

W. David Arnold, Attorney at Law

March 30, 1996

VIA FEDERAL EXPRESS

Hon. William Wayne Justice
United States District Court
211 West Ferguson
Suite 318
P. O. Box 330
Tyler, Texas 75710

Re: Motion To Vacate Final Judgment

Dear Judge Justice:

Following our recent telephone conference, Vince and I discussed in detail the best approach to reinstatement of the special mastership in Ruiz in light of defendants' motion to vacate the final judgment. This letter contains our recommendations.

As you suggested, I began by drafting a proposed order reinstating the special master. As Vince and I discussed that draft order, however, for reasons set out below we concluded that entry of such an order now might be premature and unwise. We believe that entry of an order so soon after the filing of the motion, before class counsel is appointed and a response is filed, could jeopardize your use of a special master in connection with the motion if you ultimately determine that such use is appropriate.

We think that a more cautious strategy will serve the case better at this stage. Accordingly, we recommend that you address the issue of appointment of counsel, and establish a schedule for appointed counsel to respond to the motion, prior to turning to the question of the special master.

It seems to us that several reasons counsel in favor of this approach. First, appointed class counsel and defendants' counsel should be required to attempt to narrow the matters truly in dispute, and perhaps also to identify the issues upon which the special master should focus. Second, the questions of whether and for what issues a special master may be helpful should in the first instance be put to the parties.

Third, the parties may agree on the use of a special master in this case, on the scope of his duties, or both. Such agreement would permit you to enter an order without objection from either party. It is not likely, however, that the parties could reach an agreement on employment of a master until after class counsel is appointed and a response to the motion is filed.

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Thus, we believe that the possible reinstatement of the mastership is one of the matters you could address in your order appointing class counsel. You could direct class counsel to report to you on their desire to seek appointment of a special master as part of their response to the motion following their evaluation of the case. It seems to us that reintroduction of the mastership after these initial steps, and upon a specific request of a party, or the agreement of the parties, would strengthen your ultimate determination that a master is necessary.

The only potential downside we can see to waiting until after appointment of class counsel to enter an order on the special master is that the pending federal legislation may have been enacted by that time and such an order would have to address that legislation directly. It is our best judgment today, however, that if the legislation passes it will by its terms be applicable retroactively to pending cases. Accordingly, acting now on the reinstatement of the mastership is not likely to protect that order from the federal legislation in any meaningful way.

As you suggested, and as we discussed by telephone on Thursday, I have talked with Donna Brorby about her willingness to be reappointed as class counsel. I did not also talk to Bill Turner because Donna indicated to me that she had spoken with Bill and that Bill had asked her to pass on his position. As you can imagine, both Donna and Bill approach this situation with mixed feelings. On the one hand, they maintain a very great loyalty to you, to the prisoners in Texas, and to the process that resulted in what by most accounts is the most successful prison litigation in history. On the other hand, neither Bill nor Donna is a member of a law firm, which means that the risks and dislocations, financial and otherwise, of jumping into this potentially massive undertaking are daunting.

Donna asked me to convey to you that both she and Bill prefer that you identify a first rate Texas lawyer for appointment as class counsel. If you conclude that the class will not be best served by any of the lawyers you identify who are willing to accept the appointment, she and Bill will accept the appointment. Bill is not willing to serve as lead counsel, but he has indicated to Donna that he is amenable to working with her on strategy, legal analysis, and drafting.

I have seen the memorandum on the preliminary research your clerk performed concerning the potential availability of attorney fees in connection with enforcement of decrees. I also am aware of a Fourth Circuit case, Plyler, that holds that protection of an

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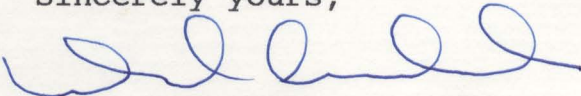
institutional reform judgment against subsequent challenge may be compensable even if not successful. I will conduct some additional research in this area and call your clerk on Monday to discuss it.

To summarize, we believe that a more cautious and orderly approach to consideration of the appointment of a special master will better serve the case and the parties. Accordingly, we recommend that you first select class counsel, and defer entering an order on the special mastership until after that is accomplished. We also think that in the order appointing class counsel you could require them to notify you within a reasonable period of time whether they think a special master would advance the efficient and effective determination of the case. This requirement might also be applied to the United States as intervenor in any order that you enter concerning their status in the case.

I will continue to work on the immediate identification of class counsel. I think the first step is to complete the research your clerk has started. I will then talk to Donna and Bill again. In addition, Vince will be talking this week to lawyers at the National Prison Project to both gauge their interest in participating in the case and to obtain their ideas on other first rate attorneys who could step in.

As always, please feel free to call either of us to discuss this matter further.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'W. David Arnold', with a stylized, cursive flourish.

W. David Arnold

cc: Vince Nathan