

FILED

UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

JAN 6 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
MATTHEW J. DYKMAN
CLERK

JIMMY KINSLOW,
Plaintiff,

vs.

No. 07-CV-1164 RLP/MV

NEW MEXICO CORRECTIONS DEPT., et al.,
Defendants.

MOTION FOR RELIEF
PURSUANT TO RULE 60 OF THE FEDERAL RULES OF CIVIL PROCEDURE

COMES NOW Plaintiff, Jimmy Kinslow, pro se, to respectfully move the Court to grant him relief pursuant to Rule 60 (b) (3) of the Federal Rules of Civil Procedure, based upon the Defendants' outright "fraud, misrepresentation or misconduct" as is set forth in the following Statement of Facts sworn to under oath. The Defendants affirmative conduct in this matter constitutes a deliberate and knowing violation of the contractual Terms agreed to by the Parties in the Settlement Agreement finalized in April of 2009, resulting in further, additional First Amendment violations of the Plaintiff's religious freedom rights similar in kind to those proven in the original Complaint. [Doc. 1].

As a preliminary matter, Plaintiff Jimmy Kinslow would hereby swear under oath pursuant to 28 U.S.C. § 1746 that the following set of numbered "Facts" are true and correct, and are being made pursuant to his personal knowledge of the events described herein, and would ask the Court to view them as an Affidavit, and if called to testify, Plaintiff would state the same.

STATEMENT OF FACTS

1. In November of 2007 plaintiff, a registered/enrolled member of the Native American Potawatomi Nation, filed his pro se federal civil rights Complaint against various New Mexico Corrections Department (NMCD) prison Officials, pursuant to 42 U.S.C. § 2000c-1-5, the "Religious Land Use and Institutionalized Persons Act," 42 U.S.C. § 1983 and State Tort claims under NMSA 1978, § 28-22-1 et seq., the "New Mexico Religious Freedom Restoration Act" for violations of NMSA 1978, §§ 33-10-1 et seq., the "New Mexico Native American Counseling Act," alleging specific denials of his religious access/freedom of religious expression and worship guaranteed under the First Amendment and State law. [Doc. 1].

2. On or about August 28, 2008, plaintiff appeared pro se before Magistrate Judge Puglisi at an Evidentiary Hearing, and after testimony from various prison officials and oral arguments, Magistrate Puglisi ruled that as a matter of law the plaintiff had proven that his religious freedom rights were in fact being denied in violation of the First Amendment to the U.S. Constitution and under state tort statutes, and issued a "Recommendation" that Summary Judgment be entered in the plaintiff's favor on his claims, and, ordered further Briefs before deciding the plaintiff's motion for a Preliminary Injunction. Chief U.S. District Judge Martha Vazquez adopted the Magistrate's Recommendation and entered Summary Judgment in the plaintiff's favor pursuant to 42 U.S.C. § 1983 and his state tort claims pursuant to the New Mexico Religious Freedom Restoration Act. [Doc.'s — and —].

3. On or about November 2008 Magistrate Puglisi ruled that the pro se plaintiff had met his burden proving his entitlement to a Preliminary Injunction in the case, and issued a Recommendation to the District Court to that effect with the urging that the Court hold a Bench Trial on the merits to determine whether a Permanent Injunction was warranted. Judge Vazquez adopted the Recommendation, entered a Preliminary Injunction but deferred implementation of the requested terms until a Bench Trial could be held for a Permanent Injunction. [Doc.'s — and —].

4. On or about December 2008 Judge Vazquez asked local attorney's Larry Montaño, Robert Sutphin, Jr. and Kristina Martinez of the Law Offices

of HOLLAND + HART, LLP, to accept Pro Bono appointment to represent the pro se plaintiff at the Bench Trial for a Permanent Injunction, which they accepted and plaintiff concurred. [Doc. —].

