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Prison Litigation Reform Act Update

As we go to press, the Second Circuit has still not issued its decision in *Benjamin v. Jacobson*. Lawyers for the plaintiffs in *Plyer v. Moore* have asked the Supreme Court for a writ of certiorari.

As promised in the last edition of the *Journal*, we are summarizing here some of the court decisions regarding the In Forma Pauperis provisions of the Prison Litigation Reform Act -- PLRA § 804 (amending 28 U.S.C. § 1915). *Note:* This is not intended to be a complete list of all the decisions on these issues.

IN FORMA PAUPERIS PROVISIONS -- PLRA § 804 (amending 28 U.S.C. § 1915)

Three-Strikes Provision, 28 USC § 1915(g) -- Constitutionality, Retroactivity, and Application to Habeas/Mandamus

Abdul-Wadood v. Nathan, 91 F.3d 1023 (7th Cir. 1996): The court held that pre-PLRA "strikes" count towards the three strikes, but only post-PLRA filings are subject to the three-strikes provision. (*See also Abdul-Wadood v. MacMillillan*, 1996 U.S. App. LEXIS 32198 (7th Cir. Dec. 4, 1996) (reaching merits of appeal notwithstanding pre-existing three strikes because appeal pending at time of PLRA's passage); *Abdul-Wadood v. Huckins*, 1996 U.S. App. LEXIS 31664 (7th Cir. Nov. 12, 1996) (same).

Adepegba v. Hammons, 103 F.3d 383 (5th Cir. 1996): The court applied *Landgraf* to conclude that cases dismissed before the PLRA's passage count towards the three strikes. The court undertook no constitutional analysis.

Arvie v. Lastrapes, 106 F.3d 1230 (5th Cir. 1997): The court declined to address the merits of an appeal filed by a "frequent filer" familiar to the court. Instead, the court remanded the case for the district court to determine whether the plaintiff was a prisoner at the time of his prior "strikes." The court seems to assume that the pivotal point in time is the date on which the Complaint is filed or the appeal "was taken." *Id.* at 1231.

Carson v. Johnson, No. 96-41003, 1997 U.S. App. LEXIS 11392 (5th Cir. May 15, 1997): The court held that the three-strikes provision is inapplicable to habeas petitions under 28 USC § 2254. *Id.* at *3-*5. Application of the provision to § 1983 actions does not violate the right of court access because filing fees are unconstitutional in the civil context only when the litigant has a "fundamental interest at stake." *Id.* at *8 (quoting *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 562 (1996)). Plaintiff's claim is that he was improperly placed in administrative segregation, and prisoners do not have a fundamental liberty interest in their placement except in the rarest of circumstances not present here. *Id.* at *9 (citing *Sandin v. Conner*, 115 S. Ct. 2293, 2302 (1995). Plaintiff's claim that the provision imposes "discriminatory treatment" is subject to rational basis review because the provision does not impair a fundamental right (*see id.*). "[D]eterring frivolous and malicious lawsuits, and thereby preserving scarce judicial resources, is a legitimate state interest" and "prohibiting litigants with a history of frivolous or malicious lawsuits from proceeding IFP will deter such abuses." *Id.* at *10. It is equally rational to draw a distinction between prisoners and other litigants because prisoners have

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substantially more free time than non-prisoners, and are provided with food, housing, paper, postage, and legal assistance by the government. *Id.* They have abused the judicial system in a manner that non-prisoners simply have not." *Id.* at *11. Finally, the court held that pre-PLRA dismissals count towards the three strikes. *Id.* at *12.

Green v. Nottingham, 90 F.3d 415 (10th Cir. 1996): The court applied *Landgraf* to conclude that cases dismissed before the PLRA's passage count towards the three strikes. The court undertook no constitutional analysis.

Smith v. Officer Przyblyski, 1997 U.S. App. LEXIS 5540 (7th Cir. March 19, 1997): The court implicitly held that a dismissal by the district court, and the dismissal of an appeal from the district court's dismissal, can count as one strike each. *Id.* at *8. However, the three-strikes provision only applies to cases filed after the three-strikes have been exhausted; it does not apply to cases pending before the district or appellate court at the time the third strike is reached. *Id.*

Dalvin v. Beshears, 943 F. Supp. 578 (D. Md. 1996) The court employed FRCP 60(b) to remove a "strike," because counting the dismissal as a strike would be "unduly harsh and inappropriately punitive" under the circumstances.

Lyon v. Van De Krol, 940 F. Supp. 1433 (S.D. Iowa 1996), appeal pending (8th Cir. 1997): Judge Longstaff struck down the "three strikes you're out" provision of the PLRA (§ 804(d), codified at 28 U.S.C. § 1915(g)), as violative of equal protection because it treats those who proceed IFP differently from those who do not. He subjected the provision to strict scrutiny because it burdens the fundamental right of prisoners to file constitutional claims in federal court. He found that the standards of review set forth in *Turner v. Safley*, 482 U.S. 78 (1987), *Procunier v. Martinez*, 416 U.S. 396 (1974), and *Thornburgh v. Abbott*, 490 U.S. 401 (1989), are inapplicable because they involved "prison administration and security matters," while § 1915(g) relates to "federal court administration and legal issues." In applying strict scrutiny, he found that, even if the interest in deterring frivolous lawsuits is compelling, § 1915(g) only stops *indigent* inmates. Furthermore, the provision's application is *not* limited to frivolous lawsuits. That is, the provision is both under- and over-inclusive, rather than narrowly tailored.

Munoz v. Hjambon, No. 96-2372, 1997 U.S. Dist. LEXIS 6785 (E.D. La. May 9, 1997): Judge Marcel Livaudais, Jr. held that pre-PLRA dismissals count towards the three strikes. *Id.* at *2.

Various judges in the Northern District of California have dismissed prisoner suits sua sponte, finding that § 1915(g) requires them to consider as "strikes" actions dismissed prior to, as well as after, the PLRA's enactment.

Harris v. Armstrong, 1997 U.S. Dist. LEXIS 4633 (N.D. Cal. March 31, 1997) (Judge Walker);

Harris v. Correctional Officer Mitchell, 1997 U.S. Dist. LEXIS 4629 (N.D. Cal. March 31, 1997) (Judge Walker);

Cavaness v. San Mateo County, 1997 U.S. Dist. LEXIS 3264 (N.D. Cal. March 21, 1997) (Judge Smith);

Harris v. Correctional Officer K. Phillips, 1997 U.S. Dist. LEXIS 2866 (N.D. Cal. March 6, 1997);

Day v. United States Secret Serv., 1996 U.S. Dist. LEXIS 18884 (N.D. Cal. Dec. 20, 1996) (Judge Smith);

Lewis v. San Mateo Courts, 1996 U.S. Dist. LEXIS 18892 (N.D. Cal. Dec. 20, 1996) (Judge Smith);

Harris v. Standley, 1996 U.S. Dist. LEXIS 18298 (N.D. Cal. Dec. 4, 1996) (Judge Walker);

Harris v. Correctional Staff, 1996 U.S. Dist. LEXIS 18308 (N.D. Cal. Dec. 4, 1996) (Judge Walker);

Harris v. Carter, 1996 U.S. Dist. LEXIS 18309 (N.D. Ca. Dec. 4, 1996) (Judge Walker);

Harris v. Horn, 1996 U.S. Dist. LEXIS 18349 (N.D. Cal. Dec. 4, 1996) (Judge Walker);

Washington v. Gomez, 1996 U.S. 1867 (N.D. Cal. Dec. 4, 1996) (Judge Henderson);

Washington v. Gomez, 1996 U.S. Dist LEXIS 17031 (N.D. Cal. Nov. 15, 1996 (Judge Henderson);

Day v. United States Senate, 1996 U.S Dist. LEXIS 17033 (N.D. Cal. Nov. 13 1996) (Judge Smith):

Constitutionality of Filing Fee Provisions, 28 USC § 1915(b)

Hampton v. Hobbs, 106 F.3d 12 (6th Cir. Feb. 13, 1997): The Sixth Circui upheld the filing fee requirements, findin that they do not violate (1) the right o access to courts; (2) the First Amendment (3) equal protection; (4) substantive o procedural due process; or (6) the Doubl Jeopardy Clause.

Mitchell v. Farcass, USCA No. 96-3026, 1997 U.S. App. LEXIS 10369 (11t Cir. May 6, 1997): The Eleventh Circui held that the PLRA's filing fe requirements withstand equal protectio review because they are rationally relate to curtailing abusive prisoner litigation and that, to the extent the filing fe provisions conflict with the federal rules the PLRA controls.

Nicholas v. Tucker, USCA Dkt. Nos 96-2470, 96-2525 (2d Cir. May 27, 1997 The Second Circuit upheld the PLRA filing fee provisions against an attac based on equal protection and the Firs Amendment. The court applied rationa basis scrutiny because the provisions d not deny access to courts, they simpl make access more difficult. *Id.* at 9. Th court found the "goal of relieving th pressure of excessive prisoner filings o our overburdened federal courts" to be legitimate purpose (*Id.* at 7), and tha imposing a filing fee is a rational mean to accomplish this goal because it wil cause prisoners to think twice before filing

Id. at 8. Prisoners are not similarly situated to other litigants in this regard because their essential needs -- food, clothing, shelter, and medical care -- are taken care of by the state, leaving them to pursue litigation as a "recreational activity." *Id.* at 8. Finally, the court declined to undertake any additional analysis of the plaintiff's first amendment claim, finding it "subsumed" within his access to courts claim. *Id.* at 10.

Roller v. Gunn, 107 F.3d 227 (4th Cir. Feb. 19, 1997): The Fourth Circuit upheld the filing fee and cost provisions of the PLRA (§ 804(a), codified at 28 U.S.C. § 1915(1), (2), (3) & (4)). The court rejected the plaintiffs' challenge based on the right of court access for three reasons: First, the right of court access is subject to Congress' Article III power to set limits on federal jurisdiction. "Congress is no more compelled to guarantee free access to federal courts than it is to provide unlimited access to them." *Id.* at 7. Second, courts have generally upheld the imposition of partial filing fees on IFP plaintiffs. *Id.* at 8 (citing numerous cases). Third, the filing fee requirements are too "mild" to amount to a "burden" on the right. *Id.* at 9-10. With respect to equal protection, the court ruled that prisoners are not a suspect class and the provisions do not burden any fundamental rights, and are therefore reviewed under rational basis scrutiny. The classification chosen by Congress -- singling out prisoners -- was rational because prisoners are not similarly situated to non-prisoners. They have their basic material needs, paper, postage, and legal assistance provided at state expense and they often have free time on their hands that other litigants do not possess. As a result, there has been a far greater opportunity for abuse of the federal judicial system in the prison setting. Prisoners are also different from other litigants in that they are under the control of the state so it is administratively easier for the courts to check their finances than it would be for other IFP plaintiffs. A legislature may take one step at a time, addressing itself to the phase of the problem which seems most acute. *Id.* at 11-12.

Retroactivity of Filing Fee Provisions, 28 USC § 1915(b)

Circuits Applying Provisions to Notices of Appeal Filed Before Passage:

Second Circuit:

Covino v. Reopel, 89 F.3d 105, 108 (2d Cir. 1996): Filing fee provisions generally apply to appeals pending at the time of the PLRA's enactment.

Duamutef v. O'Keefe, 98 F.3d 22, 24 (2d Cir. 1996); ***Ramsey v. Coughlin,*** 94 F.3d 71, 73 (2d Cir. 1996): Filing fee provisions do not apply to appeals that were fully briefed before the PLRA's passage.

Rodriguez v. Hynes, 1996 U.S. App. LEXIS 34450 (2d Cir. Dec. 12, 1996): Declining to apply filing fee provisions to case in which appellants' brief was filed before, but appellees' brief filed after, ruling in *Covino.*

Fifth Circuit:

Ayo v. Bathey, 106 F.3d 98 (5th Cir. 1997): Applying *Landgraf* and concluding that certification and filing fee requirements apply to cases in which appellate briefing completed before PLRA's passage. No constitutional analysis.

Strickland v. Rankin County Correctional Facility, 195 F.3d 972 (5th Cir. 1997): Applying *Landgraf* and concluding that certification and filing fee requirements apply to cases in which Notice of Appeal was filed before PLRA's passage. No constitutional analysis. *See also* ***Moreno v. Collins,*** 105 F.3d 955 (5th Cir. 1997) (reaching same result, without analysis).

Cf. ***Jackson v. Stinnett,*** 102 F.3d 132 (5th Cir. 1996) (applying filing fee requirements to Notice of Appeal filed after PLRA's passage, after analyzing conflict between these requirements and Fed. R. App. P. 24(a)).

Circuits NOT Applying Provisions to Notices of Appeal Filed Before Passage:

Sixth Circuit:

Miles v. United States, 1996 U.S. App. LEXIS 30846 (6th Cir. Nov. 21, 1996): Declining to apply filing fee provisions to appeal filed before enactment.

Seventh Circuit:

Thurman v. Gramley, 97 F.3d 185, 188 (7th Cir. 1996): The filing fee requirements do not apply where the Notice of Appeal was filed before the Act's effective date.

Tenth Circuit:

Carter v. Sharp, 1996 U.S. App. LEXIS 31872 (10th Cir. Dec. 10, 1996); ***Duffy v. Uphoff,*** 1997 U.S. App. LEXIS 3630 (10th Cir. Feb. 27, 1997); ***Filmore v. Hargett,*** Case No. 96-6025, 1997 U.S. App. LEXIS 2288 (10th Cir. Feb. 11, 1997); ***Hay v. Giles,*** No. 96-3142, 1996 U.S. App. LEXIS 21149 (10th Cir. Aug. 20, 1996); ***Johnson v. Andrews,*** 1996 U.S. App. LEXIS 32209 (10th Cir. Dec. 10, 1996); ***Lacey v. City of Casper,*** 1996 U.S. App. LEXIS 28959 (10th Cir. Nov. 5, 1996); ***Lee v. Fields,*** 1997 U.S. App. LEXIS 5840 (10th Cir. March 24, 1997); ***Petrick v. Fields,*** 1997 U.S. App. LEXIS 1143 (10th Cir. Jan. 24, 1997); ***Raine v. Nelson,*** 1996 U.S. App. LEXIS 31874 (10th Cir. Dec. 10, 1996); ***Schlicher v. Thomas,*** 111 F.3d 777 (10th Cir. April 16, 1997); ***Tucker v. Graves,*** 1997 U.S. App. LEXIS 3996 (10th Cir. March 6, 1997); ***White v. Gregory,*** 87 F.3d 429 (10th Cir. 1996), *cert. denied,* 136 L. Ed. 2d 415 (1996); ***Zimmer v. Bork,*** No. 95-3337, 1996 U.S. App. LEXIS 21441 (10th Cir. Aug. 20, 1996): Ruling without analysis, that the PLRA amendments to 28 USC § 1915 do not apply to cases in

which the Notice of Appeal was filed before the Act's effective date.

Washington v. Loving, 1997 U.S. App. LEXIS 4714 (10th Cir. March 13, 1997): Declining to apply filing fee requirements to appeal filed *after* the PLRA's passage because "[a]t this point in the litigation [on second appeal], it would be inequitable to reverse the district court's grant of leave to proceed in forma pauperis on appeal." *Id.* at *5 n.4.

District Courts:

Rhoden v. DeTella, 1996 U.S. Dist. LEXIS 14300 (N.D. Ill. Sept. 25, 1997): Holding that the PLRA's filing fee provisions are applicable to motions for leave to proceed IFP that were pending at the time of passage.

Rodgers v. Deboe, 950 F. Supp. 1024 (S.D. Cal. Jan. 13, 1997) (Judge Brewster): Filing fee provisions do not apply to cases filed before passage.

Sledge v. Guest, Case No. 96-CV-208 (RSP/GJD), 1997 U.S. Dist. LEXIS 5528 (N.D.N.Y. April 24, 1997) (Judge Pooler): Filing fee provisions do not apply to suits commenced before PLRA's passage. *Id.* at *1 n.1.

Application of Filing Fee Provisions, 28 USC § 1915(b), to Habeas/Mandamus

Second Circuit:

In re Nagy, 89 F.3d 115 (2d Cir. 1996): Filing fee requirements apply to extraordinary writs such as mandamus that seek relief analogous to civil complaints under 42 USC § 1983, but do not apply to writs directed at judges conducting criminal trials.

