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HABEAS CORPUS

Retroactivity

Second Circuit holds that Antiterrorism and Effective Death Penalty Act of 1996 should not be applied retroactively to noncapital habeas appeal. Petitioner's appeal of the district court's denial of his habeas petition was argued in the appellate court on March 29, 1996. On May 3 the appellate court vacated the district court's order and remanded with instructions to grant the petition and discharge petitioner from prison. *See Boria v. Keane,* 83 F.3d 48, 55 (2d Cir. 1996). The state petitioned for rehearing, arguing that the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter AEDPA), signed into law April 24, 1996, applies to this case and would change the result.

The court rejected the state's arguments and reaffirmed its earlier holding. "[A]pplication of the new statute to these circumstances would be retroactive" because it would attach new legal consequences to events completed before its enactment. "Because application of the new statute to this case would be retroactive, the next step is to discern whether Congress intended the new statute to apply retroactively. . . . While Congress has spoken clearly in some portions of the new statute with respect to the application of the statute to pending cases, . . . in the context of non-capital habeas cases the statute's silence is striking. This silence, coupled with the presumption against retroactivity, leads us to hold that the new statute does not apply to this case."

Boria v. Keane, 90 F.3d 36, 37–38 (2d Cir. 1996) (per curiam). *Cf. Burkett v. Love,* 89 F.3d 135, 138 (3d Cir. 1996) (where habeas petition was filed and rejected in district court and appealed before April 24, 1996, "we need not digress to determine the effect of [§ 106 of the AEDPA] on this pending action, filed, as it was, before the amendments were enacted").

Second Circuit holds that one-year time limit provision of the AEDPA does not apply to petition filed before Act's effective date, but that the certificate of appealability provision does. "Section 101 of the AEDPA amends 28 U.S.C. § 2244 to require that habeas petitions brought under 28 U.S.C. § 2254 be filed no later than one year after the completion of state court direct review, with certain exceptions not pertinent to the pending case. . . . Reyes filed his habeas petition in the Southern District on July 13, 1994, more than one year after leave to appeal to the New York Court of Appeals from the affirmance of his state court conviction was denied in 1989. . . . In this case, it would be entirely unfair and a severe instance of retroactivity to apply to Reyes the new requirement of the AEDPA that a habeas petition be filed within one year after completion of state court direct review where that period ended before the effective date of the Act."

The court also had to determine whether to apply the Act's new provisions for a "certificate of appealability," which replaced the requirement for a "certificate of probable cause" and will be codified at 28 U.S.C. § 2253(c). "The new requirement of a certificate of appealability ('COA') appears to make no significant change in the standard applicable to the former requirement of a certificate of probable cause ('CPC'). . . . In agreement with the Tenth Circuit, *see Lennox v. Evans,* 87 F.3d 431, 433–34 (10th Cir. 1996), we hold that the substantive standard for a COA is the same as the standard for the prior CPC. *But see Williams v. Calderon,* 83 F.3d [281,] 286 [(9th Cir. 1996)] (stating, without discussion, that COA standard is 'more demanding' than CPC standard)." The court also concluded that the new requirement in § 2253(c)(3), that the COA "indicate which specific issue or issues satisfy the showing required" of the denial of a constitutional right, should apply to a habeas petition filed before the effective date of the AEDPA. "This is well within the category of procedural changes that pose no issue of retroactivity."

If a petitioner makes a motion for a certificate of probable cause, the court held that it should be treated as a motion for a certificate of appealability "[a]s long as a prisoner's request for a CPC meets the substantive and procedural requirements of the new COA." Treating petitioner's request for a CPC here as a request for a COA, the court concluded that one of his claims presented a substantial issue warranting a COA and granted the COA as to that issue.

Reyes v. Keane, 90 F.3d 676, 678–81 (2d Cir. 1996).

Tenth Circuit applies "gatekeeper" mechanism for second or successive habeas petitions to petition filed after the AEDPA became effective. A death row prisoner's habeas petition was denied in the district court and the denial was affirmed by the appellate court in 1995. After his petition for writ of certiorari was denied by the Supreme Court on June 3, 1996, he filed in the appellate court an application for an order authorizing the district court to consider his second petition,

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pursuant to the new "gatekeeper" provision in 28 U.S.C. § 2244(b)(3), as amended by the AEDPA. Petitioner also challenged whether the AEDPA should even apply to his case.

