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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Fred Graves, et al., Plaintiffs, v. Joseph Arpaio, et al., Defendants.	No. CV 77-479-PHX-NVW **PLAINTIFFS' TRIAL BRIEF CONCERNING REMEDIES AVAILABLE AT CONCLUSION OF EVIDENTIARY HEARING**

Plaintiffs file this trial brief concerning the remedies available to the Court at the conclusion of this evidentiary hearing if the Court determines that there are current and ongoing constitutional violations at the Maricopa County Jails.

As the Court is aware, under the PLRA 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." 18 U.S.C. § 3626(b)(3). In *Gilmore v. California*, the Ninth Circuit explained that "[i]f the existing relief qualifies for termination . . . but there is a current and ongoing violation, the district court will have to modify the relief to meet the Act's standards." 220 F.3d 987, 1008 (9th Cir. 2008); *see also id.* at 1000 ("A district court is bound to maintain or modify any form of relief necessary to correct a current and ongoing violation of a federal right, so long as that relief is limited to enforcing the constitutional minimum."); *Balla v. Idaho Bd. of Corr.*, 2005 WL 2403817, at *4 (D. Idaho Sept. 25, 2005) ("[If] the Court finds current and ongoing constitutional violations, 'it cannot terminate or refuse to grant prospective relief necessary to correct a current and ongoing violation, so long as the relief is tailored to the constitutional minimum.'" (quoting *Gilmore*, 220 F.3d at 1007-08)).

If the Court determines that there are current and ongoing constitutional violations at the end of the hearing on the motion to terminate, the Court has several options. The Court could determine that the current provisions in the Amended Judgment are narrowly drawn and are the least intrusive means to correct the violations, and could simply deny the motion to terminate as to the specific existing paragraphs in the Amended Judgment. On the other hand, the Court could determine that some or all of the paragraphs at issue in the Amended Judgment should be terminated, either because they are not narrowly drawn or because the Court determines that the existing remedies need to be modified to address ongoing and current violations.

Under this last scenario, the Court would then need to determine the appropriate remedies to correct the current and ongoing violations, and in this instance, Plaintiffs believe that Defendants must first be given the opportunity to suggest remedies for those violations. *See Preiser v. Rodriguez*, 411 U.S. 475, 492

(1973). In *Preiser*, the Supreme Court explained that "'[t]he strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors . . . also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons.'" 411 U.S. 475, 492 (1973). The Supreme Court reiterated this rule in *Lewis v. Casey*, stating that "federal courts must 'giv[e] the States the first opportunity to correct the errors made in the internal administration of their prisons.'" 518 U.S. 343, 363 n.8 (1996) (quoting *Preiser*, 411 U.S. at 492). In *Lewis*, the Court held that the district court erred by making the special master responsible for *originating* the remedy instead of the State—the State's involvement, which was only "an opportunity for rebuttal," was insufficient. *Id.* at 363.[1]

Numerous courts have followed *Lewis*. *E.g.*, *Pope v. Hightower*, 101 F.3d 1382, 1384 n.2 (11th Cir. 1996) ("[T]he district court proceeded to compound its error by dictating the precise course the prison officials had to follow to rectify the perceived constitutional violation."); *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 920 (D.C. Cir. 1996); *Cobell v. Norton*, 283 F. Supp. 2d 66, 142 (D.D.C. 2003) ("[A]n institutional defendant must be afforded the initial opportunity to present a plan to the presiding court to satisfy its obligations to the plaintiff class."), *superseded by statute*, Pub. L. No. 108-108, *as recognized in* 392 F.3d 461 (D.C. Cir. 2004); *Fisher v. Goord*, 981 F. Supp. 140, 177 (W.D.N.Y. 1997) ("The process set forth by the [*Lewis*] Court requires that the district court find an

[1] The Court stated that "th[is] ground alone" was sufficient to require the order "to be set aside." *Id.* at 363. Plaintiffs therefore believe that the failure to provide Defendants an opportunity to submit a plan would be grounds for appeal, unless Defendants consent to an alternative procedure for fashioning relief and thus waive any objection. *See id.* at 363 n.8 (implying that an institutional defendant may waive its right to present a remedy first, but finding no waiver in that case because "there was no reasonable doubt that the State objected" to the methodology utilized by the district court in fashioning relief).

injury first, then afford prison officials an opportunity to devise and present an appropriate remedy for judicial review." (citing *Lewis*, 518 U.S. at 363)).