Liriano v. United States, 95 F.3d 119 (2d Cir. 1996): Filing fee requirements do not apply to § 2244 actions and other "gatekeeping" motions.

Reyes v. Keane, 90 F.3d 676 (2d Cir. 1996): Filing fee requirements do not apply to habeas corpus proceedings.

Third Circuit:

Madden v. Myers, 102 F.3d 74 (3d Cir. 1996): Filing fee requirements do not apply to bona fide mandamus petitions.

Santana v. United States, 98 F.3d 752 (3d Cir. 1996): Filing fee provisions do not apply to habeas corpus proceedings.

Fourth Circuit:

Smith v. Angelone, 1997 U.S. App. LEXIS 8247 (4th Cir. April 24, 1997): Filing fee provisions inapplicable to habeas corpus proceedings.

Fifth Circuit:

United States v. Cole, 101 F.3d 1076 (5th Cir. 1996): Filing fee requirements do not apply to motions to vacate a criminal sentence brought pursuant to 28 USC § 2255..

Seventh Circuit:

Martin v. United States, 96 F.3d 853 (7th Cir. 1996): PLRA not applicable to mandamus. *See also* ***In re Barnes***, 1996 U.S. App. LEXIS 37141 (7th Cir. Dec. 5, 1996): "[T]he Act does not apply to petitions for a writ of mandamus filed in cases where the underlying litigation is a petition for a writ of habeas corpus."

Moore v. Pemberton, 110 F.3d 22 (7th Cir. 1997): A person appealing from the denial of a habeas corpus petition under § 2254 is not subject to the filing fee requirements of the PLRA.

Eighth Circuit:

In re Tyler, 1997 U.S. App. LEXIS 6186 (8th Cir. April 2, 1997): Filing fee requirements apply to mandamus petition arising from an ongoing civil rights lawsuit. The court explicitly left for another day the question of whether the provisions would apply if the underlying litigation were a civil habeas corpus proceedings.

Ninth Circuit:

Naddi v. Hill, 106 F.3d 275, 277 (9th Cir. 1997): Filing fee provisions do not apply to habeas corpus proceedings.

Tenth Circuit:

Green v. Nottingham, 90 F.3d 415 (10th Cir. 1996): Filing fee requirements apply to mandamus.

Shabazz v. Kaiser, No. 96-6404, 1997 U.S. App. LEXIS 10568 (10th Cir. 1997): Vacating district court's application of filing fee provisions to habeas petition. *Id.* at *6.

United States v. Simmonds, 111 F.3d 737 (10th Cir. 1997): Filing fee requirements do not apply to habeas corpus proceedings brought under 28 USC § 2254, or to actions brought under 28 USC § 2255.

Eleventh Circuit:

Anderson v. Singletary, 111 F.3d 801 (11th Cir. 1997): Filing fee provisions do not apply to habeas corpus proceedings.

D.C. Circuit:

United States v. Levi, Nos. 96-3083 and 96-5200, 1997 U.S. App. LEXIS 9886 (D.C. Cir. May 6, 1997): Filing fee provisions inapplicable to actions brought under 28 USC §§ 2254 and 2255.

District Courts:

United States v. Jones, 1996 U.S. Dist. LEXIS (N.D. Ill. 1996): Filing fee requirements do not apply to habeas corpus proceedings.

Van Doren v. Mazurkiewicz, 935 F. Supp. 604 (E.D. Pa. 1996): Filing fee requirements apply to habeas corpus proceedings.

Miscellaneous IFP Decisions

In re Prison Litigation Reform Act, 105 F.3d 1131 (6th Cir. 1997): In class actions, district courts are not to assess fees and costs to each member of the class; rather, the responsibility to pay the required fees and costs shall rest with the prisoner or prisoners signing the complaint or the notice of appeal. *Id.* at 1137. A prisoners who is released while litigation is pending but before the filing fee is fully paid is not subject to the PLRA's

requirements after his release; rather, his obligation to pay fees is to be determined, like any non-prisoner, solely by whether he qualifies for IFP status. *Id.* at 1138.

Jeffery v. Unknown Walker, No. 96-40709, 1997 U.S. App. LEXIS 11715 (5th Cir. May 14, 1997): The financial screening and assessment procedures of the PLRA regarding appellate filing fees are to be conducted by the district courts. *Id.* at *2.

Marks v. Solcum, 98 F.3d 494 (9th Cir. Oct. 18, 1996): IFP provision that calls for appeals to be dismissed if they are frivolous or malicious, or fail to state a claim upon which relief may be granted, is applicable to appeals pending at time of PLRA's passage.

McGann v. Commissioner, Social Security Administration, 96 F.3d 28 (2d Cir. 196): The partial payments required by § 1915(b)(1) are to be made only while the prisoner remains in prison; upon his release, his obligation to pay fees is to be determined, like any non-prisoner, solely by whether he qualifies for IFP status.

Mitchell v. Farcass, USCA No. 96-3026 (11th Cir. May 6, 1997): 28 U.S.C. § 1915(e)(2) (which set new standards for dismissal of prisoners' claims) is applicable to claims pending at the time of the PLRA's passage because the provision is "wholly procedural" in nature.

Robbins v. Switzer, 104 F.3d 895 (7th Cir. 1997): Holding that, with respect to ex-prisoners, pivotal point for determining applicability of filing fee requirements is the date of the filing of the Notice of Appeal. Thus, the filing fee provisions do not apply to appeals filed by a person who is released from prison before the Notice of Appeal is filed. However, they do apply to cases filed by persons who are prisoners at the time of the filing of the Notice of Appeal but who are released while the appeal is pending.

Summarized by NPP Staff Attorney Ayesha Khan

Federal Sentencing Guidelines -- new coalition works for review

On the 10th anniversary of the adoption of the Federal Sentencing Guidelines, the National Center on Institutions and Alternatives (NCIA) announced the creation of a new project, the Coalition for Federal Sentencing Reform, devoted to a review of federal sentencing practice. The Coalition will be comprised of members of the bar (judges, prosecutors, defense attorneys and others) as well as organizations, individuals and families who wish to reform the system.

In announcing the project, NCIA Director Herbert J. Hoelter said, "the objective is to determine if the Guidelines are meeting the original goals enumerated by Congress -- just punishment, deterrence, incapacitation and rehabilitation." He expressed doubts whether this "ten-year experiment" has succeeded. The Coalition plans to develop specific policy recommendations and to ensure that people outside of the justice system understand how this problem effects everyone as budget cuts in schools, parks, hospitals and drug treatment centers are required to meet escalating corrections budgets. The Coalition will compile relevant data, solicit the views of a wide variety of individuals impacted by the federal sentencing structure and suggest reform as needed.

For further information, contact the Coalition for Federal Sentencing Reform, c/o NCIA, 635 Slaters Lane, Suite G-100, Alexandria, Virginia 22314.

The scope of the problem --

Number of federal prisoners in 1987 ..... *41,000*

Number of federal prisoners in 1997 ..... *106,600*

Number of pages in 1987 Federal Sentencing Guidelines Manual *325*

Number of pages in 1996 Federal Sentencing Guidelines Manual *1,137*

Average number of Federal Guidelines Amendments per year *60*

Number of federal sentencing appeals in 1988 ..... *225*

Number of federal sentencing appeals in 1995 ..... *8,731*

Percentage of federal trial judges who say the Guidelines should be modified so they have more discretion to impose sentences that are fair *86%*

Number of federal prisons built between 1900 and 1980 ..... *41*

Number of federal prisons built between 1980 and 1995 ..... *38*

Number of federal prisons currently under construction *10*

Percent capacity federal prisons are currently operating *125%*

Percentage of federal prisoners in 1994 who were sentenced to federal prison for a nonviolent crime *92%*

NPP AIDS Education Project Update

The use of combination therapy, protease inhibitors and viral load testing is dramatically changing the lives of people living with AIDS/HIV. Articles from national magazines have featured discussions on possible cures and the end of AIDS. So far neither exists. Behind these headlines is the reality of people managing complex regimens of upwards to 40 pills daily, the dilemma faced by women who become pregnant while on combination therapy and the problem of those unable to resume employment due to the toxicity of medications.

While these treatments have become the community standard of care, their use in correctional facilities has been inconsistent. Recent letters from prisoners have identified a variety of scenarios -- from medical staff informing prisoners these treatments are still experimental, to prisoners on combination therapy with undetectable viral loads, and prisoners whose combination therapy is arbitrarily discontinued. The next issue of the AIDS Update will explore the impact of these treatments through interviews with correctional and medical staff, prisoners, attorneys and advocates.

Updates & Resources

Last month members of the **NORA Incarcerated Populations Working Group** met with Sandra Thurman, Director, of the Office of National AIDS Policy to discuss the obstacles faced by prisoners living with HIV/AIDS. During this meeting advocates, former prisoners and service providers discussed a range of issues including prevention /education, standards of care, discharge planning and compassionate release. The NORA Incarcerated Populations Working Group meets monthly, members include representatives from over 25 organizations and over 20 prisoner peer educators. To be added to the mailing list please contact us at (202) 234-4830 (no collect calls).

On April 8 the **Presidential Advisory Council on AIDS** issued recommendations to President Clinton on HIV vaccine development, medical marijuana, needle exchange and prisons. The recommendations on prisons address compassionate release, discharge planning, standards of care, protective barriers and substance use. Contact the Office of National AIDS Policy at (202) 632-1090 to receive a copy of these recommendations.

The AIDS Counseling and Education (ACE) program at Bedford Hills Correctional Facility will be holding its fifth annual AIDS walkathon on September 6. An AIDS walkathon at ACE's sister program at Taconic Correctional Facility is slated for September 20. ACE's first AIDS walkathon was held in 1992 and raised over $3,000 for the Incarnation Children's Center. Over 250 women participated in last year's program which included a range of events from participants forming a human red ribbon to a memorial ceremony. Recipients of this year's funds will include the Incarnation Children's Center and other AIDS service organizations. To send pledges or for additional information contact Liz Mastroieni, ACE Coordinator, at (914) 241-3100 ext. 4360.

PWA-RAG Newsline has moved its operations from Georgia to California. In 1987 Jim Magner, a federal prisoner living with AIDS, founded Prisoners With AIDS-Rights Advocacy Group and began publishing the newsletter, Newsline, as a forum for prisoners living with AIDS/HIV. After Mr. Magner died of AIDS related complications, his parents continued the work of PWA-RAG and published the Newsline. Today the Newsline is distributed to over 12,000 subscribers(free to prisoners) throughout the United States and Canada. To become a subscriber contact Bryan Farley, Managing Editor at 1626 North Wilcox Avenue, Suite 537, Los Angeles, CA 90028, (213) 692-6533.

This fall the **Correctional HIV Consortium(CHC)** will be sponsoring an educational update, "Infectious Disease in Small Facilities". The one-day conference will be held at De Paul University, Chicago, Illinois, on Saturday, September 20 from 8:30 a.m. to 4:30 p.m. The educational update will include workshops on infectious disease staffing, prevention/education and reintegration programs. Register with CHC at (805) 568-1400/(800) 572-9310 or by using your VISA, Mastercard, or AmEx, on-line at http://www.silcom.com/~chc.

Jackie Walker is the Project's AIDS Information Coordinator

Case Law Report -- Highlights of Most Important Cases

by John Boston

Court of Appeals Cases

Grievances/Transfers

Ward v. Dyke, 58 F.3d 271 (6th Cir. 1995). The plaintiff was transferred to a less desirable prison; defendants admitted that this was done in part because he filed 115 grievances in less than five months. He was also found guilty of two major misconduct charges and asked to change housing units twice. The Constitution was not violated. At 274: "The ability to transfer a prisoner who is interfering with prison administration and staff morale goes to the essence of prison management." The plaintiff "attempts to circumvent" *Meachum* by alleging that his transfer was in retaliation for protected activity. Defendants did not violate the First Amendment by acting based on his expressive conduct. At 274: "By transferring Ward, defendants were able to maintain the peaceful management of the prison by reducing the tension between the staff and Ward without discouraging him from seeking redress of grievances." At 274-75: "Ward's failure to adjust was detrimental to himself and also posed a potential threat to other inmates and the staff." At 275 n. 4: The court distinguishes an unpublished case on the ground that the transfer in that case was to a higher security prison.

Hazardous Conditions and Substances/ Evidentiary Questions

Goffman v. Gross, 59 F.3d 668 (7th Cir. 1995). The plaintiff, who had previously had a lung removed because of lung cancer and was supposedly cured, failed to show a serious medical condition exacerbated by his current exposure to his cellmates' cigarettes. There was no medical testimony on record contrary to the prison doctor's testimony on this point. At 672: ". . . [T]he medical effects of secondhand smoke are not within the ken of the ordinary person, so . . . inmates' lay testimony [about the plaintiff's breathing difficulties] cannot establish the showing of medical causation necessary to sustain Goffman's claim." The plaintiff made no argument based on future risk of cancer, but only on present breathing problems.

Mental Health Care/Psychotropic/ Medication/Training/Municipalities/ Evidentiary Questions

Young v. City of Augusta, Ga. through DeVaney, 59 F.3d 1160 (11th Cir. 1995). The plaintiff alleged that she did not receive adequate mental health care in jail and as a result had to be hospitalized in an overtly psychotic state. She was returned to jail, where she wound up naked and chained to a bed among filth and excrement, subject to macing because of her violent behavior; she was also beaten while shackled to a bed.

The district court did not abuse its discretion in refusing to appoint a mental health expert, since the plaintiff's indigence would have required the entire cost to be allocated to the defendants. The court does not hold that such an appointment would never be appropriate. Here, there was no need, since the existence of a material factual issue was evident.

The plaintiff's allegations that treatment for her mental health condition was unduly delayed, that she did not receive medication as prescribed, and her treatment in isolation fell below standards of human decency sufficiently supported her constitutional claim. Evidence that some treatment was provided and some medication was delivered did not entitle the defendants to summary judgment.

The plaintiff sufficiently supported a claim of municipal liability. At 1171:

> We reject, as a matter of law, her contention that municipal jails should be equipped to offer on-site, expert psychiatric care for inmates. . . . [T]he claim that jail employees are inadequately selected or trained to recognize the need to remove a mentally ill inmate to a hospital or to dispense medication as prescribed is cognizable, however, if the deficiency reflects deliberate indifference by City policymakers to the rights of inmates and it is closely related to the ultimate injury.

The need for such training is not so obvious as to put jail officials on notice; however, a pattern of constitutional violations may support a claim of deliberate indifference.

Searches--Person--Convicts/Ex Post Facto Laws/Procedural Due Process/ Personal Involvement and Supervisory Liability

Rise v. State, 59 F.3d 1556 (9th Cir. 1995). An Oregon statute requiring felons convicted of murder or certain sex offenses to submit a blood sample for a DNA data bank did not violate the Fourth Amendment. The intrusion is minimal and is rationally related to the public interest in preventing recidivism and in identifying and prosecuting murders and sex offenses. The statute limits the use of the samples to courts and law enforcement agencies and prohibits analysis of them for genetic predispositions to physical or mental conditions. The court does not reach the defendants' claim that it is also related to effective penal administration.

Applying the statute to persons convicted before the statute was enacted did not violate the Ex Post Facto Clause

because the statute's purpose was not to punish. Due process did not require a hearing before being required to submit a blood sample.

Correspondence--Legal and Official/ Access to Courts/Federal Officials and Prisons/Qualified Immunity

Bieregu v. Reno, 59 F.3d 1445 (3d Cir. 1995). The plaintiff alleged that mailroom employees repeatedly opened mail from federal judges outside his presence. A pattern or practice of doing so "infringes communication protected by the right of free speech." It also violates the right of court access, which the court locates in the right to petition for redress of grievances. Due process is also a basis for the right to court access. The Sixth Amendment is not implicated as to a convicted prisoner corresponding about civil proceedings.

At 1455: ". . . [W]e conclude that repeated violations of the confidentiality of a prisoner's incoming court mail are more central than ancillary to the right of court access, and thus no showing of actual injury is necessary for plaintiff to establish that the right has been infringed." (This holding is obsolete after *Lewis v. Casey*.) However, isolated and inadvertent instances of mail opening do not violate the Constitution.

