IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 83-Z-222

PINIO GARCIA, and
ESTELLE GARCIA, father and mother of
decedent Vincent Garcia,
ROSE LOBATO, as Personal Representative of
the Estate of Vincent Garcia, and
DON GARCIA, individually,

Plaintiffs,

v.

THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF EL PASO,
SHERIFF BERNARD J. BARRY, in his official
capacity,

Defendants.

PLAINTIFF DON GARCIA'S OPPOSITION TO DEFENDANTS'
MOTION TO TERMINATE CONSENT JUDGMENT

INTRODUCTION

Vincent Garcia died in the El Paso County Jail in 1982. He committed suicide by hanging himself with a bed sheet after being left alone, intoxicated, in a small cell.

His family brought this action against the Sheriff of El Paso County under 42 U.S.C. § 1983. The lawsuit alleged that by ignoring the predictable recurrence of suicides in the Jail, the Sheriff was deliberately indifferent to Vincent Garcia's mental health needs in violation of the Fourteenth Amendment to the United States Constitution.

After completing extensive discovery, including depositions of nationally recognized experts in jails and suicide, the family agreed to settle the case without any significant monetary recovery. Estella Garcia, the mother of Vincent and sixteen other grown children, and Don Garcia, Vincent's brother, wanted only to prevent other persons from dying in the Jail. Thus, on January 14, 1985, a Consent Judgment ("CJ") was entered which requires screening of prisoners for mental health needs, and training of custody staff in mental health issues. The Consent Judgment also requires adequate mental health staffing and a special ward for mental health purposes, and requires that recently admitted prisoners and those with identified mental health problems be closely monitored.

Defendants now move to terminate the Consent Judgment pursuant to the Prison Litigation Reform Act (PLRA). However, as demonstrated by the recent epidemic of suicides and suicide attempts at the Jail, the serious constitutional deficiencies that led to Vincent Garcia's death still exist. For this and other reasons explained below, defendants' motion should be denied.[1]

ARGUMENT

In 1996, Congress enacted the Prison Litigation Reform Act (PLRA). That statute provides in relevant part:

> **(2) Immediate termination of prospective relief**.--In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further

[1]Plaintiff does not oppose defendants' motion to substitute Sheriff Terry Maketa, in his official capacity, for former Sheriff Bernard J. Barry, in his official capacity. Indeed, such substitution is automatic. See Fed. R. Civ. P. 25(d)(1).

> 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.
> **(3) Limitation.**--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)(2), (3).

The Tenth Circuit has not construed PLRA's termination provision. The leading case on the construction of that provision is Gilmore v. People of the State of California, 220 F.3d 987 (9th Cir. 2000). Gilmore makes clear that termination under PLRA is far from automatic; rather, it requires defendants to demonstrate that (1) the relief granted by the decree exceeds constitutional minima, and (2) there are no current and ongoing violations of federal rights:

> First, nothing in the termination provisions can be said to shift the burden of proof from the party seeking to terminate the prospective relief. Second, and more importantly, although § 3626(b)(2) speaks of "immediate termination," and although § 3626(e)(1) requires a "prompt" ruling, a district court cannot terminate prospective relief without determining whether the existing relief (in whole or in part) exceeds the constitutional minimum. And, consistent with § 3626(b)(3), a district 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. Thus, unless plaintiffs do not contest defendants' showing that there is no current and ongoing violation under § 3626(b)(3), the court must inquire into current conditions at a prison before ruling on a motion to terminate. If the existing relief qualifies for termination under § 3626(b)(2), but there is a current and ongoing violation, the district court will have to modify the relief to meet the Act's standards. It is plain that each of these steps requires real adjudication--the careful application of law to fact--not the wooden ratification of a legislatively prescribed conclusion.

Gilmore, 220 F.3d at 1007-08 (footnote omitted).

I. PLRA does not require termination of the underlying judgment.

As a threshold matter, "§ 3626(b) mandates only the termination of prospective relief, it does not require a court to terminate or vacate the underlying final judgment (typically a consent decree) which provides for such relief." Gilmore, 220 F.3d at 999-1000. Thus, defendants' "motion to terminate Consent Judgment" must be denied on this ground.

