No. 12-4305

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TERRITORY OF THE VIRGIN ISLANDS, *et al.*

Defendants-Appellees

*RONALD E. GILLETTE,

*Appellant (Pursuant to Fed. R. App. P. 12(a))

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE VIRGIN ISLANDS

_____

BRIEF FOR THE UNITED STATES AS APPELLEE

_____

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

RULES:

MISCELLANOUS:

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction under 42 U.S.C. 1997a(a) and 48 U.S.C. 1612. On November 7, 2012, the district court denied proposed intervenor's

motion for intervention. App. 1:4-5.[1] On November 14, 2012, the appellant filed a timely notice of appeal. App. 1:1-3. This Court has jurisdiction under 28 U.S.C. 1291 to consider the district court's denial of intervention.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in denying appellant's motion to intervene as of right as untimely.

2. Whether the district court abused its discretion in denying appellant's motion to intervene as of right because the United States adequately represents appellant's interest in this litigation.

3. Whether the district court abused its discretion in denying appellant's motion for permissive intervention.

STATEMENT OF RELATED CASES

This case has not been before this Court previously.

Appellant's criminal conviction is on appeal before this Court. See *United States* v. *Gillette*, No. 09-2853 (3d Cir.). That matter has been fully briefed and oral argument was held on April 24, 2013.

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[1] "App. __:__" refers, respectively, to the volume and page number of the Joint Appendix. "S. App. __" refers to the page number of the Supplemental Appendix filed by the United States. "R. __:__" refers, respectively, to the document number on the district court docket sheet and page number. "Br. __" refers to the original page number of appellant's opening brief and not the pagination recorded by this Court.

On January 31, 2012, appellant filed a Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. 2241 in United States District Court, District of the Virgin Islands, which seeks medical and mental health treatment for himself while incarcerated. See S. App. 1-42 (*Gillette* v. *Keith Francois, Warden of the Golden Grove Correctional Facility, et al.* (*Francois*), No. 1:12cv00010 (D.V.I.), R. 1).[2]

STATEMENT OF THE CASE

1. In 1986, the United States filed a complaint pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997 *et seq.*, alleging that the government of the Territory of the Virgin Islands and other defendants (collectively, the Virgin Islands or defendants) has violated the constitutional rights of individuals incarcerated at the Golden Grove Adult Correctional Facility in St. Croix, United States Virgin Islands (Golden Grove). See App. 2:62-63 (February 8, 2012 Memorandum Opinion (2/2012 Opinion) (summarizing history of the case).[3] The Complaint addressed four areas of constitutional abuse or neglect:

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[2] The Habeas Petition included Exhibits A-E. Exhibit A is included in the Supplemental Appendix. See S. App. 17-42. Exhibit B, January 24, 2012, correspondence from Dr. Maria T. Margarida Julia to Joseph A. DiRuzzo, is included in the Joint Appendix. See App. 2:167. Exhibits C-E are pleadings and the trial transcript in *United Steelworkers of America* v. *Government of the Virgin Islands*, No. 3:11cv76 (D.V.I.). Exhibits C-E are not relevant to this appeal and therefore are not included in the Supplemental Appendix.

[3] Documents filed with the district court prior to Document No. 113, and dated earlier than February 1996, are not available electronically on PACER.

inadequate medical care, inadequate protection from unreasonable fire safety risks, inadequate protection from violence by other inmates and staff, and inadequate sanitation within the facility. See App. 2:63 (2/2012 Opinion).

In 1986, the United States and defendants entered into a Consent Decree in which defendants agreed to improve conditions, and provide care and protection, that met constitutional standards to inmates and pretrial detainees at Golden Grove. See App. 2:63 (2/2012 Opinion). Between 1990 and 2010, in response to the defendants' slow and ineffectual efforts to implement the Consent Decree, the parties entered into supplemental agreements to define the specific action defendants needed to take. The district court issued findings of contempt and remedial orders that required specific action by defendants. See 2:64-66 (2/2012 Opinion).

In June 2011, the United States filed a Motion for Appointment of a Receiver with supporting memorandum. See R. 541; see also S. App. 17-42 (Mem. of Points And Authorities In Supp. Of U.S.' Mot. For Appointment Of A Receiver). In July 2011, the defendants filed a Motion to Terminate Prospective Relief, which triggered the automatic stay provisions of the Prison Litigation Reform Act (PLRA), 18 U.S.C. 3626(e)(2)-(3). See App. 2:66-67 (2/2012 Opinion). Since approximately September 2011, and with greater intensity after February 2012, the parties engaged simultaneously in discovery regarding

conditions at Golden Grove in preparation of litigation, and settlement negotiations to try to create a new agreement to address the outstanding, unresolved conditions of confinement. See R. 679:5 (VI Opp'n to Intervention); R. 680:5-6 (U.S. Opp'n to Intervention).

On February 8, 2012, the district court ruled that all but one of the substantive orders issued after the 1986 Consent Decree constituted prospective relief under the PLRA, and did not include findings required under the PLRA. See App. 2:62 (2/2012 Opinion). The district court also ruled that there was insufficient evidence of Golden Grove's current conditions before the court. See App. 2:62. Accordingly, the district court stated that an evidentiary hearing was necessary to determine whether "prospective relief remains necessary to correct a current and ongoing violation of a federal right at Golden Grove under § 3626(b)(3) of the PLRA, and, if so, to ensure that the prospective relief is narrowly tailored to that violation in the manner required by the PLRA." See App. 2:62.

On February 28, 2012, the district court issued a Scheduling Order that contained a compressed timetable for discovery, and scheduled an evidentiary hearing for July 25, 2012. See App. 2:92-97. On June 19, 2012, the district court extended discovery deadlines and rescheduled the evidentiary hearing to begin January 7, 2013. See R. 673:3-5.

2. On July 21, 2012, appellant Ronald Gillette, an inmate at Golden Grove, filed a Motion to Intervene (App. 2:103-105) and supporting memorandum. See App. 2:106-167. On August 6, 2012, the United States and Virgin Islands opposed appellant's motion. See R. 679-680. On August 10, 2012, appellant filed reply memoranda, which included a "Petition In Intervention." See App. 2:174-213.

3. On August 22, 2012, in response to the parties' representations to the district court, the district court ordered the parties to submit a proposed settlement agreement by August 31, 2012. See R. 688 (text docket entry). On August 31, 2012, the United States and the Virgin Islands submitted a Joint Motion To Enter Consent Judgment (App. 2:214-223) and a proposed Settlement Agreement. See App. 2:224-244. On October 30, 2012, the district court issued an Order that instructed the parties to submit briefs in support of the joint motion to enter the Settlement Agreement by December 14, 2012. See R. 691.

4. On November 7, 2012, the district court denied appellant's motion for intervention. See App. 1:4-16. The district court held that appellant did not satisfy two of four requirements of Federal Rule of Civil Procedure 24(a)(2) for intervention as of right; appellant's motion was untimely and he failed to prove that his interests were not and would not be sufficiently protected and represented by the United States. See App. 1:7-15. For the same reasons, the district court denied appellant permissive intervention under Rule 24(b). See App. 1:15-16.

On November 14, 2012, appellant filed a timely notice of appeal from the denial of his motion to intervene. See App. 1:1-3.