The *Turner* standard is applicable to this claim of a pattern and practice as well as to challenges to prison regulations. There is no valid, rational connection between opening legal mail outside the prisoner's presence and security. There is no alternative means but the mail for prisoners to exercise their right of court access. Opening mail in the prisoner's presence places no burden on others, since it is what the regulations have required since 1985.

The defendants are not entitled to qualified immunity. Only one federal court of appeals has reached a contrary conclusion. The court weighs the existence of federal prison regulations, which undermine any claim that the defendants were unaware of their obligations.

ProtectionfromInmateAssault/Medical Care/Qualified Immunity

Reece v. Groose, 60 F.3d 487 (8th Cir. 1995). A plaintiff who had been labeled a snitch and had been placed in protective custody was subjected to a risk sufficiently obvious to support a finding of knowledge. Placement in protective custody was a reasonable response, but permitting an inmate to work in that unit who had a known propensity for violence may not have been reasonable. Qualified immunity is defeated.

Law Libraries and Law Books/Class Actions--Effect of Judgments and Pending Litigation

Smith v. Shawnee Library System, 60 F.3d 317 (7th Cir. 1995). Protective custody inmates were brought to the law library but kept in mesh enclosures, with books brought to them by trained inmate law clerks. They had access three hours a day, five days a week, by request, with three of the days reserved for prisoners with court deadlines.

The plaintiffs were not denied access to courts. At 322-32:

> At least in civil cases such as § 1983 suits, the right to access is meant to allow a prisoner to bring claims through the preliminary stages in the courts, not to allow full-fledged self-representation. . . .
>
> When a prisoner is able to make his voice heard in the courts through the right of access, preserving his claims and beginning the litigation process, he can then proceed to hire a lawyer, find one on contingency, or he can ask that counsel be appointed for him. . . .
>
> Deciding whether a penal system provides adequate access means evaluating a legal access program as a whole, rather than requiring it to contain any particular service. . . . There is no "right to browse"; prison inmates are not constitutionally entitled to unfettered direct access to law libraries. . . .

The plaintiff is required to show both a failure to provide assistance in obtaining court access and "some quantum of detriment" as a result. He did not show prejudice. The restrictions complained of were not unconstitutional. This includes the practice of requiring prisoners to leave the library and not come back if they needed to use the toilet; the defendants placed cans in the cells to "solve" this problem.

Use of Force/Consent Decrees/Class Actions--Effect of Judgments and Pending Litigation/Modification of Judgments/ Attorneys' Fees and Costs

Gates v. Gomez, 60 F.3d 525 (9th Cir. 1995). A consent decree provides that defendants will provide appropriate psychiatric treatment for all inmates at the California Medical Facility. After the decree was signed, they commenced using a 37 mm. rubber bullet gun to extract violent or agitated mentally ill inmates from their cells. The defendants argued that shooting prisoners with rubber bullets was not treatment and that the decree did not apply. The plaintiffs said it could have an adverse effect on appropriate treatment.

The district court properly concluded that use of the gun was covered by the decree; while what force to use is a security decision, what force *not* to use is a medical decision, and use of contraindicated force would mean that a patient was not receiving appropriate treatment.

Compliance with the decree is to be judged by the language of the decree and not the Eighth Amendment standard.

At 532: ". . . [A] specific finding of

a past violation of a consent decree is not prerequisite to an injunction preventing a future violation." In any case, the court did find that the decree was violated. The district court did not abuse its discretion in adopting a mediator's conclusion and directing that medical authorization had to be sought before using the gun. However, the district court did abuse its discretion in prohibiting the gun's use to prevent "imminent substantial property damage" in the absence of a medical contraindication.

The National Prison Project is a special project of the ACLU Foundation which seeks to strengthen and protect the rights of adult and juvenile offenders; to improve overall conditions in correctional facilities; and to develop alternatives to incarceration.

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The plaintiffs were prevailing parties as a result of having obtained the consent decree, entitling them to fees for monitoring and compliance work.

Procedural Due Process--Disciplinary Proceedings/Access to Courts--PunishmentandRetaliation/Grievances and Complaints about Prison/Appeal/ Qualified Immunity

Woods v. Smith, 60 F.3d 1161 (5th Cir. 1995). The plaintiff was told he should become an informant or else; he sent a letter of complaint to federal court and gave copies of it to prison officials. He was then disciplined both for "defiance" for sending the letter and for refusing to pack to go to segregation, which he said he did not do.

At 1164: "The law of this circuit is clearly established, and was so in 1990 when the instant disciplinary charges issued, that a prison official may not retaliate against or harass an inmate for exercising the right of access to the courts, or for complaining to a supervisor about a guard's misconduct." (Footnote omitted.)

Favorable termination of the disciplinary proceeding is not a requisite of a retaliatory interference claim. The court declines to analogize to malicious prosecution claims; the latter turns on a groundless prosecution, but a retaliation claim focuses on whether there has been an obstruction of the exercise of a constitutional right. At 1165:

> Further, in a malicious prosecution claim, resolution of the underlying proceedings typically is within the province of a judge, jury, or senior prosecutor. This differs sharply from the procedures at bar where the disciplinary proceedings are conducted solely by corrections officials. Mindful of that critical difference, we are not prepared to require a favorable termination before examining an otherwise legitimate constitutional complaint. Such a requirement would unfairly tempt corrections officers to enrobe themselves and their colleagues in what would be an absolute shield against retaliation claims. This we will not do, for as we previously stated, "the court with which [the inmate] sought contact, and not his jailer, will determine the merits of his claim." (Footnotes omitted.)

To hold otherwise would be to impose a more stringent exhaustion requirement than exists for habeas corpus, contrary to the limited exhaustion requirement of 42 U.S.C. § 1997e.

The court notes that its holding is contrary to Eighth Circuit authority (n. 13).

At 1165 n. 16: Favorable termination is an element of a § 1983 claim based simply on the filing of a false charge (citing an unpublished opinion).

Retaliation claims must be carefully scrutinized; the plaintiff must allege the violation of a specific constitutional right and be prepared to prove that but for the retaliatory motive the alleged retaliation would not have occurred, either through direct evidence or a chronology from which retaliation may plausibly be inferred. A legitimate disciplinary report will be powerful summary judgment evidence against the prisoner.

Hazardous Conditions and Substances/ Qualified Immunity/Standing/Medical Care

Kelley v. Borg, 60 F.3d 664 (9th Cir. 1995). The plaintiff alleged that he asked to be let out of his cell because of fumes from nearby construction; defendants did not let him out, and he passed out.

The defendants need not admit the truth of the plaintiff's allegations to pursue a qualified immunity defense. At 666: "The very heart of qualified immunity is that it spares the defendant from having

to go forward with an inquiry into the merits of the case. Instead, the threshold inquiry is whether, assuming that what the plaintiff asserts the facts to be is true, any allegedly violated right was clearly established."

The right at issue here was the right "to have prison officials not be 'deliberately indifferent to serious medical needs,'" which was clearly established. Rights must be particularized to defeat a qualified immunity defense, but this right has been sufficiently particularized. At 667: "To hold that the magistrate judge should have defined the right at issue more narrowly, and included all the various facts that Appellants recited in their proposed definition, would be to allow Appellants, and future defendants, to define away all potential claims." (Footnote omitted)

The fact that the plaintiff did not cause the plaintiff a seizure or long-term health consequences did not mean there was no case or controversy. At 667: Although any damage may have been minimal, "it is inarguable that knocking someone unconscious constitutes an injury." There is no discussion of whether a serious medical need was denied.

Use of Force/Negligence, Deliberate Indifference, Intent/Personal Involvement/ Supervisory Liability

Robins v. Meecham, 60 F.3d 1436 (9th Cir. 1995). When an officer fired bird shot at another prisoner and a ricochet hit the plaintiff, the officer could be held liable if his actions were malicious and sadistic, regardless of whether he intended to shoot the plaintiff. The Eighth Amendment requirement of "punishment" does not require a specific intent to punish a particular person. If an act is not intended as punishment, a showing of wantonness---deliberate indifference or malice and sadism, depending on the claim--is sufficient.

The officers were not entitled to qualified immunity based on their claim that transferred intent is not a clearly established part of Eighth Amendment law.

Bystanding officers who did not state that they had no chance to intervene were not entitled to summary judgment.

Procedural Due Process--Property/ State-Federal Comity/Mootness

Lucien v. Johnson, 61 F.3d 573 (7th Cir. 1995). The plaintiff complained of delay in deciding his property claims by the Illinois Court of Claims. Although the claims he complained about were decided after his federal suit was filed, he had others, and the court holds that the matter is "capable of repetition, yet evading review" and therefore not moot.

In a rather muddled opinion, the court holds that the delays did not deny due process. The plaintiff did not show any harm from the delays. (The court notes that the statute provides for interest, that the courts don't really follow the statute, but the plaintiff doesn't complain of the failure to pay interest.) Any remedy the plaintiff has for the loss of his property is against the people who lost it, not the court. Equity and comity "counsel strongly" against setting deadlines for state courts.

Medical Care--Standards of Liability--Deliberate Indifference/Medication

Adams v. Poag, 61 F.3d 1537 (11th Cir. 1995). The plaintiffs' decedent died of asthma in prison. To defeat qualified immunity, the plaintiffs "must demonstrate that the appellants' actions in treating Adams' asthma violated a clear and specific standard and that similarly situated reasonable health care providers would have known that their actions violated Adams' constitutional right." (1543) The defendants' actions in medicating him in prison rather than admitting him to a hospital and administering IV steroids did not constitute deliberate indifference. Since the defendants' practice was to make notations in the medical chart as soon as possible after any evaluation, treatment, or review of a prisoner's medical condition, their tracking system did not constitute deliberate indifference. Prescribing medication over the telephone does not violate the Constitution. Other claims amount at most to malpractice.

At 1543-44:

> Our cases have consistently held that knowledge of the need for medical care and an intentional refusal to provide that care constitutes deliberate indifference. . . . Medical treatment that is "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness" constitutes deliberate indifference. . . . "A doctor's decision to take an easier and less efficacious courts of treatment" also constitutes deliberate indifference. . . . Additionally, when the need for medical treatment is obvious, medical care that is so cursory as to amount to no treatment at all may constitute deliberate indifference. . . . Also, delay in access to medical care that is "tantamount to 'unnecessary and wanton infliction of pain,'" may constitute deliberate indifference to a prisoner's serious medical needs. . . . Some delay in rendering medical treatment may be tolerable depending on the nature of the medical need and the reason for the delay. . . . [Citations omitted]

Equal Protection/Grievances and Complaints about Prison

Rivera v. Senkowski, 62 F.3d 80 (2d Cir. 1995). Placement of plaintiff by officials in one prison in a "limited privileges company" under more restrictive conditions than in similar units in other

prisons did not deny equal protection, since the persons responsible for conditions in that company had no authority over the operation of units at other prisons. The restrictions in that company did not constitute cruel and unusual punishment.

The right to be free of retaliation for filing grievances was clearly established by 1990. The sufficiency of the evidence to show retaliation is not reviewable on interlocutory review of qualified immunity. At 86: "The district court should recognize that the presumption of proper purpose accorded the acts of prison officials is particularly strong when officials act pursuant to a duty imposed by a prison regulation which is observed in practice and is essential to prison discipline and order."

Pre-Trial Detainees/Medical Records

Sanderfer v. Nichols, 62 F.3d 151 (6th Cir. 1995). The plaintiff's decedent died in jail of hypertensive and arteriosclerotic cardiovascular disease. The jail doctor's failure to review his medical history did not constitute deliberate indifference. The doctor did treat the decedent for those ailments of which he complained, and his blood pressure was taken three times and found to be normal. Therefore the doctor did not have knowledge of risks which she then disregarded. Her conduct was negligence at most.

Procedural Due Process--Administrative Segregation

Rimmer-Bey v. Brown, 62 F.3d 789 (6th Cir. 1995). The plaintiff was put in administrative segregation without due process. Under *Sandin*, state regulations did not create a liberty interest in staying out of segregation because his placement was not "atypical and significant hardship . . . within the context of his life sentence." (791, footnote omitted). In any case, he was given the process due, since he had had a disciplinary hearing for the incident on which his reclassification was based.

Pre-Trial Detainees/Mootness/Personal Involvement and Supervisory Liability/ Crowding

Houston v. Sheahan, 62 F.3d 902 (7th Cir. 1995). A pre-trial detainee's injunctive claim concerning jail conditions was moot after his conviction and transfer to state prison. At 903 (emphasis in original):

> Both the Sheriff and the Warden must have known the Jail's crowded state. In an official-capacity action seeking an injunction, where the Sheriff and Warden are stand-ins for the political bodies they serve, they could well be ordered to take appropriate steps if crowding has exceeded the constitutional limits. . . . Damages do not follow from knowledge of a problem; the defendants must *intend to harm the prisoner. Farmer v. Brennan* . . . . Neither the Sheriff nor the Warden designed the Jail; neither has the ability to build a larger facility; neither controls the number of prisoners assigned there. . . . They cannot be called on to pay damages . . . for the consequences of other persons' decisions.

The statement concerning intent to harm has been repudiated. *See Haley v. Gross*, 86 F.3d 630, 641 (7th Cir. 1996).

Mootness/Federal Officials and Prisons/ Mental Health Care--Transfer and Admission to Mental Health Facilities

Phelps v. U.S. Bureau of Prisons, 62 F.3d 1020 (8th Cir. 1995). An insanity acquittee who had planted pipe bombs around San Francisco was required under federal statute to be placed in a "suitable facility." The Bureau of Prisons' Federal Medical Center at Springfield, Missouri was a suitable facility despite its "prison-like conditions" given his criminal history, his mental diagnosis, and the reluctance of state officials to accept placement of someone who will need expensive long-term care.

The plaintiff's claim is not moot, although he has been transferred to another medical center. The claim is capable of repetition, yet evading review, since the defendants said they would probably continue to transfer him from one medical center to another "to defuse potentially explosive situations and to protect Phelps."

Personal Property/Federal Prisons and Officials

United States v. Sanchez-Estrada, 62 F.3d 981 (7th Cir. 1995). The district court was empowered to direct that criminal defendants' fines be paid out of their prison earnings despite their indigence. The fact that such fines may fall disproportionately on some prisoners depending on what kind of job they get in the prison system does not call for a limit on the court's discretion. The sentencing guidelines require fines unless the defendant shows that he cannot pay anything ever. (The federal Inmate Financial Responsibility Program permits prisoners to retain the first half of their earned prison wages regardless of fines.)

Pre-Trial Detainees/Procedural Due Process--Disciplinary Proceedings

Whitford v. Bogling, 63 F.3d 527 (7th Cir. 1995). Violation of a state procedural regulation in a disciplinary proceeding did not amount to atypical and significant hardship and did not create a liberty interest.

Six months of segregation may or may not meet the *Sandin* standard; additional findings of fact are needed. (Transfer to maximum security did not; nor did a loss of good time that the plaintiff earned back.)

A notice that the plaintiff was under investigation for allegedly assaulting a

named inmate and that he was charged with assault, fighting, and intimidation or threats was sufficient to inform him of the charges against him.

If the officer who prepared the investigation report sat on the hearing committee, due process would be violated. A supervisor who signed the disciplinary report as shift supervisor was not disqualified.

The use of confidential informant testimony without some evidence of reliability would deny due process, and the defendants' failure to come forward with such evidence amounts to an admission that they did not comply with legal requirements. (The court notes that without such evidence there would not be any evidence against the plaintiff.)

The hearing committee's failure to provide a reasoned explanation why they believed the evidence against the plaintiff rather than exculpatory affidavits that he submitted raised a due process claim sufficient to withstand summary judgment.

At n. 4: Pre-trial detainees cannot be punished without due process regardless of state regulations.

Equal Protection/Homosexuals and Transsexuals

Brown v. Zavaras, 63 F.3d 967 (10th Cir. 1995). The plaintiff's claim that he has been provided no treatment for gender dysphoria states an Eighth Amendment deliberate indifference claim.

At 971: "Recent research concluding that sexual identity may be biological suggests reevaluating" authority holding that transsexuals are not a protected class. However, the court doesn't actually reevaluate anything because the plaintiff's allegations are "too conclusory to allow proper analysis." His allegation that some prisoners are given estrogen and some are not, without more, does not raise an equal protection claim.