II. The relief provided by the Consent Judgment does not exceed the constitutional minimum.

Under PLRA, only relief that exceeds constitutional minima is subject to termination. "[A]ny relief that was narrowly tailored in the first instance, and 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, is not terminable." Gilmore, 220 F.3d at 1000.[2] "With respect to consent decrees ... any contractual surplusage (relief the court had jurisdiction to enforce only by virtue of the parties' consent) is rendered unenforceable by the termination provisions, but all other relief is untouched by the statute." Gilmore, 220 F.3d at 1006 (footnote omitted). Therefore, "a district court cannot terminate prospective relief without determining whether the existing relief (in whole or in part) exceeds the constitutional minimum." Gilmore, 220 F.3d at 1007 (footnote omitted).

As noted above, defendants have the burden of proof on a termination motion. More specifically, the burden is on defendants to show that the relief granted by the Consent Judgment exceeds the constitutional minimum. Gilmore, 220 F.3d at 1008. But defendants' motion does not even assert, let alone demonstrate, that the relief granted by the Consent Judgment exceeds

[2]The fact that the Consent Judgment does not contain explicit findings to this effect is not dispositive. See Gilmore, 220 F.3d at 1007 n. 25, 1008.

constitutional minima.

Defendants' motion must therefore be denied. In fact, comparison of the relief provided by the Consent Judgment with case law on prison and jail mental health demonstrates that the former hews closely to constitutional requirements. The Eighth Amendment "necessarily requires that the State make available to inmates a level of medical care which is reasonably designed to meet the routine and emergency health care needs of inmates. This includes medical treatment for inmates' physical ills, dental care, and psychological or psychiatric care." Ramos v. Lamm, 639 F.2d 559, 574-75 (10th Cir. 1980) (internal quotation marks, citations omitted). See also Riddle v. Mondragon, 83 F.3d 1197, 1202 (10th Cir. 1996) ("the states have a constitutional duty to provide necessary medical care to their inmates, including psychological or psychiatric care").[3]

Thus, courts have held that the following elements of a prison or jail mental health system are constitutionally required:

> **Training of custody staff in dealing with mentally ill prisoners.** Olsen v. Layton Hills Mall, 312 F.3d 1304, 1319-20 (10th Cir. 2002) (failure to train jail staff to recognize obsessive-compulsive disorder); Kendrick v. Bland, 541 F. Supp. 21, 25-26 (W.D. Ky. 1981) ("the placing of even well-intentioned guards in the position of dealing with inmates who are mentally ill without any training or adequate guidance, resulted in the infliction of much unnecessary cruelty and brutality"). See CJ, ¶ 5.
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> **Mental health screening of prisoners upon intake.** Gibson v. County of Washoe, Nev., 290 F.3d 1175, 1189 (9th Cir. 2002) (failure to perform immediate screening "poses a substantial risk of serious harm to those with certain mental illnesses"), cert. denied, ____ U.S. ____, 123 S. Ct. 872 (2003); Balla v. Idaho State Bd. of Corrections, 595 F. Supp. 1558,

[3]Those Jail prisoners who are pretrial detainees are protected by the Fourteenth Amendment rather than the Eighth Amendment. However, the Tenth Circuit has held that, in challenges to conditions of confinement, the same standard is to be applied in evaluating the Fourteenth Amendment claims of pretrial detainees and the Eighth Amendment claims of convicted prisoners. Craig v. Eberly, 164 F.3d 490, 495 (10th Cir. 1998).

1577 (D. Idaho 1984) ("there must be a systematic program for screening and evaluating inmates in order to identify those who require mental health treatment"); Inmates of Occoquan v. Barry, 717 F. Supp. 854, 868 (D.D.C. 1989); Inmates of the Allegheny County Jail v. Pierce, 487 F. Supp. 638, 642, 644 (W.D. Pa. 1980). See CJ, ¶¶ 6, 7.

Identification and supervision of suicidal prisoners. Sanville v. McCaughtrey, 266 F.3d 724, 738 (7th Cir. 2001) ("The Eighth Amendment does not allow officials to turn a blind eye to the activities of an inmate, particularly one who is suicidal"); Balla, 595 F. Supp. at 1577 ("a basic program for the identification, treatment and supervision of inmates with suicidal tendencies is a necessary component of any mental health treatment program"); Coleman v. Wilson, 912 F. Supp. 1282, 1298 n. 10 (E.D. Cal. 1995) (same); Waldrop v. Evans, 871 F.2d 1030, 1036 (11th Cir. 1989) ("the law was clear in 1984 that prison officials have an obligation to take action or to inform competent authorities once the officials have knowledge of a prisoner's need for medical or psychiatric care"). See CJ, ¶¶ 1, 6, 7.