On May 14, 2013, the district court entered an Order that adopted the United States' Proposed Findings Of Fact And Conclusions Of Law In Support Of Settlement Agreement, granted the parties' Joint Motion To Enter Consent Judgment, and entered the Settlement Agreement. See S. App. 43-45. On May 14, 2013, the district court also entered an Order that denied the Virgin Islands' Motion To Terminate Prospective Relief. See S. App. 46-47.

STATEMENT OF FACTS

1. Summary Of Litigation, 1986-2011

Through this litigation, the United States has sought programmatic change to ensure constitutional conditions for inmates and pretrial detainees at Golden Grove. See App. 2:62-66 (2/2012 Opinion). The Complaint addressed defendants' failure to: "1) [p]rovide inmates 'minimally adequate medical care for their serious medical needs,' 2) [p]rotect prisoners from 'unreasonable fire safety risks to their lives and safety;' 3) [a]fford the necessary staff supervision and security to protect inmates from 'wanton and reckless physical violence by other inmates or staff;' and 4) [p]rovide 'minimally adequate sanitation to protect inmates from unreasonable risks to their physical health.'" App. 2:63 (2/2012 Opinion) (quoting Complaint). Due to the defendants' noncompliance with the terms of the Consent

Decree, the parties entered into Agreements in 1990 and 2003 that identified specific steps for defendants to take to establish constitutional conditions at Golden Grove. See App. 2:64 (2/2012 Opinion). In 2006, the district court found defendants in contempt for failure to make sufficient progress in implementing the terms of the 1986 Consent Decree and the 1990 and 2003 agreements. See App. 2:64-65 (2/2012 Opinion). The district court issued additional remedial orders in 2007, 2009, and 2010. See App. 2:65-66 (2/2012 Opinion).

In June 2011, the United States filed a Motion to Appoint a Receiver and supporting memorandum. See R. 541. On July 28, 2011, the Virgin Islands moved to terminate this litigation. See R. 565. Since approximately September 2011, the parties simultaneously engaged in discovery and negotiations to try to resolve the pending disputes. See R. 679:5 (VI Opp'n to Intervention); R. 680:5-6 (U.S. Opp'n to Intervention).

2. The District Court's February 2012 Ruling, The Parties' Discovery, And Settlement Negotiations

On February 8, 2012, the district court issued a Memorandum Opinion that held that all but one court order issued after the 1986 Consent Decree granted prospective relief and failed to include requisite statutory PLRA findings. See App. 2:61-91. The district court also concluded that there was insufficient evidence in the record of Golden Grove's current conditions of care for inmates, and that an evidentiary hearing therefore was necessary to address such conditions.

See App. 2:62. On February 28, 2012, the district court set discovery deadlines, and scheduled an evidentiary hearing for July 25, 2012. See App. 2:92-97 (Order).

Between February and July 2012, the parties engaged in extensive discovery to prepare for the upcoming hearing and simultaneously continued settlement negotiations. See App. 2:98-102 (Joint Mot. to Amend the June 19, 2012 Disc. Order). The United States, with experts, conducted site visits to Golden Grove, and reviewed voluminous records relevant to the conditions at Golden Grove. The parties sought short extensions in the discovery schedule due to difficulties in defendants' production of these documents, necessary site visits, and other logistics. On several occasions, the parties stated that they were continuing to negotiate a potential settlement. See R. 653 (Joint Mot. to Amend Deadlines); R. 655 (Mot. and Mem. to Amend Feb. 28, 2012 Disc. Order); App. 2:98-102 (Joint Mot. to Amend June 19, 2012 Disc. Order).

The last court schedule prior to appellant's motion to intervene required the parties to complete expert discovery by November 2, 2012, with the evidentiary hearing scheduled to begin January 7, 2013. See R. 673:3, 5. On July 2, 2012, the parties jointly moved to extend the discovery schedule briefly, but did not ask the district court to change the hearing date. See App. 2:98-102.

3. Appellant's Motion For Intervention

On July 21, 2012, appellant moved to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a)(2), and alternatively sought permissive intervention under Federal Rule 24(b). See App. 2:103-122.

Appellant has been incarcerated at Golden Grove since he was sentenced on June 19, 2009. See App. 1:7-8 (11/2012 Opinion).[4] Appellant asserted that, as an inmate at Golden Grove in need of medical and mental health care, he had a sufficient interest that would be affected by the outcome of this litigation. See 2:108-109 (Mem. in Supp. of Mot. for Intervention). Appellant asserted that his motion was timely because the parties had recently moved (July 2) to extend the deadlines for discovery, and therefore his participation in discovery would not delay the proceedings because he proposed only one witness (Dr. Maria T. Margarida Julia), and that his counsel "only *recently* came to realize of [sic] the deplorable conditions at Golden Grove." App. 2:118-120 (emphasis added).

Appellant also asserted that the United States did not adequately represent his interests and that his interests were "coextensive, but not coterminous, with the United States' interests." App. 2:116-117. Finally, appellant asserted that he met

[4] Appellant was convicted of multiple counts of aggravated rape and unlawful sexual contact in violation of Virgin Islands law. He was sentenced to 155 years of incarceration, a $50,000 fine, and $220,000 in restitution. See *United States* v. *Gillette*, No. 1:07cr50 (D.V.I.), R. 325 (Judgment).

the criteria for permissive intervention because he "has a claim that he shares with the United States" and his participation will neither delay the proceedings nor prejudice the existing parties. App. 2:120-121. Appellant's pleadings included correspondence dated January 24, 2012, from Dr. Julia to appellant's counsel that advised that appellant needed "urgent medical care" and recommended that appellant "receive psychiatric and psychological treatment" to "stabilize[]" his condition. App. 2:167. Appellant did not file a complaint in intervention with his motion to intervene. Cf. Fed. R. Civ. P. 24(c) (motion for intervention must "be accompanied by a pleading that sets out the claim or defense for which intervention is sought").

On August 6, 2012, the United States and the Virgin Islands opposed appellant's motion. See R. 679-6890. On August 10, 2012, appellant filed reply memoranda with attachments (see App. 2:174-197) including a "Petition In Intervention." See App. 2:198-213; see also R. 682 (Reply to Opp'n by the United States). On August 13, 2012, appellant also filed notices of his first request for production of documents that were served on the United States and the Virgin Islands (see R. 685-686) and his initial Rule 26 disclosures. See R. 684.

4. Appellant Counsel's Actual Knowledge Of Appellant's Interests In This Litigation[5]

Current counsel for appellant was appointed on January 13, 2010, to represent appellant in his criminal appeal. See Docket Sheet, *United States* v. *Gillette*, No. 09-2853 (3d Cir.). In July 2011, Dr. Julia, a psychiatrist, interviewed appellant and evaluated his mental competency. See App. 2:132-133 (March 2012 competency hearing).[6] During her interview, Dr. Julia also identified some of appellant's medical needs. See App. 2:134-135 (March 2012 competency hearing).[7] On August 7, 2011, Dr. Julia submitted a report to appellant's counsel with her opinion of appellant's mental competency. See App. 2:132-133 (March

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[5] Counsel asserts (Br. 21) that "Gillette is not capable of litigating for himself," and therefore the assessment of delay should not be based on Gillette's actual knowledge but counsel's knowledge of this litigation, his client's interests, and counsel's actions. While the United States does not concede Gillette's incompetency, the United States' response is based on when Gillette's counsel knew or should have known that his client's interests in this litigation were affected.

