IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 00-cv-00612-RPM

NEW TIMES, INC.,
ASSOCIATION OF ALTERNATIVE NEWSWEEKLIES,
DARK NIGHT PRESS,
CLAY DOUGLAS,
LARRY RICE,
DORET KOLLERER,
CHRISTINE DONNER,
MAOIST INTERNATIONAL MOVEMENT,
BARRIO DEFENSE COMMITTEE,
ANTHONY LUCERO,
MAXWELL THOMAS,
DANIEL HERNANDEZ,
ARTHUR MCCRAY,
GEORGE MOORE,
TRAVIS COLVIN, and
MARTIN WILLIAMS,

Plaintiffs,

v.

JOE ORTIZ, in his official capacity as EXECUTIVE DIRECTOR OF COLORADO DEPARTMENT OF CORRECTIONS,

Defendant.

DEFENDANT'S RESPONSE TO NONPARTY JACOB IND'S "MOTION PURSUANT TO F.R.CIV. P. [SIC] 71"

Defendant, through the Colorado Attorney General, respectfully submits the following Response to Nonparty Jacob Ind's "Motion Pursuant to F.R.Civ. p. [sic] 71."

NATURE OF THE CASE

This lawsuit involves eight publisher Plaintiffs and seven inmate Plaintiffs. Plaintiffs were represented by the law firm Wheeler, Trigg & Kennedy and Mark

Siverstein of the American Civil Liberties Union of Colorado. Movant Jacob Ind was not a party to the lawsuit.

Plaintiffs filed this case on March 22, 2000. Plaintiffs challenged the Colorado Department of Corrections ("DOC") Administrative Regulation 300-26 ("AR 300-26"). Specifically, Plaintiffs contended the DOC has arbitrarily and unjustifiably censored incoming magazines, newsletters, books, and other reading material based upon content. The publications at issue were sent to the Plaintiff Inmates from the Publisher Plaintiffs. Plaintiffs alleged that the substantive censorship criteria used by the CDOC violated Plaintiffs' rights under the First and Fourteenth Amendments.

On August 10, 2004, the Parties settled this case. The Court approved the Settlement Agreement on August 18, 2004. (See **Exhibit A**, Order Approving Settlement Agreement). The Agreement required the Defendant to implement certain procedures and to refrain from altering an approved version of Administrative Regulation 300-26 for a period of two years. Additionally, Plaintiffs' Counsel were permitted to monitor compliance with the Settlement Agreement for a period of two years. (See **Attached Exhibit B**, Settlement Agreement at pp. 2, 5). The Parties also stipulated that certain portions of seized publications from the Publisher Plaintiff's publications be returned to the named Inmate Plaintiffs. Finally, the Parties stipulated and the Court found that "the terms of the Settlement Agreement are narrowly drawn, extend no further than necessary to correct the alleged violation of **Plaintiffs'** constitutional rights, are the least intrusive means necessary to correct the alleged violation of **Plaintiffs'** constitutional rights…." (See **Exhibit A** at p.2; **Exhibit B** at p. 8).

I. IND LACKS STANDING TO BRING HIS CLAIMS IN THIS ACTION.

Ind lacks standing to seek enforcement of any orders in this case. Standing is a jurisdictional prerequisite to any action in federal court. He does not have standing to enforce the rights of the named Plaintiff Inmates or Publishers. See Swoboda v. Dubach, 992 F.2d 286, 289-90 (10th Cir. 1993). To the extent he seeks to assert his own rights, he cannot do so in an action in which he is not a party. See United States v. Calandra, 414 U.S. 338, 352 (1974) (a grand jury witness who is not a party to a criminal action lacks standing to invoke the exclusionary rule); Dahlberg v. Avis Rent A Car System, Inc., 92 F.Supp.2d 1091, 1107 (D. Colo. 2000) (A plaintiff did not have standing to seek enforcement of a settlement agreement issued in a case in which he was not a party in the absence of language in the agreement **granting non-parties the right of enforcement**). Finally, although Fed. R. Civ. P. 71 confers standing upon non-parties in some cases, it does so only if the order was made "in favor of" those persons. There is nothing in any order issued by this Court to indicate that the orders were made in favor of Ind or that nonparties could seek such enforcement of the Settlement Agreement. See Floyd v. Ortiz, 300 F.3d 1223, 1225-27 (10th Cir. 2002) (A non-party could seek enforcement of a consent decree because, at the time of settlement, the parties had reached a consensus that the decree would benefit and be enforceable by all inmates, provided those inmates employed the grievance procedure specified in the agreement). Indeed, the opposite is true. The Agreement, Order and applicable federal law dictate that relief was limited to the named Plaintiffs. (**Exhibit A**, at p. 2; **Exhibit B** at p. 8). Moreover federal law specifically states:

> **(a) Requirements for relief.--**
>
> **(1) Prospective relief.--(A) P**rospective 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 further 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.