5. After diligent and comprehensive discovery and Depositions being taken in the case by plaintiff's counsel, the defendant NMCD prison Officials made a request that the Parties try to reach a reasonable "settlement," and after exhaustive negotiations a comprehensive and detailed Settlement Agreement was finalized in the latter part of April, 2007, which specifically detailed the plaintiff's right of access to a sweat lodge area to perform a Monthly 4-6 hour full Sweat Lodge Ceremony, with twice-a-month access for 1-hour each month to perform Smudging and Prayer Pipe Ceremony's, and detailing the specific quantity of materials which must be provided for each Ceremony and the plaintiff's monthly resupply of Medicine Bag materials and other specific items which he would be allowed to possess in his cell at all times to accommodate his daily religious practice and observances. [Agreement, at No. — thru —].

6. Additionally, and most importantly, in the Settlement Agreement at No. — plaintiff insisted on the inclusion of the clear and binding provision that the defendant NMCD prison Officials would guarantee and promise that no matter what prison Facility that the NMCD may decide to transfer plaintiff to in the future, that he would absolutely be entitled to AT LEAST those terms of access to a Sweat Lodge and materials detailed in the Agreement, with the provision that he was free to seek greater access should it be available at the Facility to which the NMCD had decided to house him within.

7. Plaintiff insisted on the inclusion of this binding Term since during the settlement negotiations the possibility was raised that the NMCD defendants may decide to house plaintiff in an "out-of-state" prison Facility under the authority of the New Mexico Interstate Corrections Compact (I.C.C.), NMSA 1978, § _____ et seq., which allows for such temporary housing of New Mexico prisoners

8. Plaintiff informed the NMCD defendants (and his appointed Counsel) by letters that he had no objections to being housed in an out-of-state Facility, as long as the NMCD defendants made absolutely sure that any such transfer would be to a State which already had an established Native American religious program, so that he would be ensured to at least that level of religious access to which he was guaranteed to in the Terms of the Settlement Agreement, and plaintiff provided a list of five (5) States which he knew of which had such programs: Montana, Idaho, North Dakota, Alaska and Oregon. Plaintiff even mailed to defendants General Counsel, Carlos Elizondo, newspaper articles on some State's Native religious programs for its prisoners, i.e., Montana and Oregon.

9. The NMCD defendants only followed the terms of the Settlement Agreement for six (6) short months, when ON Monday, October 19, 2009, plaintiff was placed into a transport van operated by a private company and taken to Lake Butler, Florida on October 21st; to be housed in a prison Facility there, where the Agreement was immediately broken.

10. Just prior to his transport to Florida ALL of plaintiff's personal religious items and materials guaranteed in the Settlement Agreement was seized by the NMCD defendant prison officials (i.e., Spirit Bag, Medicine Bag, Eagle Feather, Pipe, herbs and materials) along with all of his Personal Property and personal legal files, and defendants refused to send them with plaintiff when he was transferred to Florida. Plaintiff was told by Property Officer Sgt. Baca that if he wanted any of his religious, personal or legal property returned to him that the plaintiff would have to pay the NMCD defendants \$100-300 dollars for "shipping." Despite the money being deducted from plaintiff's prison account, plaintiff still to this day has not received any of his religious, personal or legal property seized by the defendants on October 19, 2009, at PNM-North Facility in Santa Fe, NM, and it is now January 04, 2010. Plaintiff was not even allowed to have his Address Book so that he could write his family to let them know that he had been moved to the State of Florida.

11. Under the New Mexico Interstate Corrections Compact at "Article IV" and the Florida Interstate Corrections Compact, Article IV, Paragraph (e), any and all "legal rights" that the plaintiff would have had if he was still housed in a Facility in New Mexico must be extended to, and provided to the plaintiff in any Facility to which he was confined in the State of Florida. F.S.A. Sec. 941.56 Interstate Corrections Compact, Article IV. "Procedures and Rights," at Para. (e) states as follows:

" (e)..... THE FACT OF CONFINEMENT IN A RECEIVING STATE SHALL NOT DEPRIVE ANY INMATE SO CONFINED OF ANY LEGAL RIGHTS WHICH SAID INMATE WOULD HAVE HAD IF CONFINED IN AN APPROPRIATE INSTITUTION OF THE SENDING STATE." Id.

This is clear, unambiguous and mandatory statutory language, and the New Mexico Interstate Corrections Compact contains identical mandatory language. Florida is simply acting as "agents" for the NMCD defendants, housing plaintiff on their behalf.