[6] At counsel's request, this Court had approved the appointment of an expert to review appellant's competency to independently withdraw his appeal, notwithstanding his counsel's contrary advice. See Order, Sept. 15, 2010, *United States* v. *Gillette*, No. 09-2853 (3d Cir.). On January 17, 2011, counsel moved this Court for a limited remand to assess appellant's competency, and this Court granted that motion. See Order, Feb. 17, 2011, *United States* v. *Gillette*, No. 09-2853 (3d Cir.).

[7] Dr. Julia's report, previously filed under seal in the criminal proceeding, is now a public document. See *United States* v. *Gillette*, No. 1:07cr50 (D.V.I.), R. 390-1.

2012 competency hearing). On January 24, 2012, Dr. Julia advised appellant's counsel that appellant has been in need of medical care due to a long-standing medical condition. See App. 2:167; see also *United States* v. *Gillette*, No. 1:07cr50 (D.V.I.), R. 390-1:3 (Dr. Julia's report). Based on her testimony during the March 2012 hearing, it does not appear that Dr. Julia received additional records regarding appellant's condition after submission of her August 2011 report. See App. 2:132-134, 144-146.

On January 31, 2012, approximately six months prior to his motion for intervention, appellant filed a Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. 2241 in U.S. District Court, District of the Virgin Islands, seeking immediate medical and psychiatric care. See S. App. 1-42. Gillette's habeas petition names the Warden of Golden Grove and the Territory of the Virgin Islands as defendants. See S. App. 3. Gillette also named the United States as a defendant as "the ultimate sovereign responsible for the Territory of the Virgin Islands, and acts as *parens patriae*." S. App. 3. In his petition (see S. App. 3-7), Gillette extensively quoted the United States' Memorandum in Support of its Motion for Appointment of a Receiver that was filed in *this* case on June 9, 2011. See S. App. 17-28. Dr. Julia's January 2012 letter was included with the petition. See S. App. 10.

On July 20, 2012, the United States moved to dismiss the habeas litigation and argued that the proper defendant for a prisoner's habeas petition is the warden of the facility where the prisoner is being held, and that the United States "does not have control in any way over Gillette's treatment at Golden Grove." *Gillette* v. *Francois*, No. 1:12cv00010 (D.V.I.), R. 23:3-4.[8] As noted, on July 21, 2012, Appellant filed his motion to intervene in *this case*. See App. 2:103-105.

5. The Parties' Proposed Settlement Agreement

On August 31, 2012 – 21 days after briefing on intervention was completed – the United States and defendants submitted a Joint Motion To Enter Consent Judgment (App. 2:214-223), and a proposed Settlement Agreement. See App. 2:224-244. The proposed Agreement includes a comprehensive plan to ensure the development and implementation of reforms that will provide constitutional care to inmates at Golden Grove. See App. 2:216-218 (Joint Mot. to Enter Consent J.); App. 2:227-236 (Agreement). The proposed Agreement addresses: (1) medical and mental health care, (2) inmate safety and supervision (including classification of inmates for housing and use of force policies), (3) fire and life safety, (4)

[8] While the motion to dismiss is pending, the district court issued an order that stayed all discovery against the United States. *Gillette* v. *Francois*, No. 1:12cv00010 (D.V.I.), R. 45. The district court further noted that dismissal of the United States would not dispose of the entire litigation. See R. 45:2.

environmental health conditions (including housekeeping, sanitation, and physical plant conditions), and (5) training of Golden Grove staff. See App. 2:227-236.

The Agreement identifies specific topics and duties that must be addressed by the defendants, but gives defendants discretion (subject to approval by the United States and the Monitor) to develop the specific policies and practices. See App. 2:227-238. For example, defendants must develop policies to address "screening, assessment, treatment, and monitoring of prisoners' medical and mental health needs." App. 2:232. More specifically, the defendants must address 19 topics with subtopics in its policies and practices related to medical and mental health care, including "[a]dequate intake screenings for serious medical and mental health conditions," "[c]omprehensive initial and/or follow-up assessments," "timely access to and provision of adequate medical and mental health care for serious chronic and acute conditions," and "[c]ontinuity, administration, and management of medications." App. 2:232-234. Under the Agreement, the mental health treatment policies and programs must include "timely, current, and adequate treatment plan development and implementation; * * * adequate mental health programs for all prisoners with serious mental illness; * * * adequate psychotropic medication practices[;]" comprehensive training for staff; and cessation of placement of inmates with serious mental illness in segregated housing or lock-down. App. 2:234.

On May 14, 2013, the district court approved the Settlement Agreement. See S. App. 43-45.

6. The District Court's Opinion Denying Intervention

On November 7, 2012, the district court issued a Memorandum Opinion denying the motion to intervene as of right for two independent reasons: appellant's motion was untimely and the United States adequately represented appellant's interests in medical care. App. 1:6-16. Relying on this Court's precedent, the district court found that the proposed intervenor's motion was untimely because of the advanced stage of the proceedings, the prejudice to the existing parties, and the absence of good reason for appellant's delay in seeking intervention. See App. 1:9-13. The district court specifically stated that briefing on the motion to intervene was completed within 12 days of the parties notifying the court of their intent to settle, and only 21 days prior to the parties' submission of the proposed Settlement Agreement. See App. 1:10. The district court was concerned that permitting appellant's intervention would delay and potentially "derail[]" the proposed settlement, which had been negotiated at arm's-length over an extended period of time, addressed complex issues, and resolved a case of long standing. App. 1:10. The district court acknowledged the comprehensive nature of the proposed Settlement Agreement and concluded that, if the Agreement was approved, appellant's intervention "would serve only to delay the conclusion of the

litigation and the remediation of the prison conditions at Golden Grove." App. 1:12. Third, the district court concluded that appellant and his counsel were aware, or at least should have been aware, of his interests in this litigation "at least six months" before filing the motion to intervene (which was when he filed his petition for habeas corpus), and he did not provide a "persuasive reason for his delay." App. 1:13.

The district court also concluded that while appellant has an interest in this litigation, he did not establish that the United States does not adequately represent his interests based on the three factors this Court has identified: divergence of interest, collusion of the parties, or failure to diligently prosecute the case. See App. 1:13-15. First, the district court found that appellant only "offers abstract conjecture" that his and the United States' interests in ensuring constitutional levels of medical and mental health care "are not aligned." App. 1:14. The district court concluded that appellant's substantial quotation from and reliance on the United States' description of conditions at Golden Grove (which appellant quoted in the memorandum in support of intervention), establish the convergence of interests of the United States and appellant. See App. 1:14. In addition, the court held that appellant had not alleged or established any collusion between the parties, nor did he prove any lack of diligence by the United States. See App. 1:14-15. Moreover, the district court concluded that appellant did not rebut the presumption

of adequacy of representation that attaches when the government is a party. See App. 1:15.

Finally, the district court denied permissive intervention for the same reasons it denied intervention as of right: "his motion is untimely, would delay litigation and prejudice the parties, and his intervention is unnecessary given that the United States adequately represents his interests in this matter." See App. 1:16.