Employment of sufficient numbers of qualified mental health staff. Ramos v. Lamm, 639 F.2d 559, 577-78 (10th Cir. 1980) (Eighth Amendment violated where mental health staff were "overworked, undertrained, and underqualified"); Balla, 595 F. Supp. at 1577 ("trained mental health professionals" required). See CJ, ¶ 7.

Housing of prisoners in cells that meet minimal standards of decency, and do not present an obvious risk of self-harm or suicide. Jacobs v. West Feliciana Sheriff's Dept., 228 F.3d 388, 395-97 (5th Cir. 2000) (jury could find Sheriff liable for placing prisoner in "detox" cell with "a significant blind spot and tie-off points," where she later hanged herself); McCray v. Burrell, 516 F.2d 357, 369 (4th Cir. 1975) (en banc) ("we cannot conceive that decent society would tolerate"confinement of mentally ill prisoner in barren "mental observation" cell); Feliciano v. Barcelo, 497 F. Supp. 14, 35 (D.P.R. 1979) (placement of mentally ill prisoners in isolation cells "offends all notions of civilized behavior of humanity"). See CJ, ¶¶ 2, 3, 8.

Housing of mentally ill prisoners in appropriate facilities. Coleman, 912 F. Supp. at 1320-21 (Eighth Amendment violated by housing mentally ill in segregation units because such placement will cause further decompensation); Finney v. Mabry, 534 F. Supp. 1026, 1036-37 (E.D. Ark. 1982) (ordering separate unit for the mentally ill). See CJ, ¶ 4.

Because the relief provided by the Consent Judgment does not exceed the constitutional minimum, it is not terminable under the PLRA. See Gilmore, 220 F.3d at 1008 (reversal required where district court "did not examine the court record and relief granted by the order to determine

whether it was narrowly tailored and minimally intrusive").

III. Defendants have failed to show the absence of current and ongoing constitutional violations at the Jail.

Even if defendants had carried their burden of showing that some relief provided by the Consent Judgment does exceed the constitutional minimum, and is therefore prima facie terminable under § 3626(b)(2), defendants have the burden of showing their compliance with the constitution. Gilmore, 220 F.3d at 1008. But defendants' motion to terminate is supported by no evidence whatsoever. The motion merely states, "defendants believe that there is no current or ongoing violation of a Federal right," Def. Mot. at 3, but the statements of counsel are not evidence. Barcamerica Intern. USA Trust v. Tyfield Importers, Inc., 289 F.3d 589, 593 n. 4 (9th Cir. 2002). Because defendants have utterly failed to carry their burden of proof, their motion must be denied.

In fact, there is ample evidence both that defendants are not in compliance with the Consent Judgment, and that current and ongoing constitutional violations exist in the areas covered by the Consent Judgment. Since March of 2001, four prisoners have committed suicide by hanging in the El Paso County Jail: Steven John Phelps, March 27, 2001; Brian Richard Bennett, Jr., November 3, 2001; Douglas Spencer Parrish, June 11, 2002; and Marca Anne Wilson, February 17, 2003. All were pretrial detainees. See Fathi dec., Exh. 1-4.

When 19 year old Steven Phelps was booked into the Jail on March 23, 2001, he was noted by Jail staff to be depressed and suicidal, and was placed on "full suicide precautions." It was also noted that he had attempted suicide while in jail about six months previously. However, on March 26, a Jail mental health worker cleared him for release to general population, writing "no other

[mental health] services at this time." The next day Mr. Phelps was discovered hanging in his cell. There was a delay in calling 911 because the telephone was not working. In addition, although Jail staff tried to videotape the efforts to revive Mr. Phelps, the video camera battery died during the incident. Due to this and other problems with the equipment, no video recording of the incident was obtained. Fathi dec., Exh. 1.

Brian Bennett Jr., age 22, suffered from a psychotic disorder and had been displaying "erratic behavior" on the day of his suicide. He was able to hang himself when the deputy who was assigned to make periodic checks on his welfare failed to do so, but falsified logs to indicate that the checks had in fact been made. Fathi dec., Exh. 2.