The court held that the Act did apply and that the application would be denied because petitioner had not made the required showing. "Because the 1996 Act was already in place at the time of Hatch's filing with this Court, the application of the 1996 Act to his case is not retroactive, and thus does not implicate the Ex Post Facto Clause." As to the substance of the petition, the court held that "Hatch has not made a 'prima facie showing that [his] application satisfies the requirements of' [amended § 2244(b)(3)(C)]. . . . Accordingly, the Application for Order Authorizing Consideration of Successive Petition for Writ of Habeas Corpus is DENIED." The court added that "[n]o petition for rehearing nor suggestion for rehearing en banc will be entertained. . . . § 106(b)(3)(E) (noting that the grant or denial of an authorization by a court of appeals to file a successive application cannot be the subject of a petition for rehearing in the court of appeals) (to be codified at 28 U.S.C. § 2244(b)(3)(E))."

Hatch v. Oklahoma, No. 96-727 (10th Cir. Aug. 6, 1996) (per curiam).

District court holds that noncapital provisions of the AEDPA should not be applied retroactively, but analyzes petition under old and new law in light of the "uncertain state of the law." After defendant exhausted his state court appeals he applied for a writ of habeas corpus in the district court in 1993. His application "proceeded along a tortuous path" and a hearing on the merits was not held until February 1996. Before a decision was reached the AEDPA was signed into law and the district court had to decide whether to apply the relevant new provisions, which in this case were the amendments to 28 U.S.C. § 2254 in the Act's § 104. (Note: Although defendant had been sentenced to death, § 107 of the AEDPA was found not to apply.)

Applying the test from *Landgraf v. USI Film Prods.,* 511 U.S. 244 (1994), the court concluded that "Congress did not intend § 104 of the AEDPA to apply to actions pending on the date of its enactment." Following the maxim that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion," the court concluded "that because § 107 [of the Act] contains an explicitly retroactive provision, and because § 104 contains no retroactive provision, Congress intended the latter to have only prospective effect. Accordingly, because Cockrum's application was pending on the date that the AEDPA was signed into law, it is found that § 104 does not apply to this action." However, the court noted that several courts have reached different conclusions regarding whether all or part of the AEDPA should be applied retroactively and that the Fifth Circuit had not decided this issue. "In light of this uncertainty, it would be imprudent to fail to consider the AEDPA altogether in this opinion. Thus, Cockrum's claims will be analyzed first under pre-AEDPA law, and second, in the alternative, his claims will be evaluated under the AEDPA."

The court determined that petitioner was entitled to relief under either law because of ineffective assistance of counsel at the penalty phase of his trial. New 28 U.S.C. § 2254(e)(1) states that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." The court concluded that, at the evidentiary hearing in February, petitioner showed by clear and convincing evidence that the factual findings underlying the state court's rejection of his ineffective assistance of counsel claim were incorrect, thus rebutting the presumption of correctness of the state court findings under new or old law.

The state argued that the evidence from the February hearing should not be used in this decision because petitioner would not have been entitled to an evidentiary hearing under amended § 2254(e)(2). The court disagreed, finding that "the AEDPA does not undo the previous ruling that an evidentiary hearing should be held, nor require evidence already received in such a hearing to be disregarded." The evidence showed that the state court proceedings "resulted in a decision that . . . involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States," *see* § 2254(d)(2) (as amended), and the court issued a writ of habeas corpus ordering the release of petitioner unless the sentence of death is vacated and a new punishment hearing is initiated within 90 days.

Cockrum v. Johnson, No. 6:93 CV 230 (E.D. Tex. July 25, 1996) (Justice, J.).

District court holds that habeas amendments do not apply to § 2254 action that was submitted and argued well before date of enactment. "This petition was filed October 12, 1994, and the matter was fully submitted following oral argument in July 1995. Consequently, neither party complied with or relied upon any provision of the recently enacted amendments to 28 U.S.C. § 2254 contained in the Antiterrorism and Effective Death Penalty Act of 1996 . . . (Apr. 24, 1996). The 1996 amendments were enacted long after this petition was filed, briefed and argued, and the new provisions do not apply explicitly to a petition such as this one which was filed before enactment. Furthermore, the 1996 amendments do not provide an effective date for the new provisions governing § 2254 petitions which might apply in this case. This Court agrees with Chief Judge Aspen who decided, in a petition brought under § 2255, that the new amendment is not retroactive apart from certain provisions involving capital cases where retroactivity is explicitly provided. *See United States v. Trevino,* No. 96 C 828, 1996 WL 252570, at n. 1 (N.D. Ill. May 10, 1996)."