SUMMARY OF ARGUMENT

1. The district court did not abuse its discretion in denying the motion to intervene because the motion was untimely. See *NAACP* v. *New York*, 413 U.S. 345, 365-366 (1973); *Choike* v. *Slippery Rock Univ. of Pa.*, 297 F. App'x 138, 140 (3d Cir. 2008). Appellant Gillette was aware of this litigation at least six months prior to filing his motion to intervene. During that time, the United States and government of the Virgin Islands had engaged in extensive discovery in preparation for a scheduled evidentiary hearing and actively pursued complex negotiations towards a settlement agreement. Approximately one month after the proposed intervenor's motion, the parties submitted a comprehensive, proposed Settlement Agreement. Given the advanced stage of the proceedings, the parties would have been unduly prejudiced by the delay intervention would have caused. Moreover, appellant failed to identify any adequate reasons for his six-month delay

in filing his motion. On this record, the district court acted well within its discretion in denying the motion to intervene as untimely.

2. The United States brought this action in 1986 pursuant to CRIPA to ensure constitutional treatment of all current and future inmates at Golden Grove. See 42 U.S.C. 1997a(a). The proposed intervenor, an inmate since 2009, cannot show that his interests are not adequately represented by the United States. The terms of the proposed Agreement make clear that the comprehensive reforms agreed to by the parties will address even more than what appellant seeks for himself in the area of medical and mental health care. The Agreement will ensure constitutional levels of medical and mental health care for all inmates, as well as improved conditions on a wide range of daily living conditions at Golden Grove.

3. The district court's decision to deny permissive intervention for the same reasons as it denied intervention as of right – untimeliness and adequate representation – is fully supported by this Court's precedent and well within the district court's discretion. See *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 500 (3d Cir. 1982); *Hoots* v. *Pennsylvania*, 672 F.2d 1133, 1135-1136 (3d Cir. 1982).

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PROPOSED INTERVENOR'S MOTION AS UNTIMELY

A. Standard Of Review

The denial of a motion for intervention as of right is reviewed for an abuse of discretion. See *NAACP* v. *New York*, 413 U.S. 345, 365-366 (1973); *Benjamin* v. *Department of Pub. Welfare*, 701 F.3d 938, 947 (3d Cir. 2012); *Harris* v. *Pernsley*, 820 F.2d 592, 597 (3d Cir.), cert. denied, 484 U.S. 947 (1987). This Court will reverse a district court's order denying intervention as of right only if the court "[has] applied an improper [legal] standard or reached a decision * * * we are confident is incorrect." *Benjamin*, 701 F.3d at 947 (citation and internal quotation marks omitted).

B. Principles Of Intervention As Of Right Under Rule 24(a)(2)

Pursuant to Federal Rule of Civil Procedure 24(a)(2), a proposed intervenor must satisfy four criteria for intervention as of right: "(1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party." *Harris*, 820 F.2d at 596. If any of these criteria are not met, the court must deny

intervention. See *Mountain Top Condo. Ass'n* v. *Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995).

Timeliness is a threshold requirement for intervention. See *NAACP*, 413 U.S. at 365; *Pennsylvania* v. *Rizzo*, 530 F.2d 501, 506 (3d Cir.) (citing *NAACP*, 413 U.S. at 365-366), cert. denied, 426 U.S. 921 (1976). This Court has explained the timeliness inquiry requires consideration of "all [of] the circumstances," and assesses three factors: "(1) how far the proceedings have gone when the movant seeks to intervene, (2) the prejudice which resultant delay might cause to other parties, and (3) the reason for the delay." *Choike* v. *Slippery Rock Univ. of Pa.*, 297 F. App'x 138, 140 (3d Cir. 2008) (quoting *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 500 (3d Cir. 1982)); see *NAACP*, 413 U.S. at 365-366; *Mountain Top Condo.*, 72 F.3d at 369; *Rizzo*, 530 F.2d at 506.

In *Choike*, for example, this Court affirmed the district court's denial of intervention because the putative intervenors' request was untimely. 297 F. App'x at 141-142. After the University terminated five men's sports (including wrestling) and three women's sports programs, female student athletes filed suit alleging that the school's actions resulted in inequitable athletic opportunities and discriminated against women, violating Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq*. See *Choike*, 297 F. App'x at 139. The potential intervenors, a group of male student wrestlers, filed their motion after the district

court had granted *preliminary* approval of a settlement. See *ibid.*; *id.* at 141. The putative intervenors filed their motion six months after the complaint was filed, more than five months after discovery had closed and a preliminary injunction hearing had been held, and 11 months after they first learned that their rights (the elimination of the wrestling program) might have been affected by the university's action. See *id.* at 141-142. This Court concluded in *Choike* that the district court did not abuse its discretion to deny intervention given the advanced stage of the proceedings, the significant "potential for prejudice" that would result for the parties who had negotiated a tentative settlement, and the absence of a legitimate reason for the proposed intervenors' delay in filing their motion. *Ibid.*

Similarly, in *In re Fine Paper*, 695 F.2d at 497-501, this Court affirmed the denial of a motion for intervention on timeliness grounds. In *In re Fine Paper*, putative intervenors filed a motion more than two and one-half years after the district court's ruling on class certification excluded them, and almost six months after the court entered final judgment approving the parties' settlement. *Id.* at 497, 499. Given the closure of the litigation, the potential prejudice to the parties, including "dilution of the settlement fund, relitigation of the class issue, or reevaluation of the adequacy of the settlement," and the absence of a justification for the purported intervenors' failure to act in a timely manner, this Court found no abuse of discretion in denying the motion. *Id.* at 500-501; see *Donovan* v. *United*

Steelworkers of Am., AFL-CIO, 721 F.2d 126, 127 (3d Cir. 1983) (motion to intervene was untimely when it was filed 13 months after the complaint was filed, all pretrial proceedings had been completed, and the case was scheduled for trial), cert. denied, 466 U.S. 978, and 467 U.S. 1252 (1984).

In contrast, in *Mountain Top Condominium*, 72 F.3d at 370, this Court held that a motion to intervene was timely when it was filed approximately one month after the proposed intervenors learned that their interests might be affected, and the original parties had engaged in only nominal discovery over a four-year period and had not filed any dispositive motions or a proposed settlement. See also *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 314-315 (3d Cir. 2005) (motion to intervene by class members six weeks prior to fairness hearing on a proposed settlement and within the time limit for class members to opt-out was "presumptively timely"; a remand was required because the district court did not adequately address claims of collusion or explain its denial of intervention based on prejudice); *United States* v. *Alcan Aluminum, Inc.*, 25 F.3d 1174, 1182 (3d Cir. 1994) (motion to intervene after a consent decree was filed was timely when government counsel had "induced" intervenors' counsel to believe its interests were not affected by the consent decree).

C. The District Court Did Not Abuse Its Discretion In Determining That Appellant's Motion To Intervene Was Untimely

In accordance with this Court's precedent, the district court correctly considered the totality of the circumstances and determined that appellant's motion to intervene was untimely because of the advanced stage of the proceedings, the prejudice intervention would have caused to the parties, and the inadequacy of appellant's reasons for his delay in filing his motion. App. 1:9-13.