18 U.S.C.A. § 3626 (a)(1)(emphasis added).

Because Ind lacks standing to seek enforcement of this order, Ind must bring a separate action challenging the reading material regulation. See Coffey v. Whirlpool Corp., 591 F.2d 618, 619 (10th Cir. 1979) (A nonparty does not have standing to appeal in the absence of most extraordinary circumstances. Instead, it can bring an action in its own name).[1] Ind cannot evade the requirements of the Prison Litigation Reform Act, the statute of limitations and other applicable law by seeking to piggyback his new complaint on to the New Times case. See, e.g., 28 U.S.C. § 1915(a)(2) and (b)(1) re: payment of filing fee; 42 U.S.C. § 1997e(a) re: exhaustion of all available administrative remedies [including Step III]. In addition, the normal procedural rules, including Rules 12, 16, 26 and 56, should apply. The Defendant, who emphatically denies Ind's allegations, will defend himself in that action once the Ind complies with federal law and the applicable rules of civil procedure.

[1] An example of an "extraordinary circumstance" is when a non-party witness challenges a court's authority to enforce a subpoena in a case where the court lacks subject matter jurisdiction. See United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 76 (1988). No such circumstances exist here.

Moreover, even if Ind were permitted to file pleadings in this case, the Plaintiffs are represented by counsel. Ind cannot file *pro se* pleadings with this Court.[2]

II. THE MOTION FAILS TO ALLEGE ANY FACTS ON WHICH A FINDING OF CONTEMPT COULD BE BASED.

Plaintiffs commenced this action under 42 U.S.C. § 1983. The movant here was not a party, nor did nor did he seek to intervene when the case was active.

The Settlement Agreement provided that the CDOC would change certain censorship criteria. It did not order changes in the CDOC's security and rehabilitative guidelines concerning the amount of paper an inmate may possess in his cell at any given time. Indeed, the regulation that Ind complains about existed before the settlement agreement was executed and approved by Plaintiff's counsel. Before this case settled and was dismissed, Ind filed the very charges he attempts to raise here in his previous action. (See **Exhibit C**, Amended Complaint dated May 16, 2003 in Ind v. Wright, et al., United States District Court Case No. Civil Action No. 00-cv-00428-LTB-CBS at p. 4). In his Amended Complaint in that case Ind alleged that the book and magazine limitations at CSP violated the Religious Land Use and Institutionalized Person's Act , the Colorado Constitution and C.R.S. § 17-42-101. Thus it is apparent that the limitations were in effect at the time the Settlement Agreement in this New Times case was executed, but the Plaintiffs did not contest the limitations as part of the New Times case.

[2] Indeed, Ind alleges in his Motion that he contacted Plaintiff's counsel with respect to the new issues he attempts to inject into this case. (Doc. # 147 at p. 2, ¶4). While Plaintiffs' counsel did not respond, Defendant responded by advising Ind that this case involved censorship criteria relating to the content of reading material. It did not encompass the issue Ind attempts to raise, the amounts of material any given inmate may possess. (Doc. # 147 at p. 2, ¶4; p. 11).