There have also been serious suicide attempts at the Jail. In late 2001, M.M.[4] was arrested and taken to the Jail after trying to commit suicide by setting fire to the bed he was sitting on. At the Jail, he was placed on "suicide watch." Nevertheless, M.M. was able to remove his prosthetic leg and saw on his wrist with the sharpened edge of the prosthesis for approximately 30 minutes, unobserved by staff. When he realized he would not be able to kill himself in this way, he climbed the staircase in the cellblock and jumped to the ground, sustaining injuries to his head and neck. Fathi dec., ¶ 3.

The Consent Judgment requires that defendants "modify the existing light fixtures, ventilator covers and other protrusions in all holding cells as recommended by an expert in jail architecture."

[4]When prisoners are identified in this brief by initials only, their full names are being provided to defendants, and will be provided to the Court upon request.

CJ, ¶ 3. Despite this requirement, on December 29, 2001, prisoner D.P. was able to attempt suicide by repeatedly slashing his wrists with the metal plate from a light switch in one of the Jail's "special detention" cells. D.P. had told Jail staff earlier that day that he was going to kill himself, and had been placed on 15-minute checks. Although an officer made log entries indicating that the 15-minute checks had been performed, in fact they had not been done. Fathi dec., Exh. 5.

Defendants have long known of these serious deficiencies in the Jail's mental health and suicide prevention systems. At a July 13, 2000 meeting, Commander Shull expressed concern about "[i]nmates receiving the wrong medication. Occurring numerous times." Fathi dec., Exh. 6, at 1. At the same meeting, Chief Willis Alexander expressed concern that "suicidal inmates [are] placed in [cellblock] 1A2. A2 not designed for suicidal inmates." Id., at 2. Indeed, although the Consent Judgment requires defendants to "[c]reate and maintain a special ward for mental health purposes," CJ, ¶ 4, there is no such ward for female prisoners. Fathi dec., ¶ 2.

Similarly, in an August 8, 2000 memorandum, Commander C. M. Santiago expressed concern that the performance of Correctional Medical Services (CMS), the contract medical provider at the Jail, may "result in major legal concerns to this county." Among the problems with CMS' performance were "[d]ispensing wrong medication to inmates" and "[n]ot providing staff with sufficient information regarding the status of an inmate, i.e. suicidal." Commander Santiago concluded, "These characteristics will not win a lawsuit!" Fathi dec., Exh. 7.

On May 7, 1998, Michael Lewis, a mentally ill prisoner, died while strapped to the Jail's restraint board. In the course of litigation over Mr. Lewis' death, the Jail's mental health system was evaluated by Richard Belitsky, M.D., of the Department of Psychiatry of the Yale University School

of Medicine. In Dr. Belitsky's January 3, 2001 report, he concluded that "there are serious problems with the provision of mental health services at the CJC." See Fathi dec., Exh. 8, at 6.[5] Dr. Belitsky detailed deficiencies in both the quality and quantity of mental health staffing at the Jail, and concluded that "the practices of the Criminal Justice Center, as they relate to the care of Mr. Lewis, violate some of the basic standards for the provision of mental health care in a correctional facility." Id. at 10.

After the suicide of Brian Bennett Jr. in November 2001, Mark Silverstein, Legal Director of the ACLU of Colorado, wrote to the defendant El Paso County Board of Supervisors, requesting that the Board investigate "whether there are ongoing and continuing deficiencies in staffing and training that have contributed to this rash of inmate deaths." Fathi dec., Exh. 9, at 2. The Board declined to do so. Fathi dec., Exh. 10. Since that refusal, two more prisoners have hanged themselves in the Jail. See Fathi dec., Exh. 3, 4.

Most recently, in October 2002, a citizens' panel appointed by the Sheriff noted numerous deficiencies in the Jail's mental health services and suicide prevention measures. Among the panel's findings:

> Staffing in the crucial mental health function is complicated by the large numbers of mentally ill inmates, limited community resources and the history of suicide attempts. The need for additional mental health professionals was identified by all three sub-committees.

Fathi dec., Exh. 11, at 4.

[5]The El Paso County Jail consists of two detention facilities: the Criminal Justice Center (CJC) and the Metro Detention Center.

> Identification and observation of potentially suicidal inmates may not be as effective as it could be. The combination of a limited mental health staff and the intake facility design together create conditions in which, particularly during high-volume processing, at-risk inmates may not be under constant supervision.

Id. at 5.