1. The Advanced Stage Of The Proceedings

After setting out the standard to assess the timeliness of a motion to intervene, the district court first concluded that, at the time of appellant's motion to intervene, the "proceedings have progressed to an advanced stage." App. 1:9-10 (11/2012 Opinion). The district court explained that briefing on appellant's motion for intervention was completed only 12 days prior to the parties' notice to the court that they had reached a settlement agreement, and only 21 days before the parties submitted the proposed Settlement Agreement. See App. 1:10. The district court expressed its "concern[] that intervention at this late stage would significantly disrupt the proceedings in view of the current status of the litigation – including possibly derailing a proposed settlement of this matter that the parties have stated 'is the result of months of arms-long [sic] negotiations.'" App. 1:10 (citation omitted). The district court cited other instances when intervention was untimely

when it was sought before a settlement agreement was fully approved. See App. 1:10-11 (citing *Choike*, 297 F. App'x at 141).

The district court's conclusion that the motion for intervention was untimely based on the parties' submission of the proposed Settlement Agreement so soon after the motion to intervene is supported by this Court's precedent, and well within the court's discretion. See *Choike*, 297 F. App'x at 141-142. In *Choike*, *ibid.*, this Court upheld the denial of a motion for intervention that was filed after the district court had preliminarily approved a consent decree. See pp. 21-22, *supra*. In *Choike*, this Court approvingly cited *Orange Cnty.* v. *Air California*, 799 F.2d 535, 538 (9th Cir. 1986), cert. denied, 480 U.S. 946 (1987), where the Ninth Circuit held intervention was untimely when a stipulated settlement had not yet been approved. See also *Empire Blue Cross & Blue Shield* v. *Janet Greeson's A Place For Us, Inc.*, 62 F.3d 1217, 1219-1220 (9th Cir. 1995) (motion to intervene untimely when filed on the day of oral announcement of settlement, and three and five days before court approval of settlement and a related order) (citing *Orange Cnty.*, 799 F.2d at 538); *Donovan*, 721 F.2d at 127.

The timing of appellant's motion, even if shortly before notice and submission of the proposed Settlement Agreement rather than simultaneously with or after preliminary approval of an agreement, is not substantively different from the timetable in *Choike*, 297 F. App'x at 141, *Orange County*, 799 F.2d at 538, or

Empire, 62 F.3d at 1219-1220. The question of timeliness should not depend solely on whether the motion is filed 10 days before or after a proposed agreement is submitted to a district court. In both instances, the parties have reached an advanced stage of the long-standing proceedings that warrant a denial of intervention. In addition, the district court's concern here that intervention would derail the proposed agreement is clearly valid. See *Choike*, 297 F. App'x at 141; *D'Amato* v. *Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001) (motion to intervene filed three days before a fairness hearing to assess a settlement agreement was untimely when putative intervenor was aware of the litigation, had no explanation for his delay, and intervention would "potentially derail the settlement" negotiated over several months).

Appellant argues (Br. 18-19) that his intervention is timely because there was, and remains, only a "possibility" of a settlement and "a resolution to this matter is not in the near future." Appellant's claims are incorrect. First, the status of proceedings near the time of appellant's motion was far more advanced than a mere "possibility" of settlement. As noted, only a few weeks after the briefing on intervention was complete, the parties submitted a 21-page proposed Settlement Agreement for the district court's review and approval. See App. 2:224-244 (Settlement Agreement). The Agreement, the product of extensive and time-consuming negotiations, will produce comprehensive reforms at Golden Grove by

the defendants' development and implementation of policies and practices that address numerous topics. See App. 2:214-220 (Joint Mot. to Enter Consent J.); App. 2:224-244 (Settlement Agreement); see also pp. 14-15, *supra*.

Second, the appellant's references (Br. 18-19) to facts or proceedings after the district court's ruling on timeliness are not relevant to this appeal and in some instances his "facts" are wrong.[9] The district court assesses timeliness based on the then-current stage of the proceedings, and not conjecture as to future events. In turn, this Court's assessment of whether the district court abused its discretion in denying intervention must be based on the facts available to the district court, including the status of the case at the time of the district court's ruling, and not subsequent events.

[9] Appellant erroneously asserts (Br. 19) that the settlement has "fallen through." The parties had a temporary disagreement after filing the proposed Settlement Agreement and after the court ruled on the motion to intervene. See R. 699 (United States' Mot. to Withdraw Joint Mot. for Settlement); R. 713 (Order approving United States' motion to withdraw their original motion to withdraw). On February 8, 2013, the United States filed proposed Findings of Facts and Conclusions of Law in Support of Settlement Agreement (see R. 716) and the Virgin Islands filed a statement of non-opposition to the United States' pleading. See R. 720. As noted, the district court adopted the United States' proposed findings of fact and conclusions of law, and approved the Settlement Agreement. S. App. 43-45.

2. The Potential Prejudice To The Parties

In its opinion, the district court noted this Court's guidance that the prejudice parties may suffer as a result of a proposed intervenor's delay in seeking intervention is inherently tied to the stage of the proceedings when the motion is filed. See App. 1:10 (citing *Choike*, 297 F. App'x at 141) (11/2012 Opinion). Following that guidance, the district court correctly determined that denial of intervention was further supported because the parties would suffer prejudice if intervention were granted. See App. 1:11-12.

First, the district court held that intervention would prejudice the parties' "extensive discovery" efforts that began after the defendant's Motion to Terminate Prospective Relief, approximately one year before the motion for intervention. See App. 1:11. The parties' discovery included the review of "thousands of pages of documents," site visits with experts, and depositions. App. 1:11. The district court stated that permitting intervention could "undermine[]" discovery that had been conducted thus far and may require more discovery and more time than the court and parties had anticipated, in order to prepare fully for an evidentiary hearing. See App. 1:11.[10]

[10] After the district court's February 2012 Order, it had issued several scheduling orders that imposed significant demands on the parties to complete discovery in short order in preparation for an evidentiary hearing. See, *e.g.*, App. 2:92-97 (2/28/2012 Scheduling Order). Short extensions were granted to address

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Second, the district court highlighted the prejudice to the parties that would occur if intervention were approved, based on the parties' simultaneous and extensive negotiations over the past year and the resulting "detailed and comprehensive" proposed Settlement Agreement. App. 1:12. "To introduce [Gillette] into the equation now would significantly delay the resolution of the case given the complexity of the issues and the substantial work done by the parties." Att. 1:11. If the district court approved the proposed Agreement, the court stated intervention "would serve only to delay the conclusion of the litigation and the remediation of the prison conditions at Golden Grove." App. 1:12.

Permitting intervention when substantial discovery had been completed, deadlines for remaining discovery were upcoming, and an evidentiary hearing was scheduled to begin in four months are additional factors that reflect an undue burden on the parties that would be caused by the late intervention. See *Donovan*, 721 F.2d at 127 (motion to intervene filed after all discovery and pretrial proceedings were complete could impose "substantial prejudice" on parties). The district court's conclusion that the potential prejudice to the parties – potentially thwarting the proposed agreement, delaying implementation of remedial efforts, or requiring additional discovery if an evidentiary hearing was held – further

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logistics and other problems with discovery. See, *e.g.*, R. 652 (4/18/2012 Order); R. 667 (5/21/2012 Order); R. 673 (6/19/2012 Order).

supported denial of intervention is reasonable and entirely consistent with this Court's decisions. See, *e.g.*, *Choike*, 297 F. App'x at 141-142 (motion to intervene filed after preliminary approval of settlement agreement has significant "potential for prejudice" to parties); *Donovan*, 721 F.2d at 127; *Rizzo*, 530 F.2d at 507 ("basic fairness to the parties and the expeditious administration of justice mandates the denial of the [untimely] motion to intervene"). Accordingly, the appellant cannot establish that the district court abused its discretion in denying intervention.