Correspondence--Non-Legal /Publications/Deference

Allen v. Coughlin, 64 F.3d 77 (2d Cir. 1995). The New York prison system has a publisher only rule for newspapers and treated newspaper clippings in correspondence as contraband. Under the *Turner* standard, the defendants should not have been granted summary judgment. The alleged danger of "inflammatory material" was not established by a single example of a dangerous clipping, since newspapers received directly from publishers and ordinary correspondence may also contain inflammatory material. Alternative means, such as requesting an interlibrary loan or subscribing to newspapers, were not shown as a matter of law to be adequate. At 80: "Subscriptions also require the expenditure of personal wealth in circumstances in which the ability to pay may be the exception rather than the rule." The need to read each clipping does not justify summary judgment; clippings are less voluminous and bulky than whole newspapers.

Ex Post Facto Laws/Procedural Due Process

Hill v. Jackson, 64 F.3d 163 (4th Cir. 1995). A statute provided for annual parole review if a prisoner was not released when first eligible, with an unused proviso for deferral upon reasonable cause. An amendment authorized deferral for up to three years for prisoners with life sentences or particularly long sentences. The amendment did not violate the Ex Post Facto Clause because it does not change either the substantive standards for initial parole eligibility or the criteria for determining release and it applies only to prisoners whose likelihood of release is remote.

The amendment did not deny due process. Although there might be a liberty interest in parole consideration, there is no liberty interest in state parole procedures.

Pre-Trial Detainees/Protection from Inmate Assault/Mental Health /Appointment of Counsel/Procedural Due Process--Disciplinary Proceedings, Administrative Segregation/Women

Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995). The plaintiff was placed in a segregation cell with a mentally ill inmate who assaulted her and injured her. This allegation adequately stated a constitutional claim given the liberality with which *pro se* complaints are read, though it might not have fully stated the knowledge element of a deliberate indifference claim.

The plaintiff's unsuccessful efforts in contacting six attorneys met the threshold requirement for appointment of counsel. However, the district court did not abuse its discretion in denying counsel despite the plaintiff's distance from the jurisdiction and her reliance on other prisoners to help with her pleadings.

The plaintiff's placement in segregation without a hearing did not deprive her of due process by punishing her, since it was a response to a legitimate security concern. The state standards for county jails do not establish a liberty interest because they contain no mandatory language and in any case the analysis of liberty interests may no longer be applicable after *Sandin*. At 292: "... [A]s a pre-trial detainee she could 'not be punished without due process regardless of state regulations.'" (Citation omitted).

Medication/Medical Care--Standards of Liability--Deliberate Indifference /Medical Care--Standards of Liability--Serious Medical Needs/Pre-Trial Detainees

Mahan v. Plymouth County House of Corrections, 64 F.3d 14 (1st Cir. 1995). The plaintiff's prescription medication (Tegretol) was delivered to the jail the day of his arrest, but he did not receive it for

a week despite his repeated requests. Jail policy prohibited officers from administering prescribed medications on days the detainee is scheduled for court and until permitted to do so by a "medical officer." He did not see a medical officer for a week.

The defendants were not deliberately indifferent. Although they knew he had a serious medical need (indicated by the prescription, and assumed by the district court), and they were aware that he was not getting his prescribed medication, there was no evidence that they were informed of or know about the plaintiff's serious symptoms (severe depression and anxiety attacks).

This case in effect holds that a prisoner who is not able to see medical personnel promptly must discuss his medical condition with non-medical staff.

This pre-trial detainee case is adjudicated under the Eighth Amendment, apparently because that is how it was pled.

Procedural Due Process--Disciplinary Proceedings/Grievances and Complaints about Prison/Deference

Bradley v. Hall, 64 F.3d 1276 (9th Cir. 1995). The plaintiff filed a grievance stating that an officer's conduct "shows her misuse of her authority and her psychological disorder needs attention.... I suggest you . . . have her act professionally instead of like a child." The officer charged him with Disrespect II and he was convicted of Disrespect III, which prohibits use of "hostile, sexual, abusive or threatening" language.

At 1279:

> The right of meaningful access to the courts extends to established prison grievance procedures....The "government" to which the First Amendment guarantees a right of redress of grievances includes the prison authorities. . . . Moreover, in some cases a prisoner may be required to exhaust the established prison grievance procedure before securing relief in federal court. . . .
>
> We are not persuaded by the director's argument that punishing a prisoner for the content of his grievance does not burden his ability to file a grievance. From the prisoner's point of view, the chilling effect is the same. . . .

The rules against disrespect do not pass muster under the *Turner* test as applied to grievances. Their purposes, to help prison staff exercise self-control by preventing prisoners from baiting or goading them, encouraging respect for others, and rehabilitation through insistence on the use of socially acceptable problem-solving means, are legitimate. However, it is an exaggerated response as applied to written grievances. "The threat of punishment for an impolitic choice of words" is an unacceptable burden on court access. An "obvious, simple alternative" would be to require grievances to be in writing and not to have them read by the officers who deal with prisoners on a day to day basis. This would serve the defendants' security interests; their rehabilitative aims are overshadowed by the importance of court access. At 1281: "If there is any time a prisoner should be permitted to speak freely, it is at the bar of justice." At 1280: "[D]eference does not mean abdication." (Citation omitted.)

The court leaves open the possibility that inclusion of criminal threats in grievances can be punished.

Procedural Due Process--Work Assignments/Federal Officials and Prisons

Bulger v. United States Bureau of Prisons, 65 F.3d 48 (5th Cir. 1995). The plaintiff's termination from his Federal Prison Industries job did not deny due process because he had no liberty interest in his job assignment. Under *Sandin*, the language of governing regulations was irrelevant because loss of a job was not atypical and significant. His loss of the ability to accrue extra good time credits automatically did not mean that the duration of his sentence would inevitably be affected.

Sandin did not address property interests, but the plaintiff lacked a property interest in his job as well.

Access to Courts--Postage and Materials/ Res Judicata and Collateral Estoppel/ Personal Involvement and Supervisory Liability

Gentry v. Duckworth, 65 F.3d 555 (7th Cir. 1995). The plaintiff's state post-conviction relief petition appeal was dismissed without reaching the merits because his brief did not conform to rules regarding typing, binding, color of paper, etc. His subsequent federal habeas petition was denied. At 558:

> . . . While access to law libraries is the most frequently discussed element of access to the courts, part of meaningful access is furnishing basic scribe materials for the preparation of legal papers. . . . Necessary scribe materials include paper, some means of writing, staplers, access to notary services where required by procedural rules, and mailing materials. [Footnote omitted]

In a court access case, the plaintiff must show some detriment from the alleged denial of access, other than mere delay. He met that requirement. At 559:

> . . . Prejudice to the right of access to the courts occurs whenever the actions of a prison official causes court doors to be actually shut on a complaint, regardless of whether the suit would ultimately have succeeded.
>
> . . . [T]he right of access to the courts means the right to rise

> to the level of being a failure. The right of access is at its base a right to be heard. Therefore, a total loss of the opportunity to raise one's voice in the courts is itself the requisite detriment.

The contrary holding would require courts in court access cases to conduct trials within trials, determining how a separate issue would have been decided in a state court. The prospects of success on the underlying litigation are relevant to damages, not liability.

Injunctive Relief--Preliminary /Transfers/Communication and Expression/Deference

Pratt v. Rowland, 65 F.3d 802 (9th Cir. 1995). The plaintiff, a former Black Panther serving a life sentence who maintains that he was framed by the FBI, was transferred for a 90-day psychiatric diagnostic program; he was then transferred to a lower security facility rather than being returned to his former maximum security prison. He was double celled at the new prison despite his claim, previously accepted by the defendants, that he needed to be single-celled for medical reasons. The district court entered a preliminary injunction requiring him to be single celled at a medium security prison on the ground that the reason for the transfer was to retaliate against the plaintiff for a news interview proclaiming his innocence.

Prisoners may not be retaliated against for exercising First Amendment rights even if the form of retaliation does not violate an independent constitutional interest. However, establishing a retaliation claim requires a finding that the action did not advance legitimate correctional goals or was not tailored narrowly enough to achieve such goals. The plaintiff has the burden of proof. The law of retaliation remains good law after *Sandin v. Conner*, but such claims should be evaluated with deference in light of *Sandin*'s concerns about prison management.

The preliminary injunction lacked adequate factual support. There is little but timing to support the inference of retaliatory motive. The legitimate reason for double celling him is that the receiving prison, and all medium security prisons, were at double their capacity.

Religion--Practices--Services Within Institution

Abdur-Rahman v. Michigan Dept. of Corrections, 65 F.3d 489 (6th Cir. 1995). The defendants' refusal to release the plaintiff from work on Friday to attend Muslim services, allegedly for security reasons, did not violate his First Amendment rights. A Muslim chaplain's testimony established that Muslims may be excused for services for "reasons such as sickness and work activities. Therefore, the prison's policy did not affect an essential tenet of Rahman's religious beliefs." (491)

Summary Judgment

Arreola v. Mangaong, 65 F.3d 801 (9th Cir. 1995). Summary judgment may not be granted against a *pro se* prisoner without the district court's giving notice of the requirements of the summary judgment rule.

Use of Force/Damages--Assault and Injury, Punitive Damages--Conditions of Confinement/Administrative Segregation/Jury Instructions and Special Verdicts/Qualified Immunity

Blissett v. Coughlin, 66 F.3d 531 (2d Cir. 1995). The plaintiff alleged that he had been beaten by officers and placed in a mental observation cell with no furnishings that was smeared with feces, where he remained for eight days. A jury awarded $75,000 in compensatory damages plus punitive damages of $5,000 and $10,000 against the various defendants for excessive force, and awarded punitive damages of $10,000 and $5,000 against two defendants for the strip cell conditions. (The jury instruction said that punitive damages could be awarded without compensatory damages.)

A jury finding that three defendants were liable but awarding punitive damages against six did not require reversal of the entire verdict; it may have stemmed from an ambiguous passage in the instructions. There is no contradiction between the finding that the plaintiff suffered compensable injuries but that they were not serious enough to "produce death, degeneration or extreme pain, [be] life-threatening or . . . fast-degenerating" (536), which the court used in its instructions on the medical care claim.

The compensatory award was supported by the plaintiff's testimony about recurring problems with his knee resulting from the assault and as to his emotional state during and after the assaults. The award is not out of line with other awards. At 537:

> Under contemporary standards of decency, a jury could justifiably consider incarceration of a naked prisoner for several days in a dark, stuffy, feces-smeared mental observation cell, without any personal amenities, following a violent assault at the hands of corrections officers, to be an additional trauma inflicted without penological justification, and thus in violation of Blissett's Eighth Amendment right to be free from cruel and unusual conditions of confinement.

The defendants were not entitled to raise qualified immunity on the conditions of confinement claim, having raised it only generally in their answer. At 538:

> . . . [B]ecause qualified immunity is an affirmative defense, it is incumbent upon the defendant to plead, and adequately develop, a qualified immunity defense

> during pretrial proceedings so that the trial court can determine which claims, if any, may be disposed of by summary judgment, or, at least, which facts material to the qualified immunity defense must be presented to the jury to determine its applicability once the case has gone to trial.

Here, the defense was given the opportunity to raise qualified immunity during the trial but failed to do so. The defense bears the burden both of pleading and of proof of qualified immunity.

Equal Protection/Use of Force/ Searches--Person--Convicts/Color of Law/Procedural Due Process--Administrative Segregation/ Discovery

Seltzer-Bey v. Delo, 66 F.3d 961 (8th Cir. 1995). The plaintiff alleged that a staff member made comments about his penis and buttocks and during strip searches rubbed his buttocks with a night stick and asked him if it reminded him of anything, and that he was placed in a strip cell for two days without clothing, bedding, or running water.

The allegation about the strip searches stated a constitutional claim. The fact that the officer was alleged to have an illegitimate purpose did not mean that his conduct was not under color of law. The claim was pled under the Fourth Amendment, though the court does not explicitly say that this is a proper basis for it.

The equal protection claim based on the strip search was properly dismissed because the plaintiff did not allege that he was treated differently from other inmates because he belonged to a protected class.

Placement in a strip cell did not deprive the plaintiff of a state-created liberty interest. The defendants were entitled to qualified immunity on the conditions claim. To establish a conditions claim, the plaintiff must show that "(1) the alleged deprivation is sufficiently serious that it denies '"the minimal civilized measure of life's necessities,"' *and* (2) the prison officials were deliberately indifferent to '"an excessive risk to inmate health or safety."' (964, emphasis supplied, citations omitted) (This conclusion that there must be a health or safety risk to establish an Eighth Amendment violation is wrong, but increasingly common. It's not clear that the court really means it, since it uses "or" in a similar statement later in the opinion.) The court has previously held that the Eighth Amendment does not absolutely bar placing an inmate in a cell without clothes or bedding. The defendants were not shown to have known of a risk to the plaintiff's health or safety.

The concurring judge says that two days in a strip cell would likely be "atypical and significant" under *Sandin* if there were a state-created liberty interest at stake.

Procedural Due Process--Disciplinary Proceedings/Good Time

Gotcher v. Wood, 66 F.3d 1097 (9th Cir. 1995). A challenge to a disciplinary proceeding that resulted in a loss of good time is not barred by *Heck v. Humphrey*. This holding appears to have been overruled in *Edwards v. Balisok*.

The plaintiff has a liberty interest in good time credits because the relevant statute creates one. *Sandin* did away with the "mandatory language/substantive predicate" analysis, but preserved the *Wolff* holding that an interest of "real substance" is protected by due process, and the good time system here is similar to that in *Wolff*. The fact that state policy says that it is not intended to create a liberty interest is not dispositive.

The record is inadequate to determine whether the plaintiff's disciplinary segregation deprived him of liberty under *Sandin*. The court does not say how long he was confined.

In Forma Pauperis/Personal Property/ Federal Officials and Prisons

Deutsch v. United States, 67 F.3d 1080 (3d Cir. 1995). A court may dismiss an *in forma pauperis* complaint as frivolous "if, after considering the contending equities, the court determines that the claim is: (1) of little or no weight, value, or importance; (2) not worthy of serious attention; or (3) trivial." The plaintiff's Federal Tort Claims Act claim for $4.20 for pens that were taken from him by prison officials could properly be dismissed as trivial. However, it was improper for the district court to rely on the maxim *De minimis non curat lex*.

"Triviality" may be found it the record shows "that a reasonable paying litigant would not have filed the same claim after considering the costs of suit." (1089) At 1090: "If, in addition to finding that the amount of damages in controversy is less than the court costs and filing fees, the court is satisfied that there is no other meaningful interest at stake, then the suit is frivolous within the meaning of § 1915(d)." *Id.* at n. 11: This inquiry is restricted to court costs and filing fees and should not include attorneys' fees and possible sanctions. At 1090:

> We recognize emotions are intensified in the insular life of a correctional facility and that prisoners often must rely on the courts as the only available forum to redress their grievances, even when those grievances seem insignificant to one who is not so confined. A court must therefore take into account the unique nature of each claim presented and the extent to which the claim is "meaningful" to one in the litigant's situation. Hence, in determining whether a claim is meaningful, a court must protect the right of indigent persons to have access to the courts.

Procedural Due Process--Disciplinary Proceedings/Habeas Corpus

Armento-Bey v. Harper, 68 F.3d 215 (8th Cir. 1995). A plaintiff who sought damages for a defective disciplinary proceeding, and not restoration of good time, was not subject to the *Heck* rule and did not have to show that his disciplinary conviction had been reversed. At 216: "... [T]he *Heck* court explicitly stated that *Wolff* claims do not 'call into question the lawfulness of the plaintiff's continuing confinement'. . ."

Women/Staffing--Sex/Rights of Staff

Tharp v. Iowa Department of Corrections, 68 F.3d 223 (8th Cir. 1995). The district court properly granted summary judgment to the defendants in a Title VII suit by male prison employees who objected to a policy that restricted posts in the women's unit to women employees. The policy addresses inmate privacy concerns, improves rehabilitative services to women prisoners, and advances the interests of female employees while only imposing minimal restrictions (occasional denial of preferred shifts or posts) to male employees.