> The El Paso County jails are critically overcrowded and this has an effect on the operations of the jails. ... Overcrowding affects the staff's abilities to:
>
> * * *
>
> Assist in the identification of mentally ill inmates.
> Assist in the identification of inmates who may be exhibiting signs or symptoms of suicide.

Id. at 7-8.

> [I]t is recommended that deputies and other direct supervision staff are trained to identify mental health issues, particularly in the area of suicide.

Id. at 11.

> **RECOMMENDATION:** Upgrade the skill level of medical staff doing intake assessment in relation to mental health issues. ...
> **DISCUSSION:** The entry of an individual into a jail is the most critical period of time. We know the first 72 hours represent the higher risk for suicide. There are many intervening variables that occur in an individual's life if they enter into a jail environment. This requires skilled diagnostic assessments. The current mental health system, or even an expansion, could not do all the intakes given the volume coming into the jail.

Id. at 16.

> **RECOMMENDATION:** Based on review of the workload of the two [mental health] direct service providers, it is recommended that there be an increase of 2.0 FTE to meet the demands of the Criminal Justice Center and the Metro Jail Facility.
> **DISCUSSION:** As we are aware, jail suicide and other significant mental health problems have been a major risk management issue for the county for a sustained period of time. The ability to identify people who are mentally ill and people who represent self-destructive tendencies requires an extensive amount of on-going monitoring. ... The Physician Assistant responds to all acute mental health events, typically without the accompaniment of a mental health staff person, and strongly expressed that it would be beneficial to have additional mental health counselor staffing. A minimum of 2.0 FTE should be immediately added.

Id. at 17.

> **RECOMMENDATION:** Increased structured training and educational support to medical, mental health and correctional staff.
> **DISCUSSION:** The level of medical and mental health training required needs to be increased to meet the needs of a large and diversified population.

Id. at 19.

"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." Gilmore, 220 F.3d at 1000. Because there is ample evidence of current and ongoing constitutional violations at the Jail, defendants' motion should be denied.

IV. If the Court does not immediately deny the motion, the Court should schedule discovery and an evidentiary hearing on current conditions at the Jail.

If the Court does not immediately deny defendants' motion, the Court should schedule a hearing to take evidence on current conditions at the Jail, to determine whether there is a "current and ongoing violation" of federal rights. See Gilmore, 220 F.3d at 1010 ("The court was further obliged to take evidence on the current circumstances at the prison as the plaintiffs requested"). Other courts agree that plaintiffs resisting a termination motion are entitled to an evidentiary hearing on current conditions at the facility. See Ruiz v. United States, 243 F.3d 941, 950-51 (5th Cir. 2001); Hadix v. Johnson, 228 F.3d 662, 671-72 (6th Cir. 2000); Loyd v. Alabama Dept. of Corrections, 176 F.3d 1336, 1342 (11th Cir. 1999); Benjamin v. Jacobson, 172 F.3d 144, 165-66 (2d Cir. 1999) (en banc).

In order to make such a hearing meaningful, plaintiffs must be entitled to discovery regarding

current conditions at the Jail. "Evidence 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." Benjamin v. Jacobson, 172 F.3d at 166. See also In re Scott, 163 F.3d 282, 284-85 (5th Cir. 1998) (holding that "the district court should have an updated record before ruling on the defendants' motion for termination"); United States v. State of Michigan, 134 F.3d 745, 747-48 (6th Cir. 1998) (district court granted plaintiff's motion for access to prison facilities, staff, and documents; appeal dismissed for lack of jurisdiction); Benjamin v. Jacobson, 161 F.Supp.2d 151, 155 (S.D.N.Y. 2001).

In order to overcome defendants' monopoly on information regarding current conditions at the Jail, plaintiff should be allowed to conduct paper discovery and depositions, as well as a tour of the Jail by plaintiff's correctional mental health expert, Michael Gendel, M.D.[6]

CONCLUSION

Defendants' motion should be denied. Alternatively, if the Court does not immediately deny the motion, it should establish a discovery schedule, to be followed by an evidentiary hearing on current conditions at the Jail.

[6]Dr. Gendel's curriculum vitae is attached to the declaration of David C. Fathi as Exhibit 12.

Plaintiff has attempted to engage in informal discovery, requesting various documents by letter faxed to defendants' counsel on April 9, 2003. As of the date of this brief, plaintiff has not received most of the documents requested. See Fathi dec., ¶ 16, Exh. 13.

Respectfully submitted this 29th day of April, 2003.

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