

11-1430(L)  
Kimber v. Tallon

# MANDATE

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

### SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals  
2 for the Second Circuit, held at the Thurgood Marshall United  
3 States Courthouse, 40 Foley Square, in the City of New York,  
4 on the 26<sup>th</sup> day of February, two thousand fourteen.

5  
6 PRESENT: DENNIS JACOBS,  
7 RAYMOND J. LOHIER, JR.,  
8 CHRISTOPHER F. DRONEY,  
9 Circuit Judges.

10  
11 - - - - -X  
12 KEVIN KIMBER,  
13 Plaintiff-Appellant,

14  
15 -v.-

11-1430(L)  
11-1554(Con)

16  
17  
18 KEITH TALLON, Superintendent, Southern  
19 State Correctional Facility,  
20 individually and in his official  
21 capacity, CELESTE GIRRELL,  
22 Superintendent, Northern State  
23 Correctional Facility, individually  
24 and in her official capacity, ROBERT  
25 HOFMANN, JOHN GORCZYK, KATHLEEN  
26 LANMAN, MICHAEL O'MALLEY, ANITA  
27 CARBONELL, STUART GLADDING, DANIEL  
28 FLORENTINE, RAYMOND FLUM, CAROL

1 CALLEA, ANDREW PALLITO, Commissioner,  
2 Vermont Department of Corrections,  
3 individually and in his official  
4 capacity,

5 Defendants-Appellees,

6  
7 JACOB SEXTON, and all other inmates  
8 similarly situated, RICHARD PAHL, and  
9 all others similarly situated, JOSE  
10 TORRES, and all others similarly  
11 situated, DANIEL MUIR, and all others  
12 similarly situated, JAMES ANDERSON,  
13 and all others similarly situated,  
14 DAVID MCGEE, and all other inmates  
15 similarly situated,

16 Plaintiffs.

17 - - - - -X

18  
19 **FOR APPELLANT:** TIMOTHY W. HOOVER (William J.  
20 Simon, on the brief), Phillips  
21 Lytle LLP, Buffalo, New York.

22  
23 **FOR APPELLEES:** DAVID MCLEAN, on behalf of  
24 William H. Sorrell, Attorney  
25 General for the State of  
26 Vermont, Waterbury, Vermont.

27  
28 Appeal from a judgment of the United States District  
29 Court for the District of Vermont (Murtha, J.).

30  
31 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
32 **AND DECREED** that the judgment of the district court be  
33 **VACATED AND REMANDED.**

34  
35 Kimber, on behalf of a class of Vermont prisoners,  
36 appeals from the judgment of the United States District  
37 Court for the District of Vermont (Murtha, J.), granting  
38 summary judgment dismissing his claim that 24-hour security  
39 lighting in the cells violates the Eighth Amendment's  
40 prohibition against cruel and unusual treatment. The

1 district court appointed the Prisoner Rights Office ("PRO")  
2 of the Vermont Defender General to serve as class counsel.  
3 Kimber, as a class representative, argues here (and in the  
4 district court) that the PRO's performance was deficient.  
5 We assume the parties' familiarity with the underlying  
6 facts, the procedural history, and the issues presented for  
7 review.

8 The state contests Kimber's standing to represent the  
9 class in this appeal because he is pro se and unable to  
10 understand the complex issues in the case. Generally, it is  
11 inappropriate for a pro se litigant to represent the  
12 interests of a class. See, e.g., Hagan v. Rogers, 570 F.3d  
13 146, 158-59 (3d Cir. 2009). However, Kimber appears before  
14 us with counsel. The consequences of disallowing Kimber  
15 from challenging the PRO's representation are also troubling  
16 when the class counsel has abandoned any appeal and the  
17 class consists of inmates who may otherwise have trouble  
18 retaining counsel. We conclude Kimber has standing to raise  
19 the issues before us.

20 The state also argues that Kimber's appeal was mooted  
21 when he was released from incarceration. While release  
22 might moot Kimber's individual claim for injunctive relief,  
23 his release did not occur until after the class was  
24 certified, and "class certification will preserve an

1 otherwise moot claim." Comer v. Cisneros, 37 F.3d 775, 798  
2 (2d Cir. 1994). The state contends that the district court  
3 erred in the initial certification of the class, since not  
4 all of the named plaintiffs were subjected to 24-hour  
5 security lighting at the time of certification. The  
6 district court properly concluded, however, that the  
7 prisoners' claims are "inherently transitory," such that the  
8 class certification relates back to the filing of the  
9 complaint. See Amador v. Andrews, 655 F.3d 89, 100-01 (2d  
10 Cir. 2011); see also Muhammad v. N.Y.C. Dep't of Corr., 126  
11 F.3d 119, 123 (2d Cir. 1997) (noting, in a prison conditions  
12 case, that there is an exception to the mootness doctrine  
13 "generally invoked to preserve a class action in which some  
14 members of the class retain a cognizable interest in the  
15 outcome after the claim of the named representative has  
16 become moot"). As a result, the class claim is not moot.

17 We review a district court's appointment and  
18 supervision of class counsel for abuse of discretion. See  
19 Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072,  
20 1078-79 (2d Cir. 1995); Foe v. Cuomo, 892 F.2d 196, 198 (2d  
21 Cir. 1989) ("[T]he question of whether the district judge  
22 abused his discretion in supervising the counsel before him  
23 must be considered in light of the judge's obligation to  
24 insure that the plaintiff class is adequately represented

1 throughout the litigation." ). In appointing the PRO, the  
2 district court failed to address the mandatory factors set  
3 forth in Fed. R. Civ. P. 23(g). The court therefore did not  
4 consider the PRO's inexperience litigating class actions or  
5 under the Federal Rules of Civil Procedure more generally  
6 (such as discovery requirements). Moreover, the court was  
7 aware at the time of appointment--and throughout the  
8 litigation below--that the PRO lacked the resources  
9 necessary to litigate this case properly. The PRO's  
10 deficiencies as class counsel became more apparent as it  
11 blew through filing deadlines, requested numerous filing  
12 extensions, and failed to communicate with the named  
13 plaintiffs.

14 The PRO generously volunteered to take on this case  
15 after the earlier withdrawal of two other attorneys.  
16 However, its lack of resources and its inexperience in  
17 federal class actions are significant considerations. We  
18 recognize that the district court had few options, or none,  
19 but we must conclude that it abused its discretion in  
20 appointing and retaining the PRO as class counsel. We,  
21 therefore, vacate the judgment of the district court. On  
22 remand, the district court will consider an appropriate way  
23 forward. The law of the case doctrine does not foreclose  
24 any option to achieve this goal--including decertification

1 of the class or appointing new class counsel for the  
2 currently certified class.<sup>1</sup>

3 For the foregoing reasons, we hereby **VACATE AND REMAND**  
4 the judgment of the district court.

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FOR THE COURT:  
CATHERINE O'HAGAN WOLFE, CLERK

  


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<sup>1</sup> We note that appointed counsel for appellants  
argument a willingness to  
e the representation if this  
's grant of summary  
his to the district court to

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

  