Habeas Corpus

Littles v. Board of Pardons and Paroles Division, 68 F.3d 122 (5th Cir. 1995). The plaintiff's claim that he did not receive a statement of reasons for his parole revocation is barred under *Heck v. Humphrey* because he did not allege that the decision had been reversed, expunged, set aside, or called into question. This cursory *per curiam* holding appears to contradict *Orellana v. Kyle*, 65 F.3d 29 (5th Cir. 1995), which reiterates the Fifth Circuit rule that challenges to parole procedures that do not automatically entitle the petitioner to release are not subject to the *Heck* rule.

Access to Courts--Punishment and Retaliation/Transfers/Federal Officials and Prisons/Sanctions

Sterling v. Wood, 68 F.3d 1124 (8th Cir. 1995). The plaintiff, a federal prisoner, was transferred to a Minnesota state prison and was asked to sign a transfer agreement including a clause "Must not become litigious." He then asked to file a supplemental complaint in a case against North Dakota officials in which he complained about actions by the Minnesota officials. They then transferred him back to federal custody.

The requirement to "not become litigious" was not facially invalid. At 1126: "Although the clause could be more precise, we read it as nothing more than a condition that the prisoner cannot harass prison officials or the courts with frivolous litigation, rather than as a prohibition against even a single meritorious lawsuit. This condition is similar to restrictions this court has placed on litigious prisoners in the past." (Of course, those prisoners had a record of large amounts of frivolous litigation.) The "litigious" clause is a reasonable cost control method for state officials who accept federal prisoners, especially since the only sanction is returning the prisoner to federal custody.

The plaintiff's return to federal custody was not in retaliation for exercising constitutional rights. The court finds that the claim he asserted was frivolous, since it did not state a constitutional claim.

The bottom line: a prisoner can be transferred under such a clause based on a single instance of litigation that a court finds frivolous.

Appeal

Koch v. Ricketts, 68 F.3d 1191 (9th Cir. 1995). The plaintiff sent his notice of appeal by regular mail rather than by registered, certified or insured mail. As a result, there was no record of the date of mailing. The district court held that this made the plaintiff ineligible for the application of the *Houston v. Lack* rule that a prisoner's notice is deemed filed when delivered to prison authorities. However, the amendment to Rule 4, Fed.R.Civ.P., to incorporate the *Houston* rule did not make such a distinction; it refers only to "the institution's internal mail system." Nor did *Houston* itself include a requirement that the prisoner use a mailing system that created a record. This holding appears to overrule the prior decision in *Miller v. Sumner*, but the court is not explicit.

The plaintiff's affidavit of mailing, corroborated by another prisoner who had helped him prepare his notice of appeal, was sufficient to put the burden of producing evidence of date of mailing on the defendants.

Protection from Inmate Assault/Personal Involvement and Supervisory Liability/Evidentiary Questions

Taylor v. Michigan Dept. of Corrections, 69 F.3d 76 (6th Cir. 1995). The young, small, mentally retarded plaintiff was transferred to a camp with dormitory-style barracks, where he was raped. The appeals court previously held in an unpublished opinion that even absent precedent that "it was unlawful to transfer small, vulnerable-looking prisoners to unstructured prison camps, the unlawfulness of such an action was apparent in light of pre-existing precedent." (78)

The plaintiff raised a material issue of fact as to the warden's responsibility for reviewing and approving all transfers from the prison, "and it was his responsibility to implement procedures that would protect vulnerable inmates from dangerous transfers." (80) He knew that the deputy wardens to whom he delegated authority were redelegating it to lower echelon staff without explicit authorization, he was not sure of the procedures for approval of transfers, and he had no review procedures to determine whether his authority was being abused.

At 81:

> In the instant case Foltz is charged with abandoning the specific duties of his position--adopting and implementing an operating procedure that would require a review of the inmate's files before authorizing the transfers--in the face of actual knowledge of a breakdown in the proper workings of the department. A jury could find on the facts that Foltz personally had a job to do, and that he did not do it. A jury could find that the fact that Foltz was under constant pressure to transfer inmates due to overcrowding would not excuse his failure to adopt reasonable policies to insure that the transferees were not placed in grave danger of rape. . . .

The lack of personal knowledge of the plaintiff's particular vulnerability is no defense. At 81: Under *Farmer*, the question is "whether he had knowledge about the substantial risk of serious harm to a particular class of persons, not whether he knew who the particular victim turned out to be." The defendant testified 20 years ago in a criminal case that small, youthful prisoners are especially vulnerable to sexual pressure.

As to the risk of rape at the camp, the district court appointed an expert to testify on the subject but granted summary judgment before receiving his report. The expert must be given an opportunity to investigate and report. Even without the report, there is a material question of fact. At 83: "A review of the record reveals a prison system in crisis." There was evidence of a pervasive problem of sexual abuse in the Michigan prisons, and the warden knew about the more open, less structured conditions in the camps, which created an "inherently greater" risk. The obviousness of a risk can be a basis for inferring knowledge.

Pre-Trial Detainees/Staffing--Sex/ Searches --Detainees/Negligence, Deliberate Indifference and Intent

Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995). The plaintiff objected to female guards' observation of detainees while they (the detainees) were naked. At 145: "Observation is a form of search, and the initial question therefore is whether monitoring is 'unreasonable' under the fourth amendment." Judge Easterbrook then says that prisoners have no Fourth Amendment rights under *Hudson v. Palmer*. (This is wrong. *Hudson* says that convicted prisoners have no privacy rights in their cells; it does not say they have no privacy rights in their persons, and this opinion ignores the large amount of authority that says they do.) The fact that the case is brought under the Due Process Clause and not the Fourth Amendment does not matter; substantive due process does not trump the Fourth Amendment. The court raises the Title VII rights of staff, notes that it has previously upheld prison officials' prohibition on cross-gender supervision against a Title VII attack, and says that in either case courts should defer to prison officials.

The court acknowledges *Hudson v. Palmer*'s statement that calculated harassment unrelated to prison needs can violate the Eighth Amendment, and states that prior law on prisoners' privacy should be viewed as Eighth Amendment law. In the absence of allegations of particular susceptibility on the part of the plaintiff or a design to inflict psychological injury.

At 148: "How odd it would be to find in the eighth amendment a right not to be seen by the other sex. Physicians and nurses of one sex routinely examine the other. In exotic places such as California people regularly sit in saunas and hot tubs with unclothed strangers." (148)

The mental state requirement of the Eighth Amendment applies to systemic conditions which affect all prisoners, even though the result may be to "perpetuate some unwelcome conditions." (150) (This is dictum, since this case is about damages only.)

Judge Posner dissents eloquently. At 152: "We must not exaggerate the distance between 'us,' the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration." He also disputes Easterbrook's argument on intent: "The motives of prison officials and guards are in fact irrelevant. The relevant deliberateness is the deliberate adoption of a measure that constitutes cruel and unusual punishment."

Religion--Practices--Beards,Hair,Dress

Hicks v. Garner, 69 F.3d 22 (5th Cir. 1995). The Rastafarian plaintiff challenged grooming regulations that prohibit long hair and beards. He conceded that the defendants had legitimate security interests but said an exception should be made because he is in administrative segregation and has no desire to leave.

The plaintiff's First Amendment claim was properly dismissed as frivolous because the defendants' security interests were applicable despite his segregated confinement.

Procedural Due Process--Property/ Publications/ Qualified Immunity

Al-Ra'id v. Ingle, 69 F.3d 28 (5th Cir. 1995). The plaintiff submitted Shi'ite Muslim materials for photocopying; they were not returned. The plaintiff had no procedural due process claim, since the defendants provided adequate post-conviction remedies through the grievance procedure, and he did not allege that the prison censorship procedures are invalid.

The defendants were entitled to qualified immunity on the plaintiff's religious discrimination claim because their actions were based on the material's

"highly inflammatory and divisive character." A defendant said that it "promoted violence and denounced Christianity as Satanism." (There is no indication that the court actually reviewed the material.) Prison rules said that "no one shall disparage the religious beliefs of any inmate, or other person," and that regulation supported the claim of qualified immunity.

Grievances and Complaints about Prison/ Transfers/Procedural Due Process--Disciplinary Proceedings /Damages--Punitive, Intangible Injuries/Attorneys' Fees

Cornell v. Woods, 69 F.3d 1383 (8th Cir. 1995). Internal affairs officers interviewed the plaintiff about a staff violation of the rule forbidding transactions between prison employees and prisoners (he had contracted with the officer to construct a fence around his wife's house). He was promised freedom from retaliation. A month later, after the officer had been forced to resign, the plaintiff was disciplined and transferred.

At 1388:

> We find that the right to respond to a prison investigator's inquiries is not inconsistent with a person's status as a prisoner or with the legitimate penological objectives of the correction system. To the contrary, we agree with the district court that truthfully answering questions concerning a misconduct investigation against a correctional officer is "undoubtedly quite consistent with legitimate penological objectives."

Therefore the plaintiff was exercising First Amendment rights.

There was ample evidence of retaliatory motive for the transfer. There was also evidence of retaliatory motive for the discipline. Although the Eighth Circuit holds that a disciplinary decision supported by some evidence cannot be found to be unconstitutional retaliation, this case is different, since the prisoner had been promised immunity.

In dictum, the court expresses doubt that violation of prison disciplinary regulations would deny due process, citing *Sandin*.

Protection from Inmate Assault/Cruel and Unusual Punishment--Proof of Harm

Horton v. Cockrell, 70 F.3d 397 (5th Cir. 1995). At 401:

> There is no concise definition of what types of prison conditions pose a "substantial risk of serious harm" under the Eighth Amendment. Instead, we examine this component of the test "contextually," making sure to be responsive to "contemporary standards of decency." We must consider "whether society considers the risk . . . to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." We also must consider that the Eighth Amendment is intended to protect against both present and future dangers to inmates. Prison authorities must protect not only against current threats, but also must guard against "sufficiently imminent dangers" that are likely to cause harm in the "next week or month or year." [Footnotes omitted]

Threats of extortion and physical assault are sufficiently serious to meet this standard. Although the plaintiff started one fight, he alleged that he did so in self-defense because of the prior threats of assault. Although he was not hurt badly, he could have been.

The deliberate indifference standard was met, at the initial stage, by allegations that the plaintiff filed three grievances about his assailant, made at least one oral complaint to a guard, and wrote his counselor, and his assailant allegedly assaulted other inmates and tried to start a race riot, all during a two-year period. The assailant's conduct could show that he posed an obvious risk even without the plaintiff's formal complaints.

Transfers/Procedural Due Process--Property/Work Assignments/Personal Property

Jennings v. Lombardi, 70 F.3d 994 (8th Cir. 1995). The plaintiff, a Missouri prisoner, was transferred to Arkansas under the Interstate Corrections Compact at his own request because he is a former Missouri corrections officer. In Arkansas, prisoners are required to work but are not paid for it; instead they receive good time. In Missouri, prisoners are paid for working, and under the ICC's enabling statute, Missouri prisoners retain the rights they would have had if incarcerated in Missouri.

The Interstate Corrections Compact is not federal law, so the plaintiff must show that he has a property interest in his wages to prevail under § 1983. He has no property interest because Missouri law does not create a property interest in prison wages and that law, in combination with the Compact, does not show an intent to create a property interest in wages for prisoners held out of state.

Hazardous Conditions and Substances/Negligence, Deliberate Indifference and Intent

Wallis v. Baldwin, 70 F.3d 1074 (9th Cir. 1995). The plaintiff was required to clean an asbestos-laden area without protective gear except for an inadequate face mask. At 1076:

> It is uncontroverted that asbestos poses a serious risk to human health. *See, e.g.*, 20

U.S.C. §§3601(a)(3),4011(a)(3) (noting the Congressional finding that medical science has not established any minimum level of exposure to asbestos considered safe). Wallis' medical expert declared that forty-five hours of unprotected exposure to asbestos is medically serious.

Evidence that the defendants knew of the existence and dangers posed by the asbestos, consisting of an inspection report from a year earlier, an order from the state fire marshal to remove it, etc., established deliberate indifference. It was not enough to claim they didn't know the asbestos was there; the information available to them created a duty to inspect before sending work crews there.

Searches--Person--Convicts/Deference

Hayes v. Marriott, 70 F.3d 1144 (10th Cir. 1995). The plaintiff alleged that he was subjected to a body cavity search in the presence of about 100 witnesses, including female correctional officers as well as other "nonessential personnel" such as case managers or secretaries. The district court erred in holding that a single such search cannot violate the Fourth Amendment. Statements by a prison official that every effort was made to minimize the number of female staff present do not entitle the defendants to summary judgment, since (a) they are unsworn, and (b) there is no explanation of which female staff members were allowed to view the search and why it was necessary, or as to the location of the search and the necessity of conducting it there.

Hazardous Conditions and Substances

Good v. Olk-Long, 71 F.3d 314 (8th Cir. 1995). The plaintiffs were required to clean up raw sewage without adequate protective clothing. The employees involved were disciplined for failure to provide the proper clothing. However, they were entitled to qualified immunity because they provided *some* protective clothing and there was nothing in the record to show that the employees acted in "bad faith." They thought coveralls weren't necessary because they had already partially cleaned out the area by machine.

Procedural Due Process--Administrative Segregation

Luken v. Scott, 71 F.3d 192 (5th Cir. 1995). The plaintiff was placed in administrative segregation because of alleged gang membership. Placement in segregation, without more, does not constitute a deprivation of liberty for due process purposes. The opportunity to earn good time credits (unlike loss of good time credits already accrued) is not a liberty interest because its effect on release date is "speculative" and "collateral." The plaintiff was not denied due process anyway, since he got a hearing within ten days and his status is reviewed every 90 days.

Searches--Person--Convicts/Urinalysis/Qualified Immunity

Sparks v. Stutler, 71 F.3d 259 (7th Cir. 1995). The plaintiff was asked for a urine sample after a syringe was found in his shoe. He said he could not provide one. He was catheterized in the infirmary and his bladder was found to be empty. A urine sample taken later tested positive for drugs. The district court awarded $5,000 in damages for violation of the Fourth Amendment.

Generally, prison searches are evaluated under the Eighth Amendment, which requires a subjective component; the district judge's finding that the search was "egregious" does not meet that requirement. Judge Easterbrook concedes that prisoners have some rights under the Fourth Amendment, which requires only an objective showing of unreasonableness. Introducing drugs or biological materials into prisoners might violate the Fourth Amendment, since *Vitek v. Jones* says it violates the Due Process Clause.

The defendants are entitled to qualified immunity. This search could be analogized either to body cavity searches or to taking of blood samples, both of which are constitutional, or to surgery, which is not constitutional for the purpose of extracting unimportant evidence. At 261: ". . . [I]f doctors must reach their own conclusions about reasonableness, then the lack of clear substantive rules precludes an award of damages." *Id.*: "The existence of such line-drawing problems calls for immunity; the rule should be established prospectively rather than at the expense of public employees who predict the development of the law incorrectly." Of course, Judge Easterbrook does not go on to establish the rule prospectively.

Religion--Practices--Names/Qualified Immunity/Notarial Services

Malik v. Brown, 71 F.3d 724 (9th Cir. 1995). Prisoners have a First Amendment interest in using their religious names, at least in conjunction with their committed names. Prisoners cannot compel prisons to reorganize their filing systems to reflect the new names. In states where there is a legal name change process, prisons are generally required to recognize only legally changed names. This right is clearly established; the results did not change when the *Turner* standard displaced the *Procunier* standard. Allowing a prisoner to use his religious name next to his committed name on outgoing mail is an obvious, easy accommodation under *Turner*.

At 729-30: "Because the issue of religious name changes has been litigated extensively and courts have consistently recognized an inmate's First Amendment interest in using his new, legal name (at least in conjunction with his committed name), we find that the law was clearly established in the absence of binding Ninth Circuit precedent." A reasonable officer

would not believe it was lawful to punish an inmate for mailing correspondence with both names on it.

A notary who refused to notarize a legal document on which the plaintiff's signature did not match his prison identification was entitled to qualified immunity given the state statute concerning the duties of notaries.

Searches--Person--Visitors

Spear v. Sowders, 71 F.3d 626 (6th Cir. 1995) (en banc). Searches of prison visitors require a showing of reasonable suspicion; that requirement was clearly established by 1990. Reasonable suspicion "requires only specific objective facts upon which a prudent official, in light of his experience, would conclude that illicit activity might be in progress." (Footnote omitted)

A report that a confidential informant informed a guard that an inmate with an extensive history of drug possession in prison was receiving drugs from a "young unrelated female" established reasonable suspicion justifying a strip and body cavity search of the plaintiff, who was the only young unrelated female who visited the prisoner.