Appellant asserts (Br. 19) that the district court erred by finding that, had intervention been granted, the parties would be prejudiced and intervention would cause undue delay of the proceedings. Neither allegation has merit.

Appellant places undue weight (Br. 20) on the district court's passing reference to the lengthy history of this case. First, the district court did not err in considering the history of this "generations-spanning litigation" (App. 1:11 n.1) and the significance of an agreement that will address long-standing problems at Golden Grove. Second, the relevant section of the district court's opinion (App. 1:11-12) makes clear that the district court found Gillette's proposed intervention would prejudice the existing parties based on the *then-current* status of the litigation – *i.e.*, the parties' simultaneous discovery efforts, and settlement negotiations the parties had engaged in after the defendant moved to terminate the

litigation in July 2011, and the parties' further efforts after the district court's February 2012 opinion ordering an evidentiary hearing under the PLRA.

Gillette also fails to show that the district court's finding that intervention would cause prejudice because of his delay of the proceedings is clear error. Appellant asserts (Br. 20) that he would only call one witness, Dr. Julia, the psychiatrist who assessed Gillette's competency in July 2011. Appellant's bald and erroneous assertion that, if he was permitted to intervene, the parties would have no need to depose Dr. Julia merely because she prepared a report of her assessment of Gillette's mental competency ignores standard discovery practice and the parties' obligation to conduct due diligence. In addition, appellant's counsel has not addressed the extensive document requests that he served on the parties, action that belies his assertion that he would not add substantially to the discovery process. See R. 685 (Notice of Service of Intervenor's First Request for Production Issued to United States); R. 686 (Notice of Service of Intervenor's First Request for Production Issued to Virgin Islands). The district court found that appellant's claim that "any such delay would be slight" was "unpersuasive," and appellant cannot show that finding is clear error. App. 1:11 n.1. Moreover, appellant has not responded – and cannot effectively refute – the district court's conclusion that if the court approved intervention, appellant could delay

implementation of significant, affirmative steps under the Agreement that will improve the conditions at Golden Grove. See App. 1:12 (11/2012 Opinion).[11]

3. The Reasons For Appellant's Delay In Moving To Intervene Are Inadequate To Warrant Late Intervention

The district court acted well within its discretion when it rejected appellant counsel's assertion that he moved promptly to intervene upon learning of this litigation, and that his client's interests could be affected by the litigation. See App. 1:12-13 (11/2012 Opinion).[12] Appellant's counsel has not identified a persuasive justification for his delay.

In accordance with this Court's decision in *Alcan Aluminum*, 25 F.3d at 1183, the district court correctly stated that any delay in moving for intervention should be measured from the time the movant knew or should have known that his

[11] If intervention was granted, the United States does not believe appellant's agreement is necessary for the district court to approve the Settlement Agreement. See *Local 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 529 (1986) (district court may approve a settlement agreement notwithstanding objecting intervenor when the intervenor had an opportunity to voice his objections, and the agreement does not impose duties or infringe the objector's rights). At a minimum, there would be additional litigation on this issue, which would further delay implementation of the Agreement.

[12] Appellant's arguments below (see App. 2:119) and before this Court regarding the reasons for the delay in the motion to intervene (Br. 21-23) are based on when *counsel* for the appellant was aware that his client's rights were affected by this litigation and when he moved to intervene. Without conceding limitations on Gillette's competency, the United States responds to these arguments. See p. 12 & n.5, *supra*.

rights might be affected by the litigation and must "persuasively explain his reason for delay." App. 1:12 (citing *Choike*, 297 F. App'x at 141). In his memorandum in support of his intervention motion, counsel claimed he "only recently came to realize of [sic] the deplorable conditions at Golden Grove" and lack of appropriate treatment for Gillette. App. 2:119. He also claimed he sought to protect Gillette's rights by filing the habeas petition for Gillette, and moved to intervene in this litigation immediately after the United States filed its motion to dismiss the habeas case. App. 2:119-120. The district court concluded that Gillette's counsel knew or should have known of this litigation, the conditions at Golden Grove, and that Gillette's interests could be affected by this litigation as of January 31, 2012, when counsel filed Gillette's Petition for a Writ of Habeas Corpus against the Warden of Golden Grove, the Territory of the Virgin Islands, and the United States. See App. 1:13 (11/2012 Opinion); S. App. 1-42 (Petition for Habeas). This is so because appellant's habeas petition extensively quoted the United States' Memorandum in Support of a Motion for Appointment of a Receiver, which was filed *in this case*. See S. App. 3-7, 17-28.[13]

[13] Gillette's "Petition In Intervention" (App. 2:198-213), in turn, is essentially verbatim of his Petition for Habeas Corpus, and therefore again recites facts set forth in the United States' memorandum supporting appointment of a receiver. This text is also cited in the appellant's opening brief. See Br. 8-13.

The district court's assessment of appellant's pertinent knowledge of this litigation and his timing in seeking intervention is in full accord with this Court's precedent. This Court has consistently denied intervention when the potential intervenor has failed to adequately explain the reason for the delay between his knowledge of the litigation or knowledge that his interests may be affected by it, and his motion to intervene. See, *e.g.*, *Choike*, 297 F. App'x at 141 (district court did not abuse its discretion in denying a motion to intervene as untimely when, *inter alia*, the proposed intervenors did not "convincingly explain [their] reason for the [at least six-month] delay in filing [their] motion to intervene"); *Delaware Valley Citizens' Council for Clean Air* v. *Pennsylvania*, 674 F.2d 970, 975 (3d Cir. 1982) (state legislator-intervenors' explanation that they did not file a motion to intervene until more than 21 months after entry of a consent decree because they are members of an "extremely busy [legislative] body" is not a "satisfactory" reason).

Now (Br. 21-22), counsel concedes that he was aware of the conditions at Golden Grove in January 2012; refers to his habeas petition, which establishes his knowledge of this lawsuit; and asserts that his motion to intervene was timely filed in July 2012 because it was filed soon after the United States filed a motion to dismiss itself as a party to Gillette's habeas petition. Counsel believes (Br. 6) that it was necessary to intervene in *this* litigation after the United States' motion to

dismiss in the habeas litigation to ensure that "all parties that are responsible for the incarceration of Gillette at [Golden Grove] are present."

