

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 93-2148  
Summary Calendar

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Willie L. Madlock,

Plaintiff-Appellant,

VERSUS

James A. Collins, Director,  
Texas Department of Criminal Justice,  
Institutional Division, Et Al.,

Defendants-Appellees.

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Appeal from the United States District Court  
For the Southern District of Texas

CA H 92 3714

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( August 18, 1993 )

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Before THORNBERRY, HIGGINBOTHAM, and BARKSDALE, Circuit Judge.

THORNBERRY, Circuit Judge\*:

Prisoner filed § 1983 claim, and the district court dismissed the complaint without prejudice, subject to the refiling of prisoner's claims as part of another similar case pending in the same district court. We find that the district court's dismissal

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

was premature in this case and therefore the judgment of the district court is vacated and the case is remanded.

### **Facts and Prior Proceedings**

Willie L. Madlock is a Texas state prison inmate. He filed a complaint under 42 U.S.C. § 1983 alleging that the presence of female guards and non-staff females during routine strip searches was a violation of his constitutional right to privacy. Madlock requested both equitable and legal relief. The issue relating to the female guards had been raised in **Aranda v. Lynaugh**, U.S.D.C. No. H-92-277, which was also pending in the same district court when Madlock filed his § 1983 action. Since a motion for class certification was currently pending in **Aranda**, the district court dismissed Madlock's complaint without prejudice so that Madlock could petition to intervene as a member of the class to be certified. The district court's order of dismissal indicated that Madlock's action "...would needlessly duplicate and waste judicial resources", therefore it was dismissed. Madlock timely appeals the dismissal of his complaint.

### **Discussion**

In **Gillespie v. Crawford**, 858 F.2d 1101, 1103 (5th Cir. 1988) (citing **Green v. McKaskle**, 770 F.2d 445 (5th Cir. 1985)), our en banc court held that individual members of a class action are barred from pursuing separate individual suits for equitable relief within the subject matter of the class action. The Court noted the policy behind the decision:

To allow individual suits would interfere with the orderly administration of the class action

and risk inconsistent adjudications. Individual members of the class and other prisoners may assert any equitable or declaratory claims they have, but they must do so by urging further action through the class representative and attorney, including contempt proceedings, or by intervention in the class action.

**Gillespie**, 858 F.2d at 1103.

In the case presently before us, the district court dismissed Madlock's § 1983 complaint for policy reasons similar to those enunciated in **Gillespie**; however, the dismissal order reflects that no class action existed at the time of the dismissal of Madlock's complaint. The dismissal order specifically notes that a motion for class certification in **Aranda** was pending before the district court at the time of the dismissal. In this regard, the case before us is distinguishable from **Gillespie**, and the district court was premature in dismissing Madlock's complaint. Clearly, if **Aranda** is not certified as a class action,<sup>1</sup> Madlock is entitled to pursue individual relief.<sup>2</sup>

Madlock seeks appointment of counsel to pursue his claims. We deny this motion at this time as it would be inappropriate to appoint counsel before the disposition of the motion for certification in the **Aranda** case.

### Conclusion

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<sup>1</sup> Obviously, if the class is certified, Madlock will receive notice and will have the opportunity to opt-out of the class.

<sup>2</sup> We express no opinion concerning the viability of Madlock's complaint under the current law of this Circuit. In addition, we note that Madlock has asserted both legal and equitable claims. Our opinion in **Gillespie** would bar only his equitable claims if the **Aranda** case is certified as a class action.

Since the class was not certified at the time of the dismissal of Madlock's complaint, the district court erred and the order of dismissal is vacated and the case remanded to the district court for further proceedings. Motion for appointment of counsel is denied.