Grady v. Artuz, No. 94 CIV. 7362 at n.1 (S.D.N.Y. June 24, 1996) (Koeltl, J.). *See also Wilkins v. Bowersox,* No. 91-0861-CV-W-5 (W.D. Mo. May 15, 1996) (Wright, J.) (where arguments were heard in Jan. 1996 and some issues were resolved

before Apr. 24, 1996, amendments to § 2254 would not be applied); *U.S. ex rel. Jones v. Barnett*, No. 96 C 1274, slip op. at 2 (N.D. Ill. July 15, 1996) (Anderson, J.) (for state prisoner's habeas petition filed Feb. 13, 1996, "the amendment to section 2254 does not merely change the manner in which a federal court analyzes the habeas petition. The amendment narrows the standard of review habeas courts can give to questions of law and fact decided by state courts. . . . Since the amended section 2254(d) affects the quantum of protection the courts afford the rights of the defendant, this court declines to apply it retroactively.").

Special Procedures in Capital Cases

District courts hold that California and Florida do not qualify for the AEDPA's special habeas procedures for capital cases. California death row inmates filed a class action suit against the state of California, seeking to stop the state from claiming that it qualifies for the benefits of new Chapter 154 in Title 28 (§§ 2261–2266) because it satisfies the requirements for a "unitary review procedure" under § 2265. As the court noted, "defendants have threatened to invoke chapter 154 in all federal court proceedings involving members of the proposed class. Absent judicial relief from this Court, defendants' threats to invoke Chapter 154's expedited review provisions will effectively cause plaintiffs to forfeit rights to which they are entitled under Chapter 153. . . . As a practical matter, defendants' assertions would thus secure for the State the benefits of the Act, regardless of whether California actually provides the competent counsel that states are required by Congress to give plaintiffs as a quid pro quo for receiving such benefits."

The court allowed the suit to proceed as a class action, and then found that the state did not qualify for Chapter 154's procedures. "California has a unitary review procedure, as that term is defined in the Act. As explained below, however, the Court also concludes that California's alleged comprehensive scheme fails to satisfy the remaining requirements of section 2265," namely, a "rule of its court of last resort or by statute" that provides a qualifying mechanism for the appointment and compensation of competent counsel and "standards of competency for the appointment of such counsel."

The court granted a preliminary injunction ordering that "defendants, their agents, servants, employees and attorneys, and all those in active concert with them ARE HEREBY RESTRAINED AND ENJOINED from trying or seeking to obtain for the State of California the benefits of the provisions of Chapter 154 of Title 28, U.S. Code, in any state or federal proceeding involving any class member." However, the court also granted a temporary stay of the order to allow plaintiffs time to apply for a stay pending appeal.

Ashmus v. Calderon, No. C 96-1533 TEH (N.D. Cal. June 14, 1996) (Henderson, C.J.).

In Florida, a death row prisoner filed a motion to enjoin the state "from invoking or asserting, in any state or federal proceeding, that the State of Florida has complied with the so-called 'opt-in' provisions of Chapter 154," and sought "a judicial determination pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, and 42 U.S.C. § 1983, that the system of expedited habeas review may not be applied to either himself or other similarly situated Florida death-row inmates." However, because plaintiff had not yet moved for class certification, the court considered the motion only as to the individual plaintiff.

Because "Florida does not provide for a 'unitary review' process," *see* 28 U.S.C. § 2265, the court examined whether the state met the requirements of § 2261 "to provide competent counsel and reasonable litigation funding to indigent capital prisoners in its state post-conviction proceedings." Although the court found that Florida has a "comprehensive statutory framework for appointment of counsel in post-conviction proceedings brought by all capital prisoners," it held that the state "does not have a statute or rule with a mechanism for ensuring 'competent counsel in State post-conviction proceedings' is appointed for indigent capital defendants, [and thus] cannot qualify as an 'opt-in' state under Chapter 154 of the Act. See 28 U.S.C. § 2261(b)." The court also held that "any offer of counsel pursuant to Section 2261 must be a meaningful offer. That is, counsel must be immediately appointed after a capital defendant accepts the state's offer of post-conviction counsel. The present backlog of unrepresented capital defendants who are in a position to seek post-conviction review, demonstrates that Florida has not made the requisite meaningful offer of counsel."

The court granted plaintiff's motion to the extent that it enjoined defendants "from asserting against Plaintiff, in any state or federal proceeding, that Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 . . . (codified as 28 U.S.C. §§ 2261–2266), applies to Plaintiff."

Hill v. Butterworth, No. 4:96-CV-288-MMP (N.D. Fla. Aug. 7, 1996) (Paul, J.).