Moreover, the limitations are specifically related to security and rehabilitation. Ind's Motion involves property limitations at the Colorado State Penitentiary ("CSP"). CSP is a maximum-security / administrative segregation facility and is the most secure and most restrictive facility within the CDOC prison system. Colo. Rev. Stat. § 17-1-104.3 (1). All inmates housed at CSP are administrative segregation inmates and are placed at CSP based upon inappropriate behavior while in general population. Specifically Ind contends that Implementation and Adjustment ("I-A") 850-06, the CSP policy of two inmate-owned books and two magazine subscriptions, violates his First Amendment rights. (See Exhibit D, I/A 850-06).[3] His claims, even if they could be asserted here, fail as a matter of law. No provision of the Constitution or laws of the United States confers upon an inmate the right to possess property in the prison. To the contrary, precedent clearly establishes that prison officials retain broad discretion to devise regulations concerning the amount and type of personal property that an inmate may possess in prison. Abbott v. McCotter, 13 F.3d 1439, 1443 (10th Cir. 1994); Lyon v. Farrier, 730 F.2d 525, 527 (8th Cir. 1984). Indeed, prison officials may completely ban the possession of personal property, because an inmate has no constitutional right to possess personal property in prison. Searcy v. Simmons, 299 F.3d 1220, 1229 (10th Cir. 2002); Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991), overruled on other grounds, Tucker v. Graves, 107 F.3d 881 (10th Cir. 1997); Bannon v. Angelone, 962 F. Supp. 71 (W.D. Va. 1996); Twyman v. Crisp, 584 F.2d 352, 357 (10th Cir. 1978) (no right to possess personal law library). In addition, "the Due Process Clause does not give prisoners a right to retain unlimited personal property[.]" Abbott v. McCotter, 13 F.3d at

1443; see also Ruark v. Solano, 928 F.2d at 949 (finding no constitutional deprivation where an inmate was not permitted to keep a television or radio in his cell). Accordingly, Ind cannot show that the CDOC Employees violated any constitutional right by limiting the number of books and publications he could possess at any given time.

In the alternative, I-A 850-06 is valid because it is reasonably related to legitimate penological interests. Even "when a prison regulation impinges on an inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Turner v. Safely, 482 U.S. 78, 83, 89 (1987). Because limitations on the amount of property an inmate can keep in his cell at any given time are reasonably related to the goals of prison safety, security and rehabilitation, the regulation at issue here is valid. See, Green v. Johnson, 977 F.2d 1383, 1390 (10th Cir. 1992) ("[P]rison rules permitting inmates two cubic feet of legal materials in their cells were 'reasonable and necessary for orderly maintenance of the facility and proper security.'").

Whether a prison policy must be upheld under this standard depends on a weighing of the following factors:

> 1. Whether the connection between the practice and the governmental interest is rational or whether the connection is so attenuated as to be arbitrary or irrational.
>
> 2. Whether the inmate has alternative means of exercising that right.
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> 3. The impact of accommodation of the asserted right on others, including prison staff, fellow inmates, or the public.
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> 4. Whether there are "obvious, easy alternatives" to the practice adopted by the prison.

Turner v. Safley, 482 U.S. at 89-91.[4] Indeed, the Supreme Court, applying the Turner standards recently upheld a similar regulation limiting reading materials to inmates in an administrative segregation prison on a motion for summary judgment. Beard v. Banks, 126 S.Ct. 2572, ___U.S. ___ (2006).

First, the internal security of prisons is a legitimate governmental interest. Turner v. Safley, 482 U.S. at 89; See also Block v. Rutherford, 468 U.S. 576, 586 (1984); Werner v. McCotter, 49 F.3d 1476, 1479 (10th Cir. 1995) (Legitimate penological interests include safety, security, order, and discipline); Clifton v. Craig, 924 F.2d 182, 184 (10th Cir. 1991), cert. denied, 112 S. Ct. 97 (1991) (safety is a legitimate penological interest); Beard v. Banks, 126 U.S. at 2579 (Encouraging better behavior on part of segregation inmates sufficient in and of itself to support *Turner's* requirements).

The CDOC's book and magazine policy is rationally related to all of these interests. There are compelling security and rehabilitation issues associated with the regulations art issue. CSP manages in excess of 750 of the most incorrigible, violent and predatory offenders in the CDOC population. While fire-load is a consideration in the book limitation, because these offenders are confined to their cells 23 hours a day, there are other compelling security concerns associated with the book limitation. For example, books and magazines can be utilized to hide contraband, clog plumbing and start fires. Finally, the policy is designed to encourage an offender's appropriate behavior through systematic reinforcements, such as allowing additional books and magazines as an offender progresses out of administrative segregation through CSP's Quality of Life

[4]The burden is on the inmate to show that the restriction is an exaggerated response to the threat and that an alternative fully accommodates the security concern at de minimis cost. Turner v. Safley, 482 U.S. at 90-91; Thornburgh v. Abbott, 490 U.S. 401, 418 (1989).