The plaintiff alleged that she was told she would be detained until a warrant was obtained if she did not consent to the search. At 632: "These circumstances, if proven true, would vitiate her consent and would amount to a violation of her constitutional right to be free from being detained absent probable cause." The court cannot resolve the legality of the search of her automobile without further factual clarification (e.g., whether there was a visible sign concerning automobile searches). Individualized suspicion is not necessary for an automobile search.

Procedural Due Process--Administrative Segregation /Procedural Due Process--Disciplinary Proceedings /Medical Care--Denial of Ordered Care

Williams v. Ramos, 71 F.3d 1246 (7th Cir. 1995). The plaintiff was kept in segregation for 19 days after his disciplinary sentence had expired. If he was in administrative segregation or there voluntarily, he was not deprived of liberty. Even if he was considered to be in disciplinary segregation, he had not been deprived of liberty under *Sandin*, notwithstanding a regulation that limits punishment for his disciplinary offense to 15 days in segregation. The court dismisses the difference between segregation and general population conditions and also notes that at one point the plaintiff refused to transfer out of the segregation unit. The court says that *Sandin* relied on three factors: the similarity of disciplinary segregation to other forms of segregation, the comparison of segregation to general population, and whether the length of the prisoner's sentence was affected.

The failure by protective custody staff to honor a medical certificate stating that the plaintiff should be in a bottom bunk did not violate the Eighth Amendment. No bottom bunks were vacant and the defendants refused to move another prisoner; they offered to return him to the segregation unit.

At 1250: "Prison guards' intentional interference with a prescribed treatment may constitute indifference," but since the plaintiff was offered the opportunity to have a lower bunk in segregation, they did not deprive him of medically recommended treatment.

Hygiene/Administrative Segregation/ Disabled/MentalHealthCare/Crueland Unusual Punishment--Proof of Harm

Shakka v. Smith, 71 F.3d 162 (4th Cir. 1995). The plaintiff tore his sink and plumbing off the wall, flooding the floor, and used a plumbing pipe to break windows. A psychologist ordered him placed in another cell without any of his belongings, including his wheelchair. The wheelchair was returned the next day. During this period, inmates threw feces and urine into his cell and on him. Although he was provided with water and cleaning materials, he was not allowed to shower.

At 166:

> In the context of a conditions-of-confinement claim, to demonstrate that a deprivation is extreme enough to satisfy the objective component of an Eighth Amendment claim, a prisoner must 'produce evidence of a serious or significant physical or emotional injury resulting from the challenged conditions,' . . . or demonstrate a substantial risk of such serious harm resulting from the prisoner's unwilling exposure to the challenged conditions. . . . Compelling a showing of significant physical or emotional harm, or a grave risk of such harm, infuses an element of objectivity into the analysis, lest resolution of the seriousness of a deprivation devolve into an application of the subjective views of the judges deciding the question.

The denial of a wheelchair may constitute deliberate indifference to serious medical needs in some circumstances, but not here, where it was undisputed that the psychologist had it removed for the protection of the plaintiff and others. The other defendants lacked the authority to give it back and if they had might have been liable for interfering with the plaintiff's treatment.

The denial of a shower to wash off other inmates' excrement and urine for three days was not sufficiently serious to violate the Eighth Amendment, given the lack of evidence of harm and the fact that he was provided with water and cleaning materials on request. The court declines to credit the "obvious" risks of future

illness from exposure to human excrement without proof.

Temporary Release/Work Assignments/ Personal Property

Reimonenq v. Foti, 72 F.3d 472 (5th Cir. 1996). The plaintiff alleged that a requirement that he contribute ten per cent of his work-release wages from a private employer to an "Elderly/Victim Compensation Fund" violated the Fair Labor Standards Act.

The court declines to apply the usual "economic reality" test under the FLSA, which it finds "unserviceable" in the jailer-inmate context. Instead, it holds categorically that prison custodians are not employers of inmates in work-release programs.

The work-release agreement was not a contract of adhesion under state law nor the product of duress, and the work-release statute authorized conditioning work-release participation on the contribution. Apparently no federal constitutional claims were raised in this case.

AIDS/Medical Records/Hygiene/ Recreation and Exercise/Qualified Immunity/Equal Protection/ Procedural Due Process

Anderson v. Romero, 72 F.3d 518 (7th Cir. 1995). The HIV-infected plaintiff alleged that prison officials disclosed his HIV status and denied him barbering and yard privileges because of his status.

There is no clearly established right in the privacy of medical records. Disclosure of medical information might violate the Eighth Amendment; "the fact that the punishment was purely psychological would not excuse it." (523) However, such a right was not established with respect to the acts alleged by the defendants in 1992, even had it been established that some medical disclosures might be unconstitutional. *Woods v. White* does not have precedential value, since it is a district court decision affirmed without published opinion. At 525: ". . . [W]e hold that warnings to endangered inmates or staff do not violate the Constitution just because they are ad hoc" nor because they violate state law. "Any duty to protect prisoners from lethal encounters with their fellows that is derived from the Eighth Amendment would take precedence over a state law."

At 526:

> It is one thing to warn other prisoners that an inmate is an HIV carrier; it is another to "punish" him for being a carrier by refusing to allow him to get a haircut or to exercise in the prison yard. Although this is the first appellate case in which these specific modalities of punishing HIV carriers have been alleged, it has long been clear that the Eighth Amendment forbids the state to punish people for a physical condition, as distinct from acts, and that the equal protection clause forbids the state to treat one group, including a group of prison inmates, arbitrarily worse than another. If the *only* reason that the defendants denied haircuts and yard privileges to Anderson was that he was HIV-positive, and there is no *conceivable* justification for these as AIDS-fighting measures, then the absence of a case involving this specific form of arbitrary treatment would not confer immunity on the defendants. A constitutional violation that is so patent that no violator has even attempted to obtain an appellate ruling on it can be regarded as clearly established even in the absence of precedent.

A state regulation providing that all prisons "shall provide every committed person with access to . . . barber facilities" is sufficient to create an entitlement. At 527: "There is no novelty to this claim . . . and therefore no basis for a defense of immunity." However, *Sandin v. Conner* will have to be considered on remand.

At 527:

> . . . To deny a prisoner *all* opportunities for exercise outside his cell would, the cases suggest, violate the Eighth Amendment unless the prisoner posed an acute security risk if allowed out of his cell for even a short time. . . . Prisoners are entitled to reasonable medical care, and exercise is now regarded in many quarters as an indispensable component of preventive medicine. But cases that purport to recognize a right to *outdoor* exercise . . . involve special circumstances, such as that the prisoners were confined to their cells almost 24 hours a day and were not offered alternative indoor exercise facilities, . . . or the only alternative offered to the prisoners was exercise in the corridor outside their cells rather than in an indoor exercise facility and the lack of outdoor exercise was merely one of a number of circumstances that in the aggregate constituted the infliction of cruel and unusual punishment. *Wilkerson v. Maggio* . . . held that an hour a day of indoor exercise satisfied the constitutional minimum.

Transportation to Courts

Sampley v. Duckworth, 72 F.3d 528 (7th Cir. 1995). District courts lack authority to impose on the losing plaintiff the costs to a third party (the state Department of Corrections) of a writ of *habeas corpus ad testificandum*. The court distinguishes prior authority imposing such costs because it assumed

that the individual defendants--rather than a third-party agency--had paid for the transportation.

Religion--Practices/QualifiedImmunity

Hayes v. Long, 72 F.3d 70 (8th Cir. 1995). Muslim inmates had a clearly established right not to handle pork in 1992, based on a district court decision that they have a right not to be exposed to food that has been in contact with pork or pork products. The result might be different if the defendants had shown that making the plaintiff handle pork met the *Turner* test, but they didn't try.

Searches--Person, Living Quarters/ Qualified Immunity

Harding v. Vilmer, 72 F.3d 91 (8th Cir. 1995). The plaintiff alleged that he was subjected to retaliatory strip and cell searches in violation of the Eighth Amendment. It was clearly established that such searches could violate the Eighth Amendment. Given the factual disputes about the searches, there is no appellate jurisdiction over the defendant's qualified immunity appeal.

Service of Process/Procedural Due Process/Access to Courts

United States v. $184,505.01 in U.S. Currency, 72 F.3d 1160 (3d Cir. 1995). Service by the government of a notice of civil forfeiture proceedings at the address of the seizure, rather than in prison where the government knew the claimant to be incarcerated, denied due process. Service in prison of a notice of the earlier administrative proceedings did not provide notice of the judicial proceedings. Service on the criminal defense attorney did not constitute adequate notice, since the attorney did not at that point represent the claimant in the forfeiture proceedings.

Habeas Corpus/State-Federal Comity

Simpson v. Rowan, 73 F.3d 134 (7th Cir. 1995). The plaintiff sued for damages, alleging an unconstitutional arrest and search and seizure in connection with his criminal prosecution. These claims are not barred by *Heck* because neither, if successful, would *necessarily* undermine the validity of the plaintiff's conviction. However, the *Younger* abstention doctrine bars the federal court from going forward until the state prosecution (now on appeal) is completed, since the issues in the federal suit might also be adjudicated in the state proceeding. The damage claims should therefore be stayed.

Use of Force/Pro Se Litigation

Eason v. Holt, 73 F.3d 600 (5th Cir. 1996). The plaintiff alleged that he was thrown to the ground, handcuffed, and kicked by prison staff without provocation. After a *Spears* hearing, the magistrate judge dismissed on the ground that he alleged no injury, or alternatively that the injury he alleged was *de minimis*.

The court improperly ignored the plaintiff's testimony concerning his injuries; once a *Spears* hearing is held, the testimony elicited becomes "part of the total filing" and should be considered on a motion to dismiss, even when an amended complaint has been subsequently filed.

The alternative ground, that the injury was *de minimis*, is inconsistent with the allegations in the complaint.

Procedural Due Process--Administrative Segregation

Pichardo v. Kinker, 73 F.3d 612 (5th Cir. 1996). Under *Sandin*, administrative segregation, without more, does not constitute a deprivation of a liberty interest.

Procedural Due Process--Temporary Release/Ex Post Facto Laws

Dominique v. Weld, 73 F.3d 1156 (1st Cir. 1996). The plaintiff had participated in work release for almost four years and was permitted to open his own vehicle repair business. His work release was revoked "because he remains in denial of his crime" and had too little accountability at his repair business. The revocation followed a highly publicized event involving another inmate. He is ineligible to be returned to work release because of new regulations about sex offenders.

Under *Sandin*, the plaintiff had no liberty interest in staying on work release. It did not affect the duration of his sentence, and his transfer to a more secure facility subjected him to conditions "no different from those ordinarily experienced by large numbers of other inmates serving their sentences in customary fashion." (1160) Thus, the deprivation did not meet the "threshold test" of *Sandin*. The existence of a temporary release agreement does not alter this analysis.

New temporary release regulations barring sex offenders from work release until they successfully completed a treatment program, admitted their offense, etc., did not violate the Ex Post Facto Clause. Under *Morales*, "this change in the conditions determining the nature of [the plaintiff's] confinement while serving his sentence was an allowed alteration in the prevailing 'legal regime' rather than an 'increased penalty' for ex post facto purposes." (1163)

Federal Officials and Prisons/Law Libraries and Law Books

United States v. Sarno, 73 F.3d 1470 (9th Cir. 1995). At 1491: "[T]he Sixth Amendment demands that a *pro se* defendant who is incarcerated be afforded reasonable access to 'law books, witnesses, or other tools to prepare a defense.'" (Citations omitted) This right must be balanced against legitimate security concerns and resource constraints. This defendant, who is a law school graduate, received 120-140 hours in the law library before trial and about five hours a week during the trial. He also had an attorney

appointed to assist him. His access was adequate. The five hours a week during trial was justified by resource constraints.

The defendant was not denied access to witnesses, since they could visit him on 48 hours' notice and the provision of minimal personal information, and approval was given, and since he had access to unmonitored telephone calls and had access to his co-defendant at pretrial hearings and during trial. His inability to use the telephone during trial (since he was at court during the hours it was available) was remedied by letting him use the courthouse phone at lunch.

Correspondence--Legal and Official/ Correspondence--Non-Legal/InForma Pauperis

Treff v. Galetka, 74 F.3d 191 (10th Cir. 1996). The plaintiff claimed that the mail room supervisor interfered with his incoming and outgoing mail, legal and otherwise. His court access rights were not violated because in one case the court accepted his filing that was allegedly late because of defendants' actions, and in another case, it was the court's decision and not the defendants' not to consider it.

At 195: "A refusal to process any mail from a prisoner impermissibly interferes with the addressee's First and Fourteenth Amendment rights." This right is clearly established.

The costs of service were properly imposed against an IFP litigant whose financial status improved during the course of the litigation.

Pre-Trial Detainees/Habeas Corpus/Length of Stay

Hamilton v. Lyons, 74 F.3d 99 (5th Cir. 1996). The plaintiff alleged that an investigator told him that he would not be transferred out of a lousy county jail to a better one until he gave a statement. While this allegation might support a Fifth Amendment claim, it would imply the invalidity of his subsequent convictions and sentences and is barred by *Heck*.

A parolee arrested on a new charge is not entitled to the benefit of the part of the *Wolfish* "punishment" standard that permits inference of punitive intent from the lack of a reasonable relationship to legitimate governmental interests. Rather, the parolee must prove expressed intent to punish for the new charge.

The court does not remand for findings because the alleged three-day denial of visiting, telephone access, recreation, mail, legal materials, sheets and showers was *de minimis*.

Suicide Prevention/Negligence, Deliberate Indifference and Intent/Pre-Trial Detainees

Hare v. City of Corinth, Miss., 74 F.3d 633 (5th Cir. 1996) (en banc). Pre-trial detainee suicide cases should be decided under the same subjective definition of deliberate indifference used under the Eighth Amendment. This conclusion applies both to medical care and failure to protect claims. At 643:

> . . . [T]he *Bell* test retains vitality only when a pretrial detainee attacks general conditions, practices, rules, or restrictions of pretrial confinement. When, by contrast, a pretrial detainee's claim is based on a jail official's episodic acts or omissions, the *Bell* test is inapplicable, and hence the proper inquiry is whether the official had a culpable state of mind in acting or failing to act.

Deliberate indifference is the measure of culpability for *all* such episodic acts or omissions. This doesn't really change the law, because "a proper application of *Bell*'s reasonable relationship test is functionally equivalent to a deliberate indifference inquiry." There is no constitutionally significant difference between the rights of detainees and convicts to basic human needs, so the claims of both groups are governed by the subjective deliberate indifference standard. The court justifies this conclusion by noting that both the Eighth Amendment deliberate indifference standard and the due process right of detainees turn on the presence or absence of "punishment."

To invoke the *Bell* test, a detainee must show that the challenged act or omission "implement[s] a rule or restriction or otherwise demonstrate[s] the existence of an identifiable intended condition or practice." Otherwise, the detainee must show that acts or omissions "were sufficiently extended or pervasive, or otherwise typical of extended or pervasive misconduct by other officials, to prove an intended condition or practice to which the *Bell* test can be meaningfully applied." (645)

At 645-46: "Formulating a gossamer standard higher than gross negligence but lower than deliberate indifference is unwise because it would demand distinctions so fine as to be meaningless."

Only one of 17 judges objects to this conclusion.

Religion--Practices--Beards, Hair, Dress/Religion--Services Within Institution

Hamilton v. Schriro, 74 F.3d 1545 (8th Cir. 1996). The plaintiff's claim based on religious rights "encompasses two separate theories: (1) deprivation of his constitutionally protected First Amendment right to the free exercise of his religion; and (2) deprivation of his statutorily protected right, under RFRA, to the free exercise of his religion."

The Native American plaintiff challenged the prison's hair length regulations and sweat lodge ceremonies. The plaintiff's First Amendment claim fails under the *Turner* test. His RFRA claim fails too.

Disabled/Procedural Due Process--Administrative Segregation/Medical Care--Standards of Liability--Deliberate Indifference/Federal Officials and Prisons

Crowder v. True, 74 F.3d 812 (7th Cir. 1996). Under *Sandin*, federal prison regulations do not create a liberty interest in staying out of administrative segregation.

