearing, if the plaintiff proves what he has alleged in his motion for an order to show cause, the court hears from the defendant. At the end of the day, the court determines whether the defendant has complied with the injunctive provision and, if not, the sanction(s) necessary to ensure compliance." Reynolds v. Roberts, 207 F.3d 1288, 1298 (11th Cir. 2000). (citations omitted).

In this case, Plaintiff has not shown how Defendants have failed to comply with the decree's mandate. He simply alleges, for the most part, that officers, have at times failed to follow standard operating procedures. The question that should be asked is not whether, on occasion, officers violate Standard Operating Procedures but rather are procedures in place to ensure compliance with the decree. The answer to this question is yes. As noted by a sister Court, "The key element in finding compliance is the Defendant's development of a system to address these problems as they occur." Celestineo v. Singletary, 1992 U.S. Dist. LEXIS 21408 (MD Flor. 1992).

The current Standard Operating Procedures are well within constitutional dictate and vary only slightly, if at all, from those required by the consent decree. Each of Mize's allegations will be addressed in turn.

Mize alleges that there is no classification committee. This is not true.

Wesley Baker, Chief Counselor testifies that Classification is conducted in accordance with the states that standard operating procedure (SOP) requires that, "each state prison shall establish and maintain a Classification Committee to oversee inmate classification...."(Attachment 3 ¶ 8). He further goes onto explain that the classification committee at Jackson

consists of himself, Steven Goen, B.J. Murphey and Larry Truitt. (Attachment 3, ¶ 9). Specifically for inmates under a death sentence a special classification form is filled out, the inmate's file is reviewed and the counselor meets with the inmate prior to making a recommendation to the committee for review and decision. (Attachment 3, ¶ 9).

Mize complains that medications are not monitored and mental health care is inadequate and generally claims this has resulted in an increased number of suicide attempts. This is not true.

Eric Cowart is the Mental Heath Manager at Jackson. (Attachment 4). Cowart testifies that mental health services are available to all inmates at Jackson. (Attachment 4, ¶ 7). The institution has mental health professional on staff and available 24 hours a day. (Attachment 4, ¶ 7). Medications are given only by trained staff and mental health medication is only prescribed by a medical doctor. (Attachment 4, ¶ 10-11). The taking of medication is observed by medical and security staff who are available to perform oral cavity searched after medication is distributed. (Attachment 4, ¶ 9-10). A log of medication compliance is maintained by the institution and the log is reviewed by doctors to ensure compliance. (Attachment 4, ¶ 9). Lastly there have only been eleven attempted hangings since 1994. (Attachment 4, ¶ 12).

Mize complains that inmates no longer receive 32 hours of out-of-cell time. This is true except that now inmates are allotted 42 hours of inside out-of-cell time and 6 hours of outside out-of-cell time. (Attachment 5, ¶ 5). When cell assignments are made the enemy list is considered so that enemies would not be in the same exercise group. (Attachment 5, ¶ 7). There is a possibility that out-of-cell time might be reduced if unforeseen factors such as shake downs, slow clearing dining hall etc. occur but these situations are rare. (Attachment 5, ¶ 8).

Mize complains that visitation has been changed. This is also true. Inmates are now allowed to have a maximum number of 12 visitors with only 2 being significant others. (Attachment 6, ¶ 5). Inmates under a death sentence were given the option of changing their visitation in accordance with the new SOP or leaving it as it was under the current policy. (Attachment 6, ¶ 5). Mize chose to leave his at it was so he was not impacted by the changed policy. Id.

Mize complains he does not have access to legal materials and thus has been denied access to the Courts. Jackson has a Media Resource Specialist on staff who is trained to use the computerized Legal Reference Library. He has trained counselors B.J. Murphy and Larry Truit on the use of the system. (Attachment 3 ¶ 17). There is a computer station that is

available to inmates under death sentence by request as well as a Legal Reference Library which is also available upon request. (Attachment 3 ¶ 17-19).

He also complains that calls to counsel are improperly monitored. This is not true. Attorney calls are not recorded or monitored. (Attachment 3, ¶ 20). The inmate is observed but staff do not monitor the calls. Id.

Mize complains that mail is not properly handled. Mail is processed each day and delivered at approximately 2 p.m. (Attachment 7, ¶ 5). Bulk mail is delivered between 2 and 10 p.m. Id. Mail is checked to match the mail with the inmate and only contraband is denied inmates unless there is a violation of mail policies which could result in the denial of mail privileges. (Attachment 7, ¶ 8).

Mize complains that inmates on death row do not have adequate recreation. As noted above inmates do have 42 hours of inside out-of-cell time and 6 hours of outside out-of-cell time. In addition inmates under death sentence can participate in self-study related programs and sanitation detail. (Attachment 3, ¶ 12). Categories of programs include crochet program, arts and crafts program, picture program and education. (Attachment 3, UDS inmate reclassification form).

At best inmate Mize suggests that at times, the SOP's are not followed. This is insufficient to establish contempt. If the standard for contempt were as Plaintiffs suggest, Defendants would be in contempt every time an officer failed to do his job or every time the operating procedure changed to accommodate technology or security.

CONCLUSION

For the above and foregoing reasons Defendants move that Plaintiffs' motion for contempt be denied.

THURBERT E. BAKER 033887
Attorney General

KATHLEEN M. PACIOUS 558555
Deputy Attorney General

s/DEVON ORLAND 554301
Sr. Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:
Devon Orland
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
PH: (404) 463-8850
FAX: (404) 651-5304

CERTIFICATE OF SERVICE

I do hereby certify that on December 15, 2006, I electronically filed a **Response to Plaintiffs' Motion for Contempt** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

NONE - PRO SE PLAINTIFF

I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participant:

William Mize
GDC 159188
Georgia Diagnostic and Classification Prison
P.O. Box 3877
Jackson, Georgia 30233

This 15th day of December, 2006.

s/Devon Orland
Bar No. 554301
Sr. Asst. Atty. General