Prison Litigation

Proceedings In Forma Pauperis

Second Circuit holds that the obligation to pay filing fees "will be imposed prior to any assessment of the frivolousness of the appeal." The Second Circuit addressed a basic issue arising under the Prison Litigation Reform Act of 1995 ("PLRA"): "whether a prisoner filing an appeal becomes liable for appellate filing fees before or after his motion for leave to appeal *in forma pauperis* has been adjudicated." The court considered the language of two subsections of 28 U.S.C. § 1915 as amended by the Act: § 1915(a)(2), relating to the prisoner's trust fund account statement, "plainly applies to a prisoner approaching a court and 'seeking' to proceed i.f.p." On the other hand, § 1915(b)(1), which requires full payment of any filing fee, "[a]rguably . . . applies only to a prisoner who already has i.f.p. status, *i.e.*, a prisoner who has been granted such status in the district court with respect to his complaint and has been continued in such status for purposes of his appeal, or who has been granted such status by this Court." Such a construction "would produce a bizarre result" in courts where "the decision to grant a motion to appeal i.f.p. is usually made only after determining that the appeal surmounts the standard of 'frivolousness.' . . . [O]nly the prisoners who surmount the frivolousness standard would become obligated for filing fees."

The court decided that the phrase "brings a civil action or files an appeal in forma pauperis" in § 1915(b)(1) "can be read to include both prisoners who have been granted i.f.p. status and those who seek such status." The Second Circuit also considered § 1915A, which requires a court to review a prisoner complaint "before docketing, if feasible or, in any event, as soon as practicable after docketing," and to dismiss the complaint if it is frivolous or otherwise lacks merit. It noted that this screening procedure appears to be designed for district courts since it refers to the review of a complaint, and said that even in courts that delay docketing until frivolousness has been determined, "Congress likely did not intend the section 1915A screening to insulate prisoners from liability for filing fees for complaints determined to be frivolous."

As to the requirements of § 1915(b)(1) that a prisoner plaintiff pay "any court fees required by law," and of § 1915(b)(3) that the filing fee collected not exceed "the amount of fees permitted by statute for the commencement of a civil action or an appeal," the court found that these obligations apply to both the $5 filing fee required by 28 U.S.C. § 1917 and the $100 docketing fee mandated by the Judicial Conference.

Finally, the Second Circuit established a procedure to satisfy the requirements of § 1915(a)(2) that the prisoner submit to the court a certified copy of his or her trust fund account statement and § 1915(b)(1) that the court collect the initial filing fee payment. It required the prisoner to submit to the court an authorization for both tasks to be performed by the prison, which the clerk's office can then send to the prison. After such authorization, the prison has the responsibility of sending to the court a certified copy of the prisoner's trust fund account statement and the initial partial filing fee payment, as well as the subsequent payments from the prisoner's account required by § 1915(b)(2), and "the failure of the [prison] to send the statement or to remit any required payment shall not adversely affect the prisoner's appeal." An appeal filed without the required authorization and prepayment of fees will be dismissed in thirty days unless within that time the prisoner files the required authorization.

Leonard v. Lacy, 88 F.3d 181, 184–87 (2d Cir. 1996).

Second Circuit holds that PLRA fee requirements may be applied to prisoners who filed notices of appeal before the Act's effective date. The Second Circuit considered the effect of the PLRA's filing fee requirements in four unrelated cases involving notices of appeal and IFP motions filed by state and federal prisoners. All four appellants filed their notices of appeal before April 26, 1996. One filed a motion to proceed in forma pauperis before that date; two filed IFP motions after the effective date; and one acquired IFP status in the court of appeals before the effective date because the status was granted in the district court and not revoked.

Because the PLRA contains no effective date provision or other indication that the filing fee requirements should be applied to pending appeals, the court followed *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), to decide whether the requirements should be applied retroactively. "The rationales outlined in *Landgraf* strongly indicate that the fee payment obligations of the PLRA should be applied to appeals in which the notice of appeal was filed before the Act's effective date. The fee payment obligations are essentially procedural . . . . More significantly, the slight burden arising from application of the PLRA requirements to pending appeals is entirely avoidable. Even though a prisoner has filed a notice of appeal, he has no obligation to pursue it, and once confronted with the prospect of liability for filing fees, he may choose either to accept that liability or withdraw his appeal."

The court found that "the relevant event for purposes of retroactivity is, at the earliest, the granting of leave to proceed on appeal *in forma pauperis*. Neither the filing of the notice of appeal nor the making of the i.f.p motion implicates settled expectations or burdens prior conduct in ways that counsel against application of the PLRA to pending appeals." The court noted that its decision conflicted with the Tenth Circuit's ruling in *White v. Gregory*, 87 F.3d 429 (10th Cir. 1996), that the PLRA's filing fee requirements did not apply where a notice of appeal was filed before the Act's effective date. The *White* decision "contains no discussion of the issue, and we respectfully disagree with its conclusion."