Allegations that the paraplegic plaintiff was denied his wheelchair because it did not fit through the cell doors, denied physical therapy, and deprived of exercise, recreation, hygienic care, and medical care do not raise an inference of deliberate indifference to serious medical needs.

District Court Cases

Religion--Practices--Beards, Hair, Dress/Religious Diets

Luckette v. Lewis, 883 F.Supp. 471 (D.Ariz. 1995). The plaintiff is an "Ambassador/Priest" of the Freedom Church of Revelation who complained that prison rules prevented him from following various tenets of his faith: maintaining a Kosher diet, maintaining a "vow of poverty contract," not cutting his hair or beard, and covering his head with something red, white, and/or black.

The Freedom Church of Revelation is a legitimate religion and the plaintiff is a sincere adherent of it. The court rejects the defendants' claim that it is an "identity" religion, i.e., one which advocates violence against other religious or ethnic groups, since the religion disavows such violence and the defendant did not present any evidence to the contrary.

Federal Officials and Prisons/Habeas Corpus

Zolicoffer v. Federal Bureau of Investigation, 884 F.Supp. 173 (M.D.Pa. 1995). Federal prisoners, like state prisoners, are subject to the rule of *Heck v. Humphrey* that they must get their convictions overturned before they can pursue civil actions that would if successful imply that the convictions were invalid.

Correspondence/Grievances/Access to Courts--Punishment and Retaliation/Injunctive Relief/Damages--Punitive, Conditions of Confinement

Sisneros v. Nix, 884 F.Supp. 1313 (S.D.Iowa 1995). A state regulation barring delivery of letters in a foreign language unless it is the prisoner's only language was not unconstitutional under the *Turner* test as applied to a prisoner who spoke English but wished to correspond with relatives who did not. The prisoner had alternatives; he could write in English and his relatives could get the letters translated. There is no obvious, easy alternative, since translators cost money.

The plaintiff had been transferred from Arizona to Iowa; he was transferred back when he filed a grievance and a lawsuit about the language policy. The transfer constituted retaliation in violation of his First Amendment rights. The warden said: "Filing a grievance is not being ungracious, it is just being totally obnoxious." (1335) The defendants are not entitled to qualified immunity.

The plaintiff is awarded lost wages plus damages of $5000 (about $10.50 a day) as compensation for the more restrictive conditions he experienced after his transfer to Arizona, where he was kept in protective custody. The award reflects loss of out-of-cell time, loss of yard and exercise opportunities, and loss of access to communal activities. Punitive damages of $1000 against each defendant are awarded.

The court enjoins the Iowa defendants to use all available efforts to get the plaintiff transferred back to Iowa. While it might be necessary to enjoin Arizona officials at some point, the question is premature, since they have not yet interfered with any injunction.

Religion--Services within Institution/Religion--OutsideOrganizations/Equal Protection/Negligence, Deliberate Indifference and Intent

Shaheed v. Winston, 885 F.Supp. 861 (E.D.Va. 1995). The requirement that Nation of Islam members sign up before attending Sunday services, cutting short their services, and limiting the minister's access to inmates outside the visiting area did not violate the First Amendment because they were reasonably related to maintaining order and adhere to schedules for feeding and moving inmates in a crowded jail. The prisoners had a reasonable opportunity to worship, and the defendants had enacted some reforms on a trial basis.

The defendants' negligent failure to accommodate Ramadan observances in 1993 did not violate the Constitution; the word "prohibiting" in the Free Exercise Clause suggests a conscious act and not negligence.

The plaintiffs' equal protection claim fails in the absence of evidence of discriminatory intent. Much of the difference arose because of the different numbers of Christians and Nation of Islam adherents. The court does not find an equal protection violation in the "Nurture Tier"--sometimes known as the "Christian Tier"--which required Bible study as part of the routine and to which the chaplain mostly controlled admission. (Apparently no Establishment Clause claim was raised.)

Evidentiary Questions

Hodges v. Keane, 886 F.Supp. 352 (S.D.N.Y. 1995). The plaintiff alleged that he was subjected to harassment, intimidation and retaliation based on his challenges to prison procedures; the defendants alleged that he was mentally ill. The court granted a motion for a mental examination by defendants' expert.

The court now grants the plaintiffs' motion *in limine* to bar the results, which state him to suffer from "Anti-Social Personality Disorder." His records show that by 1982 he was free of psychiatric symptoms, his claim arose five years later, and the trial will be held 13 years later. Therefore this evidence is too remote to be relevant to credibility.

The court also questions how much of the psychiatric record is admissible under the exception for medical records, since some of the material was generated, e.g., for the Parole Board.

Even if the records were admissible, they would be unfairly prejudicial.

The records also are so voluminous and contain so many contradictory and inconsistent diagnoses by over a dozen practitioners that they would consume an inordinate amount of a jury's time at the expense of the events the case is about.

The expert assessment of the plaintiff is also excluded because it largely relies on "highly prejudicial and suspect records." This decision is subject to re-evaluation after the plaintiff testifies.

Procedural Due Process--Disciplinary Proceedings

McGuinness v. DuBois, 887 F.Supp. 20 (D.Mass. 1995). The denial of witnesses at a disciplinary hearing was improperly based on a policy of denying all requests by segregation inmates for general population inmates as witnesses. At 22: "There must be some case-specific determination supporting the hearing officer's decisions regarding the denial of witnesses, rather than rote applications of a blanket general policy."

Use of Force/Pendent and Supplemental Claims; State Law in Federal Courts/ Evidentiary Questions/Qualified Immunity/ Special Verdicts and Jury Instructions

Hynes v. LaBoy, 887 F.Supp. 618 (S.D.N.Y. 1995). In a use of force case involving two incidents, the plaintiff was awarded $1250 against two officers for one incident; the jury found for the defendants and one officer was awarded $1500 on his battery counterclaim for the other.

Both verdicts are supported by the evidence, as are both damage awards. The plaintiff sustained two cuts and a black eye. The officer sustained a kick to the testicles.

The court rejects alleged inconsistencies in special verdicts and a claim that the award was a compromise.

The plaintiff's conviction for murder was properly excluded, since his violent conduct under other circumstances was only marginally relevant. His violent disciplinary record was admitted, but other disciplinary convictions for verbal harassment, threats, weapons possession, etc., were properly excluded.

The defendants' workers' compensation forms and prior use of force forms were properly admitted, with the plaintiff's disciplinary record, under the Second Circuit's "inclusionary" approach. They were also proper bases of cross-examination concerning the defendants' testimony concerning their use of force history.

The jury was asked whether the force that each officer used was that which a reasonable officer would have used under the circumstances. This adequately put to the jury the question whether it was objectively reasonable for the officers to believe that their actions were lawful, which is the qualified immunity standard at the trial stage. (They were separately asked whether the defendants had acted maliciously and sadistically.)

The special verdict form is attached as an appendix.

Procedural Due Process--Disciplinary Procedures/Grievances/Sanctions/Pro Se Litigation

Brown v. Carpenter, 889 F.Supp. 1028 (W.D.Tenn. 1995). The plaintiff was convicted of disrespect and placed in segregation for ten days for bringing a grievance without any proof of wrongdoing against the accused staff member.

Charging a prisoner with a disciplinary offense violates no rights; if *Wolff* procedures are followed, due process is not violated. There was some evidence of disrespect, since the accusations "were without basis and represented a direct challenge to the authority of the prison administration." (He accused the officer of mishandling food, sexual harassment, and smuggling cocaine.) The plaintiff (at 1033)

> has no right to function as a prison ombudsman, general advocate, or agitator. He certainly has no right to abuse the TDOC grievance system by making totally unfounded attacks on prison officials. An inmate who uses that grievance system in that way may certainly be cited for disrespect. Reasonable limitations on the use of a prison grievance system and rules requiring inmates to display respect for staff members in the use of that system are clearly related to the core function of maintaining security in the prison, and such rules may be enforced by prison officials.

The fact that one of the disciplinary board members worked under the supervision of the staff member complained about does not impair the impartiality of the Board.

A claim of retaliation must be analyzed as a question of substantive due process, and "the prison official's conduct must transcend all bounds of reasonable conduct and shock the conscience." (1034) The plaintiff alleged no chronology from which retaliation could plausibly be inferred, and defendants' actions were permissible anyway.

The plaintiff is also ordered to use the court's forms for any future complaints, not to type them in italics or Old English type, and not to include briefs or cite cases in them, or file motions, briefs, affidavits, etc., until the court grants permission after the complaint is filed. No new complaints from him are to be filed by the clerk without an order from a district judge.

Administrative Segregation/Personal Property/Visiting/ Heating and Ventilation/Food/Sanitation/Pest Control

Robinson v. Illinois State Correctional Center (Stateville), 890 F.Supp. 715 (N.D.Ill. 1995). The plaintiff was assigned to segregation for a year.

Restrictions on the type of commissary items that segregation inmates may purchase does not deny due process or equal protection or violate the Eighth Amendment.

A reduction of visiting rights from two hours to one hour for segregation inmates does not violate the Constitution.

Claims of inadequate heating and cooling, coupled with allegations that the plaintiff informed the defendants, state an Eighth Amendment claim.

At 720:

> Plaintiff also bemoans the unsanitary conditions of the toilet area, the existence of roaches and bed bugs, and the lack of weekly bedding supplies. . . . Although unpleasant, the conditions plaintiff complains of do not in themselves rise to the level of a constitutional violation. . . . Moreover, Robinson's failure to allege that he suffered any injury because of these conditions defeats any contention of their objective severity.

An allegation of unsanitary food preparation conditions does not state an Eighth Amendment claim without an explanation of how they present an immediate danger.

Religion--Services Within Institution/ Protective Custody/Publications/State Officials and Agencies/Remedial Principles

Weir v. Nix, 890 F.Supp. 769 (S.D. Iowa 1995). The plaintiff is found to be a sincere fundamentalist Christian despite his alleged receipt of pornography. At 776: "While conduct inconsistent with an expressed religious belief may call into question the sincerity with which that belief is held, the gap between the ideal and reality is a universal feature of human experience."

Equal Protection/Dental Care/Injunctive Relief--Preliminary

Hogan v. Russ, 890 F.Supp. 146 (N.D.N.Y. 1995). The plaintiff sought a preliminary injunction requiring periodontal treatment; the defendants offered to pull the teeth or to let him have periodontal treatment at his own expense.

The plaintiff's equal protection claim, based on his indigency, is rejected. At 148: "the state's interest in efficiently distributing its limited resources is sufficient reason not to provide extensive specialized medical care for inmates."

There is no deliberate indifference claim. At 149: "Defendants did not deny plaintiff the ability to obtain specialized medical attention. They merely stated that it was not prison policy to pay for such specialized care and that such care would be made available to plaintiff at his own expense. This case involves a prisoner being dissatisfied with the diagnosis of the prison physician." The fact that the dentist did not take x-rays before recommending extraction does not constitute deliberate indifference. Although the plaintiff submitted some medical authority that x-rays are necessary to determine the extent of bone loss, the claim is at best for negligence.

The plaintiff is denied a preliminary injunction, since he has no likelihood of succeeding on the merits.

Procedural Due Process--Disciplinary Proceedings/Procedural Due Process--Programs

McGuinness v. DuBois, 891 F.Supp. 25 (D.Mass. 1995). State regulations authorizing sentences to the Departmental Disciplinary Unit for up to ten years do not violate a state statute that limits confinement in an "isolation unit" to 15 days, since conditions in a disciplinary unit are less onerous than those in an isolation unit.

A disciplinary hearing officer did not abuse his discretion in refusing to allow questions of an officer about a previous altercation between the officer and the inmate. The fact that an accused inmate has been placed in a segregation unit does not permit the blanket denial of witnesses on the ground that they are not permitted in the unit. A particularized determination is required. The refusal to call a staff witness on the ground that he was injured and unavailable is not a basis for summary judgment for the defendants, since regulations said such requests may be denied only when a staff member is unavailable for a prolonged period. This was compounded by the failure to get an affidavit from the officer in question. At 34: The plaintiff's "right to procedural due process was violated by Sherwin's refusal or inability to receive evidence from that officer in any form." (34)

The hearing officer's statement that he received evidence from an officer "in camera" shifted the burden to the defendants to show that there was no improper contact outside the hearing.

A state statute creates a liberty interest in educational programs. A lawful disciplinary hearing is sufficient process to withdraw that interest. (This is probably overruled by *Sandin v. Conner*.)

Procedural Due Process--Disciplinary Proceedings

Sanchez v. Roth, 891 F.Supp. 452 (N.D.Ill. 1995). A blanket rule that witnesses are never allowed to be present at disciplinary hearings would deny due process. However, this plaintiff's witnesses were denied because he did not indicate what information they would be able to provide and did not ask that they be interviewed before the hearing to determine if their testimony was necessary. The court also concludes that the witnesses would not have been helpful to the plaintiff.

Religion--Practices--Beards, Hair, Dress/EqualProtection/ProceduralDue Process

Muslim v. Frame, 891 F.Supp. 226 E.D.Pa. 1995). A jail rule prohibited prisoners from wearing headgear in common areas. Prison officials established that the rule served a compelling interest in security, but whether it was the least restrictive means of doing so was a factual question not subject to summary judgment. Among other things, the defendants did not detail the expense of the additional searches they would have to conduct.

State law allowing the wearing of religious ornaments or medals does not create a liberty interest in wearing a *kufi*, since the restriction is not atypical or significant under *Sandin*.

The fact that Christians could wear crucifixes did not establish an equal protection violation absent a showing of discriminatory intent. The jail had separate headgear rules and medallion rules, neither of which discriminated among religions.

Equal Protection/Hazardous Conditions and Substances/Personal Property/Procedural Due Process--Property/ProgramsandActivities/Drug Dependency Treatment/Access to Courts--Punishment and Retaliation/ Grievances

Pryor-El v. Kelly, 892 F.Supp. 261 (D.D.C. 1995). The *pro se* plaintiff's second-hand smoke claim is dismissed, since he does not present scientific or statistical evidence concerning the likelihood of injury, nor does he allege that the risk is so grave that it violates contemporary standards of decency to subject anyone to it. The plaintiff's complaint alleged only that people smoked in common areas. There was no showing of deliberate indifference, since the defendants had no-smoking policies, designated smoking areas, signs, etc.

The plaintiff's excess property was shipped home at his expense without a hearing after someone said he was hoarding stolen items in his cell. He had no equal protection claim, since he provided only an assertion that he was treated differently from other inmates, and since there is no allegation of an impermissible motive for the search. He also had no due process claim, since it was undisputed that he had property in excess of that permitted by jail rules. The court applies *Sandin* to a property interest claim. At 271: "Where an inmate's personal property is seized and sent to an address of his choosing, such action is not a deprivation." The denial of a receipt did not deprive the plaintiff of liberty either.

An allegation that the plaintiff was denied equal protection by his exclusion from a drug treatment program did not state a claim in the absence of specific allegations of how he was treated unequally or of an improper motive. There was no liberty interest protected by due process.

The failure to follow the procedures of the grievance system did not violate the plaintiff's federal rights.

Protection from Inmate Assault/Cruel and Unusual Punishment--Proof of Harm/Qualified Immunity

Jones v. Banks, 892 F.Supp. 988 (N.D.Ill. 1995). The plaintiff alleged that he was assaulted by another inmate who asked the defendant officer to open the door so he could "f___ that b_____ up," and had his request granted, despite the fact that Jones had requested that no inmates be let into his cell because he feared attack. Defendants' motion for summary judgment is denied. At 99: "A factfinder could readily conclude that Banks' decision to open the cell door was an unnecessary and wanton infliction of emotional pain--or . . . a brutal and demeaning attack on Jones' psyche." (Footnote omitted). The latter phrase is the standard the court adopts to define the former phrase.

The defendant was not entitled to qualified immunity; the fact that this point of damages was not clearly established does not diminish the fact that the substantive right was clearly established.

Searches--Urinalysis/Procedural Due Process--Disciplinary Proceedings/Res Judicata and Collateral Estoppel

Strauch v. Demskie, 892 F.Supp. 503 (S.D.N.Y. 1995). The plaintiff was disciplined after a positive urine test. The basis for the test was an earlier positive test on which he had been acquitted on the ground that he was working elsewhere at the time of the test and could not have been the source of the urine. A state court held that the officer did not have "reason to believe" as required by state regulations, and vacated the conviction.