Plaintiffs agree with Defendants that as a practical matter, Defendants cannot fashion a plan to remedy any constitutional violations prior to the Court's determination that such violations exist. Section 3626 of the PLRA states that prospective relief cannot extend any further than "necessary to correct the violation . . . and [must use] the least intrusive means necessary," 18 U.S.C. § 626(a)(1)(A), and it appears that Defendants would need to know the exact violations found by the Court in order to craft the least intrusive remedy for those violations.

Plaintiffs therefore suggest that the Court impose a schedule comparable to the one used in *Ginest v. Board of County Commissioners*, 333 F.2d 1190 (D. Wyo. 2004) -- a case within this circuit with a similar procedural posture. *Ginest* involved a consent decree from 1987. The plaintiff class, which included pretrial detainees, sought to hold defendants in contempt for violating the decree, and at the same time the defendants sought to terminate the decree under the PLRA. *Id.* at 1193. The district court cited the rule from *Preiser* and *Lewis*, as well as the text of 18 U.S.C. § 3626, to establish its procedure. *Ginest*, 333 F. Supp. 2d at 1209 (citations omitted).[2] The court gave the defendants thirty days to submit a proposed remedial plan that was "drawn consistent with the principles of [§ 3626] . . . and [that would] effectively rectify the shortcomings identified in [the court's] decision." *Id.* at 1209-10. The plaintiffs then had twenty-one days to submit their comments, including expert opinions, concerning the defendants' plan. *Id.* at 1210. The court encouraged the parties to work together to reduce litigation. *Id.* Plaintiffs believe that this approach would be feasible in this case.

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[2] The court also relied on an earlier case in the same district, *Skinner v. Uphoff*, 234 F. Supp. 2d 1208, 1217 (D. Wyo. 2002), as providing an example of the proper procedure.

Finally, none of the existing case law suggests that the remedies in this case are limited by the terms of the Amended Judgment. Such a position, we submit, is contrary to the language of both the PLRA and *Gilmore* stating that a Court must provide a narrowly tailored remedy for any ongoing violations of the constitution. *See Gilmore*, 220 F.3d at 1007-08 (holding that a court "cannot terminate or refuse to grant prospective relief necessary to correct a current and ongoing violation, so long as the relief is tailored to the constitutional minimum."). If the Court finds ongoing constitutional violations, it must impose the necessary relief for those violations, so long as the relief is narrowly tailored. For instance, the Amended Judgment does not specifically address the conditions in the court holding cells in Madison Jail because at the time of the Amended Judgment, the intake area at Madison Jail was not used to hold inmates awaiting court appearances. The fact that the court holding cells are not mentioned in the Amended Judgment, however, does not prevent the Court from ordering specific remedies if the Court finds that there are current and ongoing constitutional violations with respect to the court holding cells in Madison Jail. This conclusion is supported by the approach taken in *Ginest*, in which the district court required the Defendants to fashion a plan to address specific constitutional violations concerning medical care, despite the fact that the original consent decree contained only a very general medical care provision. 333 F. Supp. 2d at 1204, 1209-10.

In sum, Plaintiffs believe that the Court must provide Defendants the opportunity to devise a plan to remedy any ongoing constitutional violations that the Court finds. We would propose that the Defendants submit their plan within 30 days after the Court's findings of ongoing constitutional violations, and that Plaintiffs be given adequate time to respond to the proposed plan. Moreover, the Court is not bound by the specific provisions in the Amended Judgment when it ultimately orders relief for ongoing violations; both the PLRA and *Gilmore* indicate that if the Court finds such violations, it must grant relief that is narrowly drawn and tailored to ensure the constitutional minimums.

DATED this 18th day of August, 2008.

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