12. The specific Terms agreed to by the Parties in the Settlement Agreement bestowed upon the plaintiff specific and detailed "LEGAL RIGHTS" of religious access enforceable under the Interstate Corrections Compact, which are not being honored in the State of Florida, the NMCD defendant's "agents."

13. Upon his arrival at Lake Butler, FL on October 21, 2009, the FDOC officials immediately committed the grievous religious sacrilege of shaving the Native American plaintiff's hair off, despite his strenuous vocal objections, under threats of physical violence. Plaintiff clearly and repeatedly informed the Captain and Sgt. Vonidore in "Receiving" that under federal law and New Mexico state law NMSA 1978, § 33-10-1 et seq., and NMCD Policy CD-101100 et seq. that NO Native American prisoner can be forced to cut his hair if to do so would violate his traditional religious beliefs, that this was a "clearly-established" LEGAL RIGHT that he had under New Mexico law, and that pursuant to both States Interstate Corrections Compact, this "legal right" must be given to him while he was being housed in a Florida prison Facility by the NMCD.

They both replied that they "didn't care" what the law or I.C.C. says, that this was Florida, and as long as the NMCD housed plaintiff in a Florida Facility that his head would remain shaven, and that his Native American religious requirements carried no weight whatsoever in Florida. And to drive this message home, in retaliation they had the plaintiff placed into Administrative Confinement (the "box") for the first thirteen (13) days he was in Florida without any type of charges, simply because the plaintiff attempted to speak up for and insisted upon his rights under the law.

14. The forced cutting of the Native American plaintiff's hair in violation of the law and his sincere religious beliefs inflicted deep humiliation, was unbelievably degrading, causing severe, lasting and irreparable physical, psychological, emotional and Spiritual injuries for no legitimate penological reason or institutional necessity. This was actual "physical injury," irreparable.

15. The Florida D.O.C. has a policy, custom and/or practice of routinely inflicting humiliating and degrading treatment upon its Native American prisoners with no regards for, or accommodation of, their sincere religious / spiritual beliefs involving their hair and its place in the practice of their religion, for no reasonable legitimate penological purposes.

16. The NMCD defendants knew, or should have known prior to the transfer of plaintiff to Florida to house him in one of their Facilities under the I.C.C., that his religious and statutory right to keeping his hair under NMSA 1978, § 33-10-1 et seq. would be violated, yet they transferred him there anyway to face said illegal degrading and humiliating treatment by their agents. The Florida DOC Officials are acting as "agents" for the NMCD defendants, in this matter.

17. Plaintiff was subsequently told by Classification Officer H. Finch at the Lake Butler, FL Facility that NO prison Facility in the State of Florida allows Native American prisoners access to a "Sweat Lodge facility" in order to practice their religion, and that as long as the plaintiff was housed in Florida by the NMCD defendants that he would not be allowed to participate

in or to practice his traditional Sweat Lodge religious Ceremonies which were guaranteed in the Settlement Agreement. Plaintiff was additionally informed that while he was housed in Florida he would not be allowed to keep in his possession those items and materials that the NMCD defendants had agreed to in the Settlement Agreement, regardless of what the I.C.C. ~~may~~ say.

18. On November 17, 2009, plaintiff was sent to the Wakulla Correctional Institution - Annex in Crawfordville, FL, where he immediately renewed his Requests (and Grievances) for access to a Sweat Lodge, Prayer Pipe and Smudging materials to Chaplain Fox and the Warden, but was again told by Classification Officer Wendy Minette that the Facility does not allow Sweat Lodges to Native American prisoners, or the materials he was requesting necessary for his religious practices.

19. On or about 12-2-09, in response to plaintiff's 11-25-09 "REQUEST" to the Wakulla C.I. Chaplain for access to a Sweat Lodge, Chaplain Fox replied: "SWEAT LODGES ARE NOT AUTHORIZED IN FL. DOC. NATIVE RELIGIOUS PRACTICES ARE ONLY PERMITTED UNDER PERSONAL SUPERVISION OF A NATIVE PRACTITIONER/ VOLUNTEER. UNFORTUNATELY, NO VOLUNTEERS ARE AVAILABLE."