Finally, the court held that the appellant who had acquired IFP status in the court of appeals through the continuation of his IFP status granted in the district court could be subjected to the PLRA's requirements. It reasoned, first, that "the burdens of the PLRA are slight and entirely avoidable." Second, since no judicial time had been invested in reviewing the merits of the appeal, the congressional purpose to deter frivolous appeals "is significantly advanced by applying the PLRA's requirements to his appeal at this stage." (The court observed that "we might deem it inappropriate to apply the Act" if judicial resources had already been expended, if the appellant had expended "significant time and effort" in preparing an appellate brief, or "if this Court had granted a motion to proceed on appeal i.f.p., a step that would normally require judicial assessment of whether the appeal had sufficient merit to surmount the standard of frivolousness.") Third, requiring the appellant to choose between becoming obligated for filing fees or withdrawing his appeal now "creates at most disappointment, not impairment of protectable interests."

The court ruled that it would dismiss the four appeals unless within thirty days each appellant filed the authorization required by *Leonard v. Lacy, supra*. It cautioned appellants that if they avoided dismissal by filing the authorization, they would be obligated to pay the filing fees from their prison accounts even if their appeals were subsequently dismissed.

Covino v. Reopel, 89 F.3d 105, 106–09 (2d Cir. 1996).

Second Circuit concludes that PLRA filing fee provisions do not apply to petition for extraordinary writ directed at judge conducting criminal trial. A defendant in a pending criminal prosecution filed a motion seeking to have the trial judge withdraw from the case, and later filed a petition for a writ of mandamus in the court of appeals, seeking to compel the district judge to rule on the recusal motion and to have the Second Circuit order reassignment of the case. The petition was accompanied by an IFP motion, presenting the court with "the issue of whether the new filing fee payment requirements of the PLRA apply to a petition for an extraordinary writ."

"Neither the text nor the legislative history of the PLRA indicates whether a petition for a writ of mandamus is to be considered a 'civil action'" under amended 28 U.S.C. § 1915(a)(2). "Congress enacted the PLRA to curb the increasing number of civil lawsuits filed by prisoners . . . . It is reasonable to assume that Congress wished to apply the PLRA's deterrent effect to prisoners' complaints, regardless of the type of pleading filed by the prisoner to obtain relief." Therefore, the PLRA "should normally apply" to a petition for a writ that sought relief comparable to that which could be obtained by filing a complaint against prison officials under 42 U.S.C. § 1983. However, "a petitioner for a writ of mandamus directed to a judge conducting a criminal trial . . . is not analogous to the lawsuits to which the PLRA applies. We will therefore not apply our PLRA procedure to Nagy's motion."

In re Nagy, 89 F.3d 115, 116–17 (2d Cir. 1996).

Tenth Circuit holds that mandamus petition is covered by amended § 1915 and that bar to IFP filings after three previous dismissals of meritless claims applies retroactively. The prisoner filed a habeas corpus petition in district court on April 2, 1996. On May 7, 1996, he filed in the court of appeals a petition for a writ of mandamus under 28 U.S.C. § 1651(a), accompanied by an IFP motion, seeking prompt resolution of his habeas petition. Analyzing the PLRA amendments to 28 U.S.C. § 1915, the Tenth Circuit decided that a mandamus proceeding falls within the scope of the amended IFP statute: "Allowing prisoners to continue filing actions as they had before enactment of the amendments, merely by framing pleadings as petitions for mandamus, would allow a loophole Congress surely did not intend in its stated goal of 'discourag[ing] frivolous and abusive prison lawsuits.'" Based on the history and purpose of the PLRA, the court concluded that a mandamus petition is a "civil action" under § 1915 and that "complaint" in amended § 1915(a)(2) includes petitions for extraordinary writs. This conclusion, the court said, would cause it to dismiss the mandamus petition without prejudice because the petitioner had not complied with the amended statute. However, petitioner "faces a more serious barrier to proceeding IFP: § 1915(g)."

Section 1915(g) bars a prisoner from bringing a civil action or appeal IFP "if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal . . . that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." The appellate court observed that "[a]s of 1981, [the petitioner] had filed between 600 and 700 complaints in state and federal courts, many of which had been dismissed as malicious or frivolous." Taking judicial notice that he "has had three actions or appeals in courts of the United States dismissed as frivolous or malicious," the court stated that the petitioner "cannot proceed in forma pauperis if § 1915(g) applies to suits dismissed prior to its enactment." Applying the *Landgraf* analysis, the court determined that § 1915(g) can be applied retroactively because it "does not change the legal consequences of [earlier] prisoner actions" but rather "imposes stricter requirements for proceeding in forma pauperis in future actions." *Accord Abdul-Wadood v. Nathan*, No. 96-1074 (7th Cir. Aug. 2, 1996) (Easterbrook, J.) (petitioner who had two previous complaints dismissed as frivolous before the PLRA took effect and three more after "now has at least five strikes against him" and § 1915(g) applies).