The United States' posture in the separate habeas litigation does not provide a "convincing[] * * * reason" – indeed, any reason – for counsel's delay here. *Choike*, 297 F. App'x at 141; see *Donovan*, 721 F.2d at 127; pp. 13-14, *supra*. This Court has held that an individual's "tactical decisions" in litigation, including the pursuit of separate litigation on a claim arising from the same underlying facts as pending litigation in which the individual/proposed intervenor belatedly sought to intervene, is not a persuasive reason or a "meaningful justification" for the delay in a motion for intervention. See *Donovan*, 721 F.2d at 127. In *Donovan*, after unsuccessful efforts in independent litigation, the proposed intervenor moved to intervene only shortly before trial, and more than a year after the complaint was filed. See *ibid.* The motion was deemed untimely. See *ibid.* Similarly, appellant's decision to pursue habeas relief, but change tactics after the United States moved to dismiss itself from the habeas litigation, under this Court's precedent is not a "meaningful justification" for the delay in his seeking intervention in this litigation. *Ibid.*[14] In sum, appellant has failed to identify a

[14] Even if the United States is dismissed as a party in the habeas litigation, that case is not dismissed *in toto*, and Gillette may continue to seek relief against the Warden of Golden Grove. See *Gillette* v. *Francois*, No. 1:12cv00010 (D.V.I.), R. 45 (Order staying discovery against the United States). The availability of

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persuasive reason for his delay in moving to intervene so long after he knew of this litigation and his client's interests.

Finally, appellant mischaracterizes the district court's opinion in several ways. See Br. 22-23. Contrary to appellant's claim (Br. 22), the district court did not "[i]mplicit[ly]" conclude that appellant must simultaneously pursue habeas relief and seek intervention in this litigation. Moreover, the district court did not hold that, had appellant filed his motion to intervene at the time he filed his habeas petition, his motion would have been timely. Cf. App. 1:12-13 (appellant's delay in filing the motion to intervene after knowledge client's interests are affected by litigation supports denial of intervention). The district court's conclusion that his delay is another factor supporting lack of timeliness (see App. 1:12-13) does not, *a fortiori*, mean that if the motion was filed in January 2013, it would be timely.

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another forum to pursue claims for relief is yet another factor that weighs against appellant's intervention in this litigation. See *R & G Mortg. Corp.* v. *Federal Home Loan Mortg. Corp.*, 584 F.3d 1, 10 (1st Cir. 2009).

II

THE DISTRICT COURT CORRECTLY HELD THAT THE UNITED STATES ADEQUATELY REPRESENTS THE PROPOSED INTERVENOR'S INTERESTS

A. Standard Of Review

This Court reviews a district court's denial of intervention as of right for an abuse of discretion. See *Choike* v. *Slippery Rock Univ. of Pa.*, 297 F. App'x 138, 140 (3d Cir. 2008); *Harris* v. *Pernsley*, 820 F.2d 592, 597 (3d Cir.), cert. denied, 484 U.S. 947 (1987); p. 20, *supra*.

B. The United States Adequately Represents Appellant's Interests

Appellant's assertion (Br. 23-26) that the United States does not adequately represent his interests is without merit. The district court correctly rejected appellant's claim, and therefore acted well within its discretion to deny intervention on this second, independent basis.

A proposed intervenor can establish that his interests are not represented adequately by an existing party by proving: (1) the applicant's interest, while similar, diverges sufficiently from that of an existing party; (2) there is collusion between the existing parties; or (3) the representative party is not diligently pursuing the claim. See *Brody* v. *Spang*, 957 F.2d 1108, 1123 (3d Cir. 1992); see also *Hoots* v. *Pennsylvania*, 672 F.2d 1133, 1135 (3d Cir. 1982) (while the burden may be minimal, the proposed intervenor has the burden to establish inadequate

representation). "[A] government entity charged by law with representing the interests of the applicant for intervention" is presumed to represent the third party adequately. *Brody*, 957 F.2d at 1123; see *United States* v. *City of Phila.*, 798 F.2d 81, 90 (3d Cir. 1986) (citing *Pennsylvania* v. *Rizzo*, 530 F.2d 501, 505 (3d Cir.), cert. denied, 426 U.S. 921 (1976)); *Delaware Valley Citizens' Council for Clean Air* v. *Pennsylvania*, 674 F.2d 970, 973 (3d Cir. 1982) ("[w]hen a state is a party to a suit involving a matter of sovereign interest, it is presumed to represent the interests of its citizens"); *Rizzo*, 530 F.2d at 505.

The district court correctly concluded that appellant offered only "abstract conjecture" and no concrete examples of how his interests were not "align[ed]" with the United States. App. 1:14 (11/2012 Opinion). The court concluded that appellant's extensive quotation from the United States' memorandum in support of a receiver to describe his own interests very effectively refuted appellant's claim that his and the United States' interests diverged substantially. See App. 1:14. The district court also found that, while not raised by appellant, there was no evidence of any collusion by the United States and the Virgin Islands, nor evidence that the United States has not diligently pursued this case. See App. 1:14-15. Finally, the district court held that appellant did not rebut the presumption that the United

States adequately represented his interests. See App. 1:15 (citing *Brody*, 957 F.2d at 1123).[15]

The district court's analysis is in full accord with this Court's precedent. See *Brody*, 957 F.2d at 1123-1124; *City of Phila.*, 798 F.2d at 90 (proposed intervenors' challenge to party's litigation strategy does not establish divergence of interests); *Delaware Valley*, 674 F.2d at 973-974; *Rizzo*, 530 F.2d at 505; see also *United States* v. *City of Chi.*, 908 F.2d 197, 199 n.2 (7th Cir. 1990) (United States adequately represents interests of incumbents/putative intervenors in employment discrimination under Title VII that is resolved by consent decree even though incumbents sought more individual relief), cert. denied, 498 U.S. 1067 (1991). First, this Court has repeatedly stated that a party's decision to enter into a consent decree "does not mean that the [party] did not adequately represent the [proposed intervenor's] interests in the litigation." *Brody*, 957 F.2d at 1124 (quoting *Rizzo*, 530 F.2d at 505); *Delaware Valley*, 674 F.2d at 973-974 (state legislators did not identify an interest that diverged from the Commonwealth's interests and decision to enter into a consent decree); *Rizzo*, 530 F.2d at 505 ("Even if the injunction had been characterized as a consent decree, inadequate representation would not be

[15] The district court was "mindful" of this Court's concern when intervention as of right is denied on timeliness grounds and a proposed intervenor may be seriously harmed by that denial, and concluded that the United States' adequate representation of appellant's interests prevented any harm. See App. 1:12 n.2.

established ipso facto; any case, even the most vigorously defended, may culminate in a consent decree."). Thus, the fact that the parties have reached a settlement does not, by itself, alter the conclusion that the United States has and will continue to adequately represent appellant's interests in appropriate medical care. See *Delaware Valley*, 674 F.2d at 973-974; *Rizzo*, 530 F.2d at 505-506.

Second, the United States brought this case under CRIPA, 42 U.S.C. 1997 *et seq*. The Attorney General has specific authority to bring suits when it "has reasonable cause to believe that" a State or Territory, or official or employee of such, is "subjecting persons confined to an institution to egregious or flagrant conditions which deprive such persons" of constitutional rights. 42 U.S.C. 1997a(a). The constitutional claims the United States seeks to protect are exactly those appellant asserts for himself.