Levels. Inmates at Levels One through Four are permitted two books and two magazine subscriptions, and inmates at Levels Five and Six are permitted five books and six magazine subscriptions. (See **Exhibit D**, I-A 850-06 at p. 5; p. 8-9, allowable property for Levels One, Two, Three Four Five and Six). In accordance with Beard, this rationale in and of itself satisfies Turner. Beard v. Banks, 126 S.Ct at 2579.

Second, the only allegation made by Ind is that the CDOC limited him to two books and two magazine subscriptions. He does not allege that all reading materials have been cut off. The I-A provides and Ind admits that he may permanently possess two self owned books. He may also subscribe to and possess two magazines at any given time. He is provided with new issues on an exchange basis. He also has access to the general library as well as a law library and is permitted to check out up to 3 books or magazines at any given time and may exchange these at any time. (See **Exhibit E**, I/A 500-02 at p. 1).

Third, allowing additional materials necessarily creates workload issues for all CSP staff. It provides additional places for inmates to hide contraband and provides additional materials for inmates to utilize to obstruct plumbing and start fires. Finally it would create a disincentive for inmates to progress out of CSP to general population where they are permitted to have additional books and magazines. Beard v. Banks, 126 S.Ct. 2580

Finally, a prison need not show that its action represents the "least restrictive alternative" that it could have chosen. Thornburgh v. Abbott, 490 U.S. at 411. To the contrary, the inmate has the burden of proving that the action or regulation is unreasonable. Casey v. Lewis, 4 F.3d 1516, 1520 (9th Cir. 1993). The inmate must

show that the prison's response to the problem is "exaggerated" and that there exist other alternative methods "'that fully accommodate the prisoner's rights at *de minimis* cost to valid penological interests...'" Thornburgh v. Abbott, 490 U.S. at 418. No easy alternative to policy is obvious or apparent.

III. THE EXPRESS TERMS OF THE SETTLEMENT AGREEMENT REACHED IN THIS CASE EXPIRED ON NOVEMBER 10, 2006.

The monitoring and compliance period relating to the Settlement Agreement in this case originally expired on August 10, 2006, two years after the Agreement was signed. (See **Exhibit B**, Settlement Agreement). That date was extended by stipulation of the Parties until November 10, 2006. (See **Exhibit F**, Stipulation for Order Amending Settlement Agreement; and **Exhibit G**, Order Accepting Amendments to Settlement Agreement). No further extensions were obtained from, or approved by the Court. Accordingly, by the express terms of the Agreement expired long ago.

Additionally, 18 U.S.C. § 3626(b) provides:

> **(b) Termination of relief.--**
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> > **(1) Termination of prospective relief.--(A)** In any civil action with respect to prison conditions in which prospective relief is ordered, such relief **shall be terminable upon the motion of any party** or intervener--
> >
> > **(i) 2 years after the date the court granted or approved the prospective relief**;
> >
> > **(ii)** 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or
> >
> > **(iii)** in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

18 U.S.C.A. § 3626.

Defendant's counsel anticipates filing a motion pursuant to 18 U.S.C.A. § 3626 to terminate this court's jurisdiction relating to enforcement of the Settlement Agreement. Counsel has conferred with Counsel for the Plaintiffs pursuant to D.C.COLO.LcivR 7.1 with respect to the motion to terminate and is awaiting a response. However, the language contained in the statute appears to be mandatory.

JOHN W. SUTHERS
Attorney General

s/ James X. Quinn
JAMES X. QUINN*
Assistant Attorney General
Civil Litigation and Employment Law Section
Attorneys for Defendants
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
Telephone: (303) 866-4307
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within Response to Nonparty Jacob Ind's "Motion Pursuant to F.R.Civ. p. [sic] 71" upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado, this 24th day of April, 2008 addressed as follows:

Hugh Q. Gottschalk
Gwen J. Young
Wheeler Trigg & Kennedy, P.C.
1801 California Street, Suite 3600
Denver, CO 80202

Mark Silverstein
400 Corona Street
Denver, CO 80218-3915

Jacob Ind, #84247
Colorado State Penitentiary
P.O. Box 777
Canon City, CO 81215-0777

Courtesy Copies To:
Cathie Holst s/James X. Quinn