Therefore, petitioner cannot proceed in forma pauperis and may resubmit his petition only by paying the filing fee. The court directed the clerk of court "not to accept from [the petitioner] any further extraordinary writs in noncriminal matters, or appeals of judgments in civil actions or proceedings, unless he pays the filing fees established by our rules."

Green v. Nottingham, 90 F.3d 415, 417–20 (10th Cir. 1996).

Second Circuit finds that PLRA does not apply to habeas corpuspetitions. Following *In re Nagy, supra,* the appellate court analyzed whether a habeas petition or an appeal from the denial of such a petition constitutes a "civil action" under 28 U.S.C. § 1915(a)(2). It listed three reasons supporting its conclusion that Congress did not intend the PLRA to apply to habeas petitions: (1) Nothing in the text of the PLRA or its legislative history indicates such an intention; (2) it is unlikely that Congress intended the PLRA's elaborate procedures for collection of filing fees to apply to payment of the $5 filing fee required in habeas actions; and (3) Title I of the Antiterrorism and Effective Death Penalty Act makes no change in filing fees or in a prisoner's obligation to pay the fees in habeas cases.

Reyes v. Keane, 90 F.3d 676, 678 (2d Cir. 1996).

District court rules that sua sponte "screening" provisions of PLRA apply to IFP prisoner complaints filed before April 26, 1996. Plaintiff's 42 U.S.C. § 1983 complaint was received by the district court's pro se office on April 10, 1996. Since the PLRA amendments to 28 U.S.C. § 1915 do not indicate an effective date, the court reviewed the requirement of § 1915(e)(2) that the court dismiss a case at any time it determines the action is frivolous, malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. In addition, the court pointed to new section 1915A, "entitled 'Screening,' requiring the Court to review prisoner complaints before docketing, or as soon as practicable after docketing," and to dismiss complaints for the same reasons specified in § 1915(e)(2).

Although the district "has determined not to apply the Act's amendment to 28 U.S.C. § 1915(a)–(b), requiring prisoners to pay the filing fee, to complaints filed before April 26, 1996," the court saw "no reason why the provisions providing for sua sponte dismissal of claims that clearly fail to state a claim should not apply to pre-April 26, 1996 complaints." Applying the screening provision to all complaints, regardless of when they were filed, does not involve retroactivity, the court found. "It is no different than applying amendments to the Federal Rules of Civil Procedure to pending cases, whenever filed." The court dismissed the complaint without prejudice.

McCray v. Kralik, No. 96CIV.3891 (PKL) (AJP) (S.D.N.Y. July 1, 1996) (Leisure, J.) (unpublished).

Appropriate Remedies for Prison Conditions

District courts rule that PLRA's automatic stay provision violates separation of powers and due process clause. Under 18 U.S.C. § 3626(b), as amended, defendants filed motions in both the Western and Eastern Districts of Michigan seeking immediate termination of a 1985 consent decree entered by the Eastern District of Michigan. Portions of the case had been transferred to the Western District of Michigan in 1992 and 1993. Section 3626(b) entitles a defendant or intervener in an action involving prison conditions to immediate termination of any prospective relief under certain conditions, unless the district court makes written findings that the relief remains necessary and is as limited as possible to correct the violation. In addition, § 3626(e)(2) provides for an automatic stay of any prospective relief that has already been approved or granted, beginning on the thirtieth day after a motion for termination has been filed.

To determine whether the relief granted under the decree at issue conforms to the requirements of § 3626(b), the Western District said it would have "to reconsider each provision of the Decree and the associated plans and orders" that had been issued since 1985. This would require time to review extensive records and schedule hearings so that the parties would be "given every opportunity to present their arguments to the Court." Consequently, the court said it could not decide the motion to terminate within thirty days. Because of the scope of the impact the stay would have on prior rulings and the status of the case, and because of the automatic imposition, the court ordered the parties to address its constitutionality.

The court first disposed of a nonconstitutional argument, that pursuant to the supersession clause of the Rules Enabling Act, 28 U.S.C. §§ 2071–2077, the automatic stay provision does not take effect until and unless the Supreme Court amends Fed. R. Civ. P 60(b) and 62(b). The court concluded that "enforcement of the stay provision would not affect a court's authority to grant a relief from judgment or a stay in its discretion. Thus, it can not be said that the stay provision 'conflicts irreconcilably' with" the rules.