This Court should reject appellant's claim (Br. 25) that his and the United States' interests are "coextensive, but not conterminous." First, since "conterminous" is defined as "having a common boundary" and "coterminous," and "coterminous" is defined as "coextensive," appellant's claim here is unclear. See www.meriam-webster.com/dictionary/conterminous; www.merriam-webster.com/dictionary/coterminous ("coextensive in scope or duration"). Second, because appellant does not specify how his interests differ from those the United States advances, or how the United States' interests are adverse to his, this claim is

waived. See *Antoine* v. *Rucker*, 361 F. App'x 389, 391 (3d Cir.) (passing references in opening brief insufficient to avoid waiver), cert. denied, 1331 S. Ct. 213 (2010).[16]

Appellant also cites numerous cases (Br. 25) for the principle that the presumption of adequate representation may be rebutted, but he does not explain how it has been rebutted here. Appellant's citations (Br. 24-25) are inapposite or assert principles that are not supported by this Court's precedent. For example, appellant cites (Br. 23-24) *Holmes* v. *Government of the Virgin Islands*, 61 F.R.D. 3, 4 (D.V.I. 1973), to assert that intervention based on inadequate representation may be granted for reasons other than divergence of interests, collusion of the parties, or lack of diligent representation. That analysis is not only highly questionable in light of this Court's precedent, see p. 37, *supra*, but appellant also has failed to proffer any reason that establishes that the United States has not adequately represented his interests here.[17]

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[16] In the district court, appellant asserted that his interest in medical and mental health care that was "constitutionally adequate" was different than the United States' standards. See App. 2:116. Throughout this litigation, the United States has sought to ensure that the defendants provide inmates constitutional levels of medical and mental health care.

[17] The United States also notes that in *Holmes*, the district court inappropriately relied on the Virgin Island government's potential, future change of position as a basis to find that the intervenor's financial interest was not "identical" to the government's position. 61 F.R.D. at 4-5.

The facts and legal analysis supporting intervention in *United States* v. *Oregon*, 839 F.2d 635, 637-638 (9th Cir. 1988), are also directly contrary to the situation here. In *Oregon*, *ibid.*, the Ninth Circuit affirmed intervention by institutionalized residents in CRIPA litigation because they were seeking remedial relief on more areas of treatment, including community-based care, than the United States' more limited claims that focused only on more narrow, targeted conditions in the facility. In contrast, here appellant seeks only medical and mental health care for himself, while the United States' claims and the proposed Settlement Agreement include not only relief to address medical and mental health care for all inmates, but also constitutional levels of care that will improve many other aspects of daily life at Golden Grove that will benefit appellant and all inmates. See App. 2:227-236 (Agreement); pp. 14-15, *supra*.[18]

Appellant's reliance on *Kleissler* v. *United States Forest Service*, 157 F.3d 964, 972 (3d Cir. 1998), a rare example where an intervenor rebutted the

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[18] Appellant's other citations are inapposite. See *JLS, Inc.* v. *Public Serv. Comm'n of W. Va.*, 321 F. App'x 286, 292 (4th Cir. 2009) (intervention granted when intervenors established that they would provide a "more vigorous and effective" representation of the issues than the state agency defendant based on their understanding of the local facts and law); *Meek* v. *Metropolitan Dade Cnty., Fla.*, 985 F.2d 1471, 1478 (11th Cir. 1993) (defendant governmental entity that did not intend to pursue an appeal did not adequately represent intervenors who sought intervention for purposes of appeal), abrogated by *Dillard* v. *Chilton Cnty. Comm'n*, 495 F.3d 1324 (11th Cir. 2007) (generalized interest in voting is an insufficient interest for intervention under Rule 24).

presumption of adequate representation by a governmental party, is misplaced. In *Kleissler*, this Court held that the United States Forest Service's (USFS's) policies on timber harvesting in the Allegheny National Forest were not sufficiently similar to intervenor timber companies' "parochial" financial interests in maintaining contracts and opportunities for future contracts to harvest timber, and therefore the USFS did not adequately represent the intervenor timber companies. *Ibid.*; see also *id.* at 968. The USFS policies required consideration of "numerous complex and conflicting interests," including conservation and economically feasible timber policies, while the intervenor timber companies were singularly focused on their financial security. *Id.* at 973. In contrast, here the United States is pursuing the objective of ensuring that all individuals incarcerated at Golden Grove receive care and treatment that meets constitutional standards. While appellant is seeking care only for himself, his personal or parochial interest is not substantially divergent – indeed, in no way different – from the United States' objective to ensure constitutional levels of medical and other care for all inmates including appellant. Accordingly, he has not rebutted the presumption of adequate representation. See *Brody*, 957 F.2d at 1123; *Rizzo*, 530 F.2d at 505.

Finally, no extended argument is needed to reject appellant's assertion that the United States does not represent his interests because the United States prosecuted him for committing multiple crimes, or moved to dismiss itself as a

party in appellant's district court habeas litigation. The United States' positions in these other, independent matters are irrelevant to this Court's assessment of whether the United States is adequately representing his interest in seeking constitutional care at Golden Grove.

III

THE DISTRICT COURT'S DENIAL OF PERMISSIVE INTERVENTION WAS SOUND AND WELL WITHIN ITS DISCRETION

A. Standard Of Review

This Court reviews a district court's denial of permissive intervention for an abuse of discretion. *Harris* v. *Pernsley*, 820 F.2d 592, 597 (3d Cir.), cert. denied, 484 U.S. 947 (1987). This Court is "more reluctant to intrude into the highly discretionary decision of whether to grant permissive intervention." *Brody* v. *Sprang*, 957 F.2d 1108, 1115 (3d Cir. 1992).

B. The District Court's Denial Of Permissive Intervention Is Well Within The District Court's Discretion

Appellant's assertion that the district court abused its discretion in denying permissive intervention is without merit. The district court's two independent bases to deny intervention as of right – appellant's lack of timeliness and adequacy of representation by the United States – equally support denial of permissive intervention. See *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 500 (3d Cir. 1982); *Hoots* v. *Pennsylvania*, 672 F.2d 1133, 1136 (3d Cir. 1982).

In deciding whether to grant permissive intervention, a district court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). In addressing undue delay, timeliness remains a requirement for permissive intervention, and therefore the district court's ruling on untimeliness for purposes of intervention as of right applies equally to permissive intervention. See *In re Fine Paper*, 695 F.2d at 500. Similarly, because the district court appropriately (and well within its discretion) ruled that the United States adequately represents the appellant's interests, the district court also appropriately denied permissive intervention. See *Hoots*, 672 F.2d at 1136. As this Court explained, if mandatory intervention is denied appropriately based on adequate representation by an existing party, the district court also is "well within its discretion in deciding that the applicant's contributions to the proceedings would be superfluous and that any resulting delay would be 'undue.'" *Ibid.*

CONCLUSION

The district court's order denying intervention should be affirmed.

Respectfully submitted,

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1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 10,269 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

Date: May 28, 2013

CERTIFICATE OF EXEMPTION FROM BAR MEMBERSHIP

I certify that, as an attorney representing the United States, I am not required to be a member of the bar of this Court. See L.A.R. 28.3(d) and Committee Comments.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

Date: May 28, 2013

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2013, I electronically filed the foregoing Brief for the United States as Appellee with the United States Court of Appeals for the Third Circuit by using the CM/ECF system, and that seven paper copies identical to the brief filed electronically were sent to the Clerk of the Court by Federal Express.

I further certify that all participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. In addition, I certify that on May 28, 2013, I sent two paper copies of the foregoing brief to counsel of record by Federal Express.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney