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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Damian Hart, et al., Plaintiffs, v. Maricopa County Sheriff's Office, Joe Arpaio, the duly Elected Sheriff of Maricopa County, et al., Defendants.	No. CIV 77-479-PHX EHC-MS **PLAINTIFFS' POST-STATUS CONFERENCE BRIEF**

Plaintiffs file this memo to briefly address the issues raised by the Court at the March 13 status conference, namely whether plaintiffs entitled to present evidence at the resumed evidentiary hearing about current conditions at the Jail.

18 U.S.C. § 3626(b)(3) provides as follows:

> Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

Thus, under the plain language of the statute, a court deciding a PLRA termination motion must determine, at the time it makes its "written findings," whether there exist "current and ongoing" constitutional violations, and whether prospective relief "remains" necessary to correct those violations. To remove any possible doubt that the proper inquiry involves conditions as of the time the court decides the motion, Congress amended the statutory language from "current *or* ongoing" to "current *and* ongoing" in 1997. *Gilmore*, 220 F.3d at 1009 n. 27.

Defendants advised us several days ago that defendants now contend that the Court may only inquire into the jail conditions as they existed in 2001.[1] Defendants seize on a sentence fragment in *Gilmore* – which states that the "record" referred to in § 3626(b)(3) "must mean a record reflecting conditions as of the time termination is sought" (220 F.3d at 1010) – and leap to the conclusion that the relevant inquiry in this case is frozen in time as of September 25, 2001, the date on which defendants filed their termination motion. However, reading this language in context leads to quite a different conclusion.

In *Gilmore*, the plaintiffs had sought an evidentiary hearing "on present conditions" at the prison. 220 F.3d at 1010. The district court, "[r]elying on the existing record," denied this request. *Id.* The Ninth Circuit reversed, holding that the

[1] This position also represents an abrupt about-face by defendants, who argued to this Court in October 2005 that documents from 2001 should not be produced to plaintiffs because documents that are several years old "cannot lead to evidence showing current, ongoing, systemic constitutional violations." Defendants' Motion for Protective Order and Objections to 9/30/05 Report, Dkt. 1108 at 6, 7, 8, 9-10.

district court erred in refusing to allow plaintiffs to update the record with current information:

> The [district] court was further obliged to take evidence *on the current circumstances at the prison* as plaintiffs requested, at least with respect to those remedies as to which plaintiffs did not concede that defendants were in compliance. As the Second Circuit held in *Benjamin [v. Jacobson,* 172 F.3d 144 (2d Cir. 1999)(en banc)], "[e]vidence presented *at a prior time* … could not show a violation that is 'current and ongoing.' Hence, the 'record' referred to [in § 3626(b)(3)] cannot mean the prior record but must mean a record reflecting conditions as of the time termination is sought." 172 F.3d at 166.

Id. (emphasis added). In short, the teaching of *Gilmore* is that plaintiffs facing a termination motion may not be made to rely on "evidence presented at a prior time"; rather, they are entitled to present evidence "on the current circumstances at the prison." *Id*. *Gilmore* simply provides no support for defendants' novel contention that the relevant inquiry involves conditions as of the date defendants filed their termination motion – particularly where, as here, more than four-and-a-half years have elapsed since that date.

Benjamin, like *Gilmore*, held that the district court erred in denying plaintiffs facing a termination motion an opportunity "to present … evidence of current and ongoing violations." 172 F.3d at 166. "[W]hen the plaintiffs so request in response to a defendant's motion for termination, the district court must allow the plaintiffs an opportunity to show current and ongoing violations of their federal rights." *Id*. Thus *Benjamin* too makes clear that the relevant conditions are those that exist at the time the court rules on the termination motion. All other courts agree.[2]

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[2] *See, e.g., Cason v. Seckinger*, 231 F.3d 777, 784 (11th Cir. 2000) ("we hold that a 'current and ongoing' violation is a violation that exists at the time the district court conducts the § 3626(b)(3) inquiry"); *Hadix v. Johnson*, 228 F.3d 662, 671 (6th Cir. 2000) ("Because the PLRA directs a district court to look to current conditions, … the party opposing termination must be given the opportunity to submit additional evidence in an effort to show current and ongoing constitutional violations"); *Ruiz v. Johnson*, 154 F.Supp.2d 975, 983-84 (S.D. Tex. 2001) (making findings of "current

Moreover, examining Jail conditions that existed nearly five years ago simply makes no sense under the statutory scheme. The ultimate question on a PLRA termination motion is whether the court will preserve existing injunctive relief or grant new injunctive relief. *See Gilmore*, 220 F.3d at 1007-08 ("a district court cannot terminate or refuse to grant prospective relief necessary to correct a current and ongoing violation"). But "a prospective injunction is entered only on the basis of current, ongoing conduct that threatens future harm." *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 960 (9th Cir. 2001) (quoting *Lyons P'ship, LP v. Morris Costumes, Inc.*, 243 F.3d 789, 799 (4th Cir. 2001)). *Accord F.T.C. v. Evans Products Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985) ("As a general rule, past wrongs are not enough for the grant of an injunction; an injunction will issue only if the wrongs are ongoing or likely to recur") (internal quotation marks, brackets omitted); *Enrico's, Inc. v. Rice*, 730 F.2d 1250, 1253 (9th Cir. 1984) (same). Accordingly, in this case, as in any injunctive proceeding, the Court's inquiry must focus on the conditions that exist at the time the Court is asked to grant injunctive relief.

Plaintiffs renew again their request that Court schedule plaintiffs' portion of the evidentiary hearing in late 2006 or early 2007, at which time plaintiffs intend to present evidence about "current and ongoing" constitutional violations that are occurring in the Maricopa County Jail system.

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and ongoing" violations based upon "the most recent data available on the conditions" in the prisons at issue).

DATED this 29th day of March, 2006.

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CERTIFICATE OF SERVICE

☒ I hereby certify that on March 29, 2006, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

- Alice Loeb Bendheim
- David Cyrus Fathi
- Michele Marie Iafrate
- Theodore C. Jarvi
- Adam S. Polson
- Dennis Ira Wilenchik

☒ I hereby certify that on March 29, 2006, I served the attached document by first-class mail on the Honorable Earl H. Carroll, United States District Court, Sandra Day O'Connor U.S. Courthouse, Suite 521, 401 West Washington Street, SPC 48, Phoenix, Arizona 85003-2151.

s/Donna Toland

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