The Western District then turned to the question of the automatic stay's impact upon separation of powers. Citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), which listed several factors to consider when evaluating acts of Congress under an Article III standard, the court found that Congress usurped an exclusively judicial role in enacting the stay provision. "The power to decide substantive issues of law, such as a motion to terminate the case, is a most basic attribute of the Judiciary's power under Article III." The automatic grant of the stay, even though temporary, with no provision for a case-by-case determination, is "akin to the issuance of a preliminary injunction, which even a court cannot do without making a finding on the facts."

The district court further found that the stay provision violates separation of powers by altering a final judgment. "[W]here appeals have been exhausted or the time for appeal has elapsed or been waived, consent decrees become final judgments." The PLRA stay provision renders existing judgments inoperative, the court said, and the fact that the stay is temporary relates only "to the extent to which the Act impermissibly modifies existing judgments." The automatic stay also contravenes the due process clause because it violates the "vested rights doctrine." The stay "takes from plaintiffs their vested right in the judgment, which they have had since 1985, without any process at all." The court ordered that the stay would not take effect pending its decision on defendants' motion to terminate the consent decree.

The district court for the Eastern District of Michigan concurred with the Western District that § 3626(e)(2) is unconstitutional. It found that the automatic stay provision "is not an attempt by Congress to limit the jurisdiction of Article III courts. It is an encroachment by Congress into a court's final order, overturning it until a later date." It held that the prospective relief previously awarded under the consent decree would not be stayed pending a determination of the defendants' motion to terminate.

Hadix v. Johnson, No. 4:92:CV:110 (W.D. Mich. July 3, 1996) (Enslen, J.); *Hadix v. Johnson*, No. 80-CV-73581-DT (E.D. Mich. July 5, 1996) (Feikens, J.). *Cf. U.S. v. Engler*, 91 F.3d 144 (6th Cir. 1996) (table) (remanding consent decree appeals for reconsideration in light of amended § 3626); *U.S. v. Michigan*, 91 F.3d 145 (6th Cir. 1996) (table) (same).

District court holds PLRA's immediate termination provision is constitutional and vacates consent decrees. The district court granted defendants' motion for immediate termination of consent decrees from 1978–1979 that governed conditions for detainees awaiting plea, trial, sentencing, or transfer in certain New York City-area jails. The court limited its ruling to the application of 18 U.S.C. § 3626(a)(1), (b)(2), and (b)(3) to the decrees.

The court first held that § 3626(b)(2) does not violate the Rules Enabling Act. There is no direct conflict between § 3626(b)(2) and Fed. R. Civ. P. 60(b) because a district court may still grant relief on a discretionary basis under the rule.

As to the constitutional claims, the court concluded that the statute does not violate the separation of powers principle regarding the reopening of final judgments. "Injunctions, such as the Consent Decrees here, entail continuing, supervisory jurisdiction and therefore are not final judgments. . . . Congress may legislate retroactively so as to modify the prospective effects of a judgment that is final for appeal purposes because this does not reopen the merits of the judgment." *See also Plyler v. Moore*, Civ. A. No. 3:82-876-2 (D.S.C. June 4, 1996) (bench ruling granting motion to terminate eleven-year-old consent decree). Nor does the statute violate the separation of powers principle established in *U.S. v. Klein*, 80 U.S. (13 Wall.) 128 (1872), by prescribing a rule of decision without changing the underlying law. "[W]hile Congress did not amend the substantive law with respect to permissible prison conditions, it did change the law governing the district court's remedial powers. Under the new law, courts must apply the same limitations on relief to consent judgments as to litigated judgments." Finally, the statute does not violate separation of powers by divesting courts of remedial jurisdiction. While "seemingly cramped" by the new legal standards and time constraints imposed, the courts nevertheless retain the ability under § 3626(b) "to enforce constitutional rights. Under § 3626(b)(3), a court may not vacate prospective relief if it finds on the record that constitutional violations exist and that the relief is appropriately tailored to remedy the violation."

Section 3626(b)(2) also does not violate equal protection principles. Using a rational basis test because the PLRA provisions granting immediate termination do not implicate a prisoner's right "to bring to court a grievance that the inmate wished to present," *Lewis v. Casey*, 116 S. Ct. 2174 (1996), the court determined that although Congress could have modified the standards for consent decrees in all types of cases, nothing required it to do so. "Therefore, Congress' determination to single out prison reform litigation was within its power."

Due process arguments were equally unavailing. Because the consent decrees "are not final judgments within the scope of the vested rights doctrine," the plaintiffs "do not have any vested rights in the prospective effects" of the decrees. Nor do the plaintiffs have a due process claim that the statute impairs their contracts with the defendants. Since the federal government was not a party to the consent decrees, the "sovereign acts" doctrine is not applicable. Therefore, rational basis review is appropriate and under that standard, the PLRA provisions are not "arbitrary and irrational."

