

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2726
Summary Calendar

MARK P. TURNER,

Plaintiff-Appellant,

versus

5 UNKNOWN MEMBERS OF THE
DIRECTOR'S REVIEW COMMITTEE OF
THE TEXAS DEPARTMENT OF
CRIMINAL JUSTICE - ID, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 92-3130)

(April 13, 1994)

Before POLITZ, Chief Judge, KING and WIENER, Circuit Judges.

PER CURIAM:*

Mark P. Turner, proceeding *pro se* and *in forma pauperis*, appeals the dismissal of his 42 U.S.C. § 1983 prisoner civil rights suit as frivolous under 28 U.S.C. § 1915(d). We affirm in part and

*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

vacate and remand in part.

Turner, an inmate of the Texas Department of Criminal Justice, ordered by mail a directory of staff, faculty, and students at the University of Texas at Arlington. The Director's Review Committee of the state prison system treats such directories as contraband and, as a consequence, the publication was withheld from Turner. Turner filed the instant action seeking both equitable and monetary relief. The district court dismissed Turner's claim with prejudice, finding that he had no absolute first amendment right to the directory and that his claim was an impermissible equitable challenge to an existing remedial order.

A suit may be dismissed as frivolous under 28 U.S.C. § 1915(d) only if it lacks an arguable basis in fact or law.¹ We review such dismissals by the district court under the abuse of discretion standard.²

It cannot be gainsaid that the constitutional rights of prisoners are subject to greater limitations than the rights of free-world citizens, but those restrictions must bear a reasonable relationship to important penological interests.³ That determination is made by application of the **Turner v. Safley**⁴

¹28 U.S.C. § 1915(d); **Denton v. Hernandez**, 112 S.Ct. 1728 (1992); **Eason v. Thaler**, 14 F.3d 8 (5th Cir. 1994).

²**Denton**.

³**Thornburgh v. Abbott**, 490 U.S. 401 (1989).

⁴482 U.S. 78 (1987). We must examine whether: (1) the underlying governmental objective is legitimate and neutral; (2) there is a rational relationship between the regulation and its objective; (3) alternative means of exercising the constitutional

balancing test. In the case at bar we must determine whether the penological interest(s) at stake suffices to support the restriction of the prisoners' rights to outside publications. Applying the footnoted balancing test we are not persuaded that classifying a college directory as contraband is such a self-evident component of sound penological administration that any first amendment challenge thereto necessarily lacks an arguable basis in law or fact.⁵ The district court's threshold dismissal, therefore, was an abuse of discretion.

The trial court also found that the action challenges the administration of an ongoing remedial order,⁶ concluding on the basis of **Gillespie v. Crawford**⁷ that Turner may institute contempt proceedings or seek to intervene in that class action, but he cannot file a separate section 1983 complaint. This goes beyond our holding in **Gillespie**. While that decision bars individual actions for injunctive and declaratory relief which challenge

right remain open to the inmate; and (4) there are alternatives to barring the item. In addition, we weigh the impact of the asserted right on the guards and other inmates. See Thornburgh.

⁵Turner urged first and fourteenth amendment rights. The subject regulation expressly bars "only . . . physical items that present[] a substantial danger to the safety or security of staff, inmates or institutions, and [does] not, therefore, include any written material disapproved for its content." This wording alone elevates the question whether the instant seizure relates to a legitimate penological interest above the initial frivolous threshold.

⁶**Guajardo v. Estelle**, 568 F.Supp. 1354 (S.D.Tex. 1983). The contraband regulation in question, see supra note 5, was adopted pursuant to the **Guajardo** order.

⁷858 F.2d 1101 (5th Cir. 1988).

existing remedial orders, it permits actions for monetary relief. Whereas Turner's claim for equitable relief properly was dismissed, his action for damages survives.

The judgment of the district court is AFFIRMED IN PART and is VACATED and REMANDED IN PART for further proceedings not inconsistent herewith.