20. The NMCD defendants clearly knew, or should have known, that housing the Native American plaintiff in a Facility in the State of Florida under the I.C.C. would deny plaintiff his First Amendment religious rights and would violate the contractual Terms of the Settlement Agreement, but they deliberately and knowingly placed him there anyway without any regards for his Constitutional and legal rights, where Florida ~~is~~ the "agents" for the NMCD.

21. The contractual Terms of the Settlement Agreement outlines the bare minimum that plaintiff needs in order to freely practice his sincere religious beliefs without imposing an unreasonable burden upon the defendant prison officials, which they agreed to, and promised to accommodate.

22. The NMCD defendants knowingly and deliberately made a binding Contractual Agreement which purportedly guaranteed plaintiff specific religious access on the surface, in order to deceive and trick him into dismissing his lawsuit and legal Judgment against the NMCD prison officials, then, they did deliberately and knowingly contract with a State (Florida) to house him in one of their prison Facilities where they knew that he would be denied the religious access and freedom of religious expression promised in the Settlement Agreement, committing an outright act of "fraud, misrepresentation or misconduct" in violation of Rule 60(b)(3) of the Fed. R. Civ. Procedure.

23. If the plaintiff had known that the NMCD defendants were planning to house him in a Facility where he would not be allowed to practice his religion, then he would have never agreed to enter into a Settlement Agreement with the NMCD defendants and let them out from under the legal Judgment made against them.

24. From October 19, 2009, to this date, plaintiff has been prevented from being able to practice his religious worship that he would have had if he was still housed in a Facility in New Mexico, by the NMCD defendants through their "agents," the Florida DOC prison Officials.

25. To this date the NMCD defendant prison officials has seized all of plaintiff's personal religious items and materials absolutely necessary for the practice of his religion (purchased at his own expense) and have refused to send them to the plaintiff, ignoring his letters asking for their return. These are the very same items and materials defendants agreed to let the plaintiff possess in the Settlement Agreement.

26. To this date defendants are still holding and refuse to send plaintiff any of his personal property or legal files, or even his Address Book.

27. Despite several written and verbal request, and a Grievance, the Florida DOC prison officials refused to allow plaintiff to call appointed Counsel

Larry Mantawo to bring these violations to his attention, for no legitimate penological purpose, deliberately interfering with and obstructing his Constitutionally-protected "Attorney/Client Communications," until December 15, 2009. Plaintiff cannot adequately consult with Counsel to assist in this Rule 60 Motion under these unreasonable restrictions, nor can he research controlling New Mexico law and statutes while being housed in Florida by the NMCD defendants.

28. Plaintiff is still, without question, a New Mexico state prisoner, still subject to New Mexico legal jurisdiction in all matters under the Interstate Corrections Compact, who is simply being temporarily HOUSED in a prison Facility in the State of Florida, by the NMCD. Any illegal act committed against plaintiff while housed in Florida is actionable under the authority of the I.C.C. in the New Mexico courts, which confers Jurisdiction in all legal matters to New Mexico. (See, I.C.C., Article IV).

RELIEF REQUESTED

WHEREFORE, Plaintiff Jimmy Kinslow respectfully requests the Court to grant the following relief:

A. Grant an Evidentiary Hearing upon the Rule 60 (b)(3) Motion at a future date most convenient for the Court while allowing the Parties adequate preparation time;

B. Order Defendant Joe Williams, the NMCD Secretary of Corrections, to immediately transport the Plaintiff, Jimmy Kinslow, back to a Facility within the State of New Mexico where he is to be allowed either personal access or access through an adequate "paging system" to a Law Library in order to allow him to be able to properly research the issues for this motion, to include, but is not limited to, all State / Federal / Supreme Court case decisions,

Statutes, Federal Digests, Shepards', legal Encyclopedias, etc.;