Acknowledging that the findings now required by § 3626(b)(2) were not made when the consent decrees were entered into, the court observed that § 3626(b)(3) would allow continuation of the relief provided by the decrees "if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right." But the court did not have a record before it on which it could make such findings, and it denied an oral request by the plaintiffs, "seemingly joined by the United States," to postpone a decision on the motion to terminate until a factual record of current conditions in New York City jails could be created. "The statute provides for 'immediate termination' and based on the current record before the Court, the defendants are entitled to vacatur of the Consent Decrees." The court shared some of the concerns expressed by the Michigan district courts that declared the automatic stay provision unconstitutional, but emphasized that it did not need to decide the issue because it disposed of the motion to terminate within the thirty-day time period specified in § 3626(e). (*See Hadix v. Johnson, supra*.)

Benjamin v. Jacobson, No. 75 CIV 3073 (HB) (S.D.N.Y. July 23, 1996) (Baer, J.).

District court finds that compensation of a previously appointed special master is not governed by the PLRA. On December 11, 1995, the district court appointed a special master pursuant to Fed. R. Civ. P. 53(b) to monitor compliance with injunctive relief ordered to remedy violations of the prisoner-plaintiffs' constitutional rights. Defendants were ordered to pay the special master's compensation and expenses as a cost of suit. Following enactment of the PLRA, the special master and his staff ceased work pending further direction from the district court. The PLRA, at 18 U.S.C. § 3626(f)(4), limits compensation of a special master to "an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master," and specifies that "[s]uch

compensation and costs shall be paid with funds appropriated to the Judiciary."

The court observed that § 3626 applies "with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of enactment of this title." Section 3626(g)(7) defines prospective relief as "all relief other than compensatory monetary damages," and § 3626(g)(9) states that relief is "all relief in any form that may be granted or approved by the court." Thus, the first question to be answered was whether appointment of the special master constituted "relief." Since the statutory definition of relief shed no light on the issue, the court turned to the definition in Black's Law Dictionary, which focused on "the ultimate legal form of remedy rather than the means of achieving the remedy." This distinction, the court said, was supported by the court's order, which distinguished between the remedies required to cure the constitutional deficiencies and the appointment of a special master. Therefore, the court held that the term "relief" does not apply to the compensation of a previously appointed special master.

Coleman v. Wilson, No. CIV. S-90-520-LKK (E.D. Cal. July 12, 1996) (Karlton, J.).

Suits by Prisoners

District court holds that the PLRA does not apply retroactively to an award of attorneys' fees earned before its enactment; alternatively, plaintiff satisfied Act's requirements. In 1993, plaintiff, a nonsmoking inmate, sued under 42 U.S.C. § 1983, alleging that correctional authorities had been deliberately indifferent to the serious health risks nonsmokers face from ongoing exposure to environmental tobacco smoke. In February 1996, one month after a magistrate judge concluded that plaintiff had demonstrated a likelihood of success on the merits of his claim for permanent injunctive relief, the defendant director of the Department of Correctional Services imposed a smoking ban in all buildings owned and/or operated by the department, stating that "pending inmate litigation, both locally and nationally on the issue of second hand smoke are concerns that must be addressed." Thereafter, the district court concluded that defendants were entitled to summary judgment on the merits of plaintiff's claim because they had rectified any Eighth Amendment violations, but left open the issue of whether the plaintiff was a prevailing party for purposes of an attorneys' fee award.

Defendants argued that the PLRA "narrows the definition of a prevailing party so that a prisoner's attorney will be compensated only for those fees reasonably and directly incurred in proving an actual violation of a federal right," and that amended 42 U.S.C. § 1997e(d)(A) "abolishes the catalyst theory upon which attorney's fees may be awarded." The court noted that all of the action that triggered entitlement to attorneys' fees occurred before the Act was in effect and, further, that the portion of the Act defendants relied on had no stated effective date. Therefore, retroactive imposition would cause "'manifest injustice' to lawyers like Plaintiff's counsel who have performed their ethical obligations to the courts upon settled expectation premised upon precedent that if they 'prevailed' they would be compensated."

Nevertheless, the district court went on to determine that, if the PLRA did apply, plaintiff had made a sufficient showing at the preliminary injunction hearing to satisfy the requirement of § 1997e(d)(A) that no attorneys' fees be awarded unless "directly and reasonably incurred in proving an actual violation of the plaintiff's rights." Implementation of the smoking ban resulted from the magistrate judge's order "which put Defendants on notice that continuance of their past practice was obdurate. Consequently, I find that the requested attorney's fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights."

Weaver v. Clarke, No. 4:CV93-3356 (D. Neb. June 18, 1996) (Kopf, J.).

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