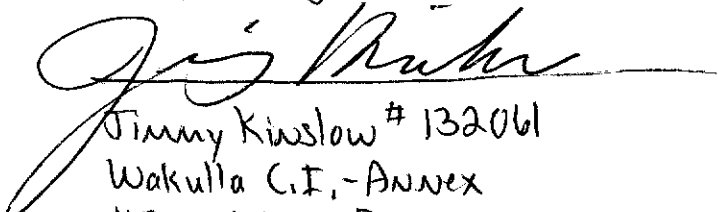
C. Order that Plaintiff's Personal Property and legal files which were seized on October 19, 2009, be returned to him in full;

D. Order that all of Plaintiff's personal Native American religious items and materials which were seized on October 19, 2009, be returned to him and that the Department will provide the same religious access as is detailed in the Settlement Agreement until otherwise notified;

E. Order that in preparation for the Hearing upon the Rule 60 Motion that Defendants will allow Plaintiff unfettered access and communications with attorneys Larry Mawtawo, Robert Sutphin, Jr. and Kristina Martinez, of HOLLAND & HART, LLP. The immediate return of Plaintiff to New Mexico is necessary to allow adequate preparation time to consult with counsel prior to the Hearing in order to determine whether to seek a complete annulment of the Settlement Agreement, restate the Judgment against Defendants and seek to add these new issues under leave to file a "Supplemental Complaint" to the original action, or, in the alternative, decide to simply file a new Complaint for fraud and breach of contract with a "MOTION TO ENFORCE" the terms of the Settlement Agreement; and;

F. Order such other and further relief as the Court deems just and necessary in order to reach a fair and equitable resolution of these issues and controversy.

Respectfully submitted,


Jimmy Kinslow # 132061
Wakulla C.I., - Annex
110 Melaleuca Drive
Crawfordville, FL 32327

SWORN DECLARATION
OF JIMMY KINSLAW

I, Jimmy Kinslow, pursuant to 28 U.S.C. § 1746, do depose and make the following statements of facts based upon my personal knowledge:

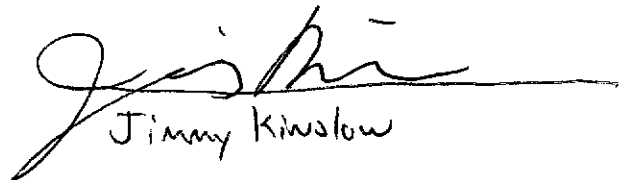
1. That the NMCD seized all of my personal legal files and law books prior to transferring me to Florida on October 19, 2009, and has refused to send these items to me to this date.

2. Since they are holding my case file for this case, I am unable to cite the specific "Document Number" of the Court rulings cited in the preceding Rule 60 Motion, but the documents are a part of the official Record in this case.

3. I am also unable to attach a true copy of the Settlement Agreement made by the Parties in this case, but will do so after the NMCD defendants are made to return my legal property. I may also have the wrong "cite number" for state statute "New Mexico Religious Freedom Restoration Act" since I do not have my files.

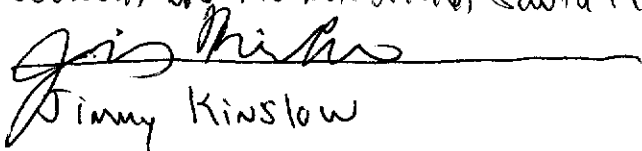
Subscribed and sworn to pursuant to 28 U.S.C. § 1746 on this the 29th day of December, 2009, by Jimmy Kinslow.

DATED: 12/29/09.


Jimmy Kinslow

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Rule 60 Motion For Relief was mailed to all Counsel of Record in this matter on this the 4th day of January, 2010, Teri Beach/ Carlos Elizondo, NMCD Dep. General Counsel, ~~at~~ P.O. Box 27116, Santa Fe, NM 87502-0116.


Jimmy Kinslow

Timmy Kinslow #132061 (A-2204 U)
Nakulla Correctional Institution - Annex
116 Melaleuca Drive
Lawfordville, FL 32327



Clerk
U.S. District Court
333 Lomas Blvd., Suite 270
Albuquerque, NM 87103

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At Albuquerque, NM

JAN 06 2010

MATTHEW J. DYKMAN
CLERK

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