The defendant is entitled to qualified immunity because as of 1990 there was no clearly established right of prisoners to be free from non-random urine tests without reasonable suspicion. At 506 n. 6: Although three circuits have upheld random testing, the lawfulness of non-random testing remains undecided. (*Storms v. Coughlin*, 600 F.Supp. 1214, 1222-26 (S.D.N.Y. 1984), is not cited.) The court is not bound by the law of the case to follow another judge's earlier determination to the contrary.

Pre-Trial Detainees/Municipalities

Smith v. Copeland, 892 F.Supp. 1218 (E.D.Mo. 1995). Cities and counties do not have Eleventh Amendment immunity.

Municipalities, Damages--Punitive (1225): The Supreme Court's holding that a municipality cannot be liable for punitive damages does not necessarily mean that a county cannot.

Immunity--Legislative (1225): County commissioners are entitled to absolute immunity for their legislative acts.

Furnishings (1227): Allegations that detainees are required to sleep on mattresses on the floor do not state a constitutional claim.

Cell Confinement, Telephones (1227): Locking detainees in during the afternoon and denying them telephone access during that time does not violate the Constitution.

Law Libraries and Law Books (1228): The allegation that the law library contained nothing but state statutes fails in the absence of any assertion of actual injury or prejudice.

Exercise and Recreation (1228): Four hours of exercise once every three weeks would not violate the Constitution for convicts if they are out of their cells for work and meals, but defendants have not made a showing that the limit is reasonably related to legitimate objectives as to these detainees (though the court expresses skepticism about this claim).

Chemical Agents (1228-29): The plaintiff's claim that he was maced for no reason and then physically abused when he refused to remove his clothing is not subject to summary judgment; under plaintiff's version of the facts, it amounted to punishment.

Medical Care (1229): The failure to provide medical care after the plaintiff was maced, allegedly resulting in damage to vision, presented a triable issue under the deliberate indifference standard.

Food (1229): A diet of cold food does not offend the Constitution. At 1232: The deprivation of lunch on one occasion did not violate the Constitution.

Suicide Prevention, Clothing, Bedding, Personal Hygiene, Length of Stay (1229-30): The plaintiff's confinement in isolation without clothing except for a paper gown, without a mattress, and without toiletries was reasonable, as was turning off his water after he flooded his cell. (It was turned on three times a day for toilet flushing, and drinking water was provided with each meal.) At 1231: A second episode of removing the plaintiff's clothing in isolation is deemed reasonable, even though this one directly followed a disciplinary offense.

Verbal Abuse (1230): "Gestures and abusive language, without more, are not actionable under § 1983."

Sanitation (1232): An allegation that the plaintiff was left in a cell with raw sewage for five days would state a claim if the plaintiff had named any defendants as responsible for it.

Procedural Due Process--Disciplinary Proceedings (1233): Prison discipline does not violate the *Wolfish* prohibition on punishment. Absent allegations of denials of procedural due process, the plaintiff's claim is subject to summary judgment.

Visiting (1234): A policy denying visits to inmates in isolation is reasonable under *Wolfish*.

Financial Resources (1234-35): Allegations that the jail is underfunded do not make out a constitutional claim in the absence of any evidence supporting it (presumably meaning evidence of harm resulting from underfunding).

Hazardous Conditions and Substances/ Procedural Due Process--Property

Austin v. Lehman, 893 F.Supp. 448 (E.D.Pa. 1995). The refusal to provide the plaintiff with the free tobacco ration provided most prisoners does not violate the Eighth Amendment, which does not shield "an activity as marginally related to prisoners' basic well-being as cigarette smoking." (452) Any pain resulting from nicotine withdrawal was reasonably related to a legitimate purpose; the defendants thought the plaintiff was using the cigarettes for barter.

There is no liberty interest under *Sandin* in smoking tobacco. Assuming there is a property interest, the plaintiff received all the process due because the defendants acted in contravention to state procedure and post-deprivation remedies were available for their random and unauthorized act. The grievance procedure was an adequate remedy; never mind that the plaintiff got no relief.

Grievances and Complaints about Prison/ Procedural Due Process--Disciplinary Proceedings /Correspondence --Legal and Official

Riley v. Kurtz, 893 F.Supp. 709 (E.D.Mich. 1995). The court rejects earlier rulings that retaliation for exercise of First Amendment rights must "shock the conscience" or amount to an "egregious abuse of governmental power." Filing, or threatening to file, complaints against an officer with appropriate governmental bodies (the prison administration or the courts) is protected by the First Amendment.

A prisoner's conviction of a disciplinary violation does not bar a subsequent claim that the charges were false and brought for a retaliatory purpose. The court rejects the analogy to malicious prosecution cases. Federal courts should not be bound by factual determinations of prison hearing officers, since they use a much lower standard of proof than reasonable doubt, and more importantly, criminal defendants have much more substantial procedural protections. As a policy matter, allowing a guilty finding to insulate prison staff from subsequent legal action would place unwarranted pressure on the hearing officers.

An allegation that the plaintiff's legal mail was read by prison staff stated a claim under the First Amendment, the right of access to the courts, and possibly deprivation of a constitutionally protected liberty interest given state regulations' protection of confidential correspondence.

Procedural Due Process--Disciplinary Proceedings

Winnie v. Clarke, 893 F.Supp. 875 (D.Neb. 1995). The plaintiff got his disciplinary conviction reversed and expunged in state court, but prison officials refused to reimburse the wages he had lost. There is no constitutional right to prison wages, and state regulations do not create a property right in them under these circumstances.

The plaintiff's chosen representative failed to appear at his hearing and another representative was substituted. Due process was not violated.

A blanket rule that only eyewitnesses could be called at disciplinary hearings appears to deny due process, and defendants are not entitled to qualified immunity. (The plaintiff had been charged with refusing to give a urine sample and the witnesses were a psychologist's assistant and a physician's assistant.)

On reconsideration after *Sandin v. Conner*, the court does not decide whether the plaintiff had a liberty interest in staying out of disciplinary segregation, but reverses its determination that defendants are not entitled to qualified immunity on the witness issue, without explanation.

Women/Equal Protection

Pargo v. Elliott, 894 F.Supp. 1243 (S.D.Iowa 1995), *on remand from* 49 F.3d 355 (8th Cir. 1995), *aff'd*, 69 F.3d 280 (8th Cir. 1995). The court adheres to its previous conclusion that women inmates are not similarly situated to men, since women of all classifications are contained in a single institution, unlike male inmates. Under this analysis, it appears that there could never be a successful equal protection claim by women prisoners in the Iowa prison system, or any other system with only one or a few women's prisons, regardless of the nature of the inequalities. (The court also cites differences in length of incarceration and other factors.) Despite this conclusion, the court goes on to subject all of the challenged practices to equal protection scrutiny under the rational relationship standard. (It finds that there was no challenge to "general budgetary and policy choices" and therefore no reason to apply heightened scrutiny.) The court concludes that none of the policies deny equal protection, repeatedly using the phrases "gender neutral in design and application" and "substantially similar" in characterizing them. In substance, it finds differences in treatment, but not inequality. The court also surveys the record for evidence of intentional discrimination (finding none), noting that, contrary to *Klinger*, other Eighth Circuit precedent supports such an inquiry even if the genders were not similarly situated.

Access to Courts--Services and Materials/Evidentiary Questions /Procedural Due Process--Property /Mootness

Kirsch v. Smith, 894 F.Supp. 1222 (E.D.Wis. 1995). Defendants' "ink tube policy," which permits punitive segregation inmates to use only the plastic tube from inside ballpoint pens, is not unconstitutional. One plaintiff's claim that he couldn't write with the ink tube because of prior injuries is too conclusory because he did not describe his injuries and because he provided no specific factual allegations of prejudice, e.g., "no evidence of court dates missed, inability to make timely filings, denial of legal assistance or of loss of a case which could have been won." (1230) The other plaintiff was not subjected to a "substantial and continuous limitation" because lack of a decent pen did not keep him from doing preliminary research and determining pleading requirements. Therefore he is required to show prejudice, which he failed to do. Even if he had shown prejudice, the policy would have been upheld under *Turner*.

At 1232: "As Dr. Hannibal Lecter demonstrated in *The Silence of the Lambs*, even a seemingly innocent tool can be turned into a deadly weapon."

State regulations concerning pens did not give the plaintiff a property interest in a complete pen.

The injunctive claim of a prisoner who had been transferred to another prison was moot. So was the injunctive claim of a prisoner who had been released from segregation. Although he had been in segregation eight out of ten years of confinement, "the mere possibility that he will be returned to such confinement" did not save his claim.

Use of Force/Evidentiary Questions/ Damages--Assault and Injury, Punitive

Grimm v. Lane, 895 F.Supp. 907 (S.D.Ohio 1995). The plaintiffs, who had tried and failed to escape, were sent to a maximum security prison. On admission, they were told not to cause any trouble and then beaten with hands and nightsticks. They were then threatened with reprisals if they reported the assault.

The record supported liability of several defendants for failure to protect against the assault and against subsequent reprisals, applying the deliberate indifference standard. The court does not make clear exactly what these defendants did.

Evidence that the guards discussed the plaintiffs' arrival and their need for an "attitude adjustment" supported the plaintiffs' conspiracy claims, as did evidence of a post-beating cover-up.

The plaintiffs' failure to give 90 days notice that a witness would testify as an expert was not unduly prejudicial, since the defendants knew for six months that

she would testify and what she would testify about. She is a senior research associate for the Correctional Institution Inspection Committee who prepared a report about the prison; apparently she testified about the risk of reprisals. Her report, which "provided background for the atmosphere at SOCF," was admissible.

Damages of $75,000 and $115,800 in compensatory damages are not excessive for prisoners beaten in handcuffs who sustained bruising, swelling, a lump on the head, blood in the urine, mental injury requiring medication, and fear of reprisal for several months. Punitive awards of $52,500 against an officer who beat the plaintiffs and $15,000 to $37,500 for others (e.g., an officer who handed the main defendants the keys to the cells) were not excessive.

Religion--Practices--Beards, Hair, Dress/Publications/Procedural Due Process--Administrative Segregation /Recreation and Exercise/Serious Medical Needs/ Medical Care--Access to Outside Care/Personal Hygiene /Food

May v. Baldwin, 895 F.Supp. 1398 (D.Ore. 1995). Denial of access to the prison's general library did not violate the Constitution.

A denial of out-of-cell recreation privileges for several weeks did not violate the Eighth Amendment. He could exercise in his cell and had the opportunity to leave his cell for a ten-minute shower three times a week.

The refusal to let the plaintiffs purchase over-the-counter items for his dry skin did not violate the Eighth Amendment, since medical personnel had examined him, determined that no treatment was required, and advised him to drink more water. He did not have a serious medical need.

The refusal to take the plaintiff to medical visits unless he unbraids his hair did not violate the Constitution. He needed follow-up treatment for a vocal cord tumor.

The denial of shampoo, conditioner and body lotion did not violate the Eighth Amendment; the plaintiff had towel, soap, comb and toothbrush.

The plaintiff's generalized allegations that food items like milk, cheese, pork and chicken are processed so as to make them lethal to consumers did not support an Eighth Amendment claim as to the prison food. The same is true of his claims about the allegedly unhealthy drinking water.

Confinement for 24 hours to undo his braids did not violate the Eighth Amendment; the Eighth Amendment does not forbid brief deprivations of television, telephone and day room privileges. The lack of a hearing did not deny due process under *Sandin*.

Religion/Publications/Qualified Immunity

VanDyke v. Washington, 896 F.Supp. 183 (C.D.Ill. 1995). The plaintiff became an adherent of the Church of Jesus Christ, Christian, the religious arm of the Aryan Nation. He was not permitted to change his religious preference to "Dualist/Identity" and the defendants declined to recognize the church. Publications from it were rejected.

It was not established in 1992 and still is not established that the Church of Jesus Christ Christian is a bona fide religion, so the defendants were entitled to qualified immunity. The plaintiff's injunctive claims were mooted by his transfer, since decisions concerning recognition of religious groups are made by each institution.

There is no constitutional right to a grievance procedure.

The defendants did not violate plaintiff's First Amendment rights in rejecting publications that contain "overt negative racial commentary, constant use of pejorative racial terms, constant reinforcement of a 'them against us' philosophy, and a 'call to action' regarding protection of the Aryan race." Such "inflammatory" material can be excluded without evidence of actual racial confrontation. (The court does not have the actual publications to review, but the parties submitted other material from the church which the court reviewed.)

The publications were rejected based on a complete ban of Church of Jesus Christ Christian publications. Later, the rule was revised to provide for case by case review. The plaintiff cannot challenge the new regulation absent evidence that he was denied publications under it.

Disabled/Equal Protection

Rewolinski v. Morgan, 896 F.Supp. 879 (E.D.Wis. 1995). The deaf plaintiff's complaint that he was denied the ability to watch closed-captioned videos, denied a sign language interpreter for disciplinary hearings and medical appointments, is not given enough visiting time to communicate in sign language, cannot utilize the telephone device for the deaf after 9:00 p.m., misses counts because he doesn't have a visual alarm clock, and is in danger of fire because there are no visual fire alarms. His claims are not frivolous under the Americans with Disabilities Act. Nor are they frivolous under the equal protection clause, though his claim is an "uphill one" since the disabled are not a suspect class.

Publications/Religion/Searches--Person -Living Quarters/Procedural Due Process--Property/Access to Courts--Punishment and Retaliation

Reimann v. Murphy, 897 F.Supp. 398 (E.D.Wis. 1995). The defendants denied plaintiff newspapers from the "Church of the Creator" because they advocated the taking of human life and violence against non-white races; the plaintiff alleged that books concerning COTC had been taken from his cell.

The claim that the denial of plaintiff's newspapers, the ransacking of his cell, and

other actions were retaliation for a lawsuit is not supported factually.

Claims regarding theft, loss of property and undocumented searches are without merit as long as state remedies exist.

Access to Courts--Punishment and Retaliation/Personal Involvement and Supervisory Liability/Procedural Due Process/Correspondence--Legal and Official/ Confiscation and Destruction of Legal Materials/Correspondence--Postage and Materials/ Standing

Pacheco v. Comisse, 897 F.Supp. 671 (N.D.N.Y. 1995). Prison officials refused to send the plaintiff to a court appearance. They said it was because he had refused to take a tuberculosis test and was in "quarantine"; he said it was retaliation for his complaints and lawsuits. The plaintiff produced sufficient evidence that the official reason was pretextual to withstand summary judgment (e.g., evidence of inconsistent and irrational application of the policy and failure to use other means to test plaintiff for TB). The plaintiff's right to petition government for the redress of grievances was established in 1992.

The Commissioner could be held liable based on four letters from the plaintiff to him setting out his factual allegations and no evidence that he did anything about it.

The defendants refused to mail some of plaintiff's legal correspondence because the recipients were not in the New York Lawyer's Diary or a defendant's personal list of lawyers and legal organizations; this was done to enforce a change in policy of refusing free postage for non-legal mail. The plaintiff did not have a liberty interest based in state regulations' definition of legal mail because under *Sandin* defendants' actions did not pose an atypical and significant hardship. At 681: "... [T]o prevail on a claim of interference with legal mail, a plaintiff must show that a pending or anticipated legal action was prejudiced by the alleged interference." The same is true of the complaint that the plaintiff's letter to the Malcolm X Legal Foundation was opened outside his presence. The defendants were entitled to qualified immunity as to their refusal to mail a letter to someone not mentioned in the New York Lawyer's Diary. They were not entitled to qualified immunity as to the Malcolm X Legal Foundation.

The prohibition on receiving stamps through the mail is constitutional.

The confiscation of legal papers with the plaintiff's name on them from another prisoner did not violate the plaintiff's rights and he did not have standing to complain about it.

Procedural Due Process--Disciplinary Proceedings

Stone-Bey v. Swihart, 898 F.Supp. 1287 (N.D.Ind. 1995). The court declines to extend *Heck v. Humphrey* to prison disciplinary proceedings; the plaintiff need not get the disciplinary proceeding reversed to seek relief under § 1983.

The accusing officer's failure to sign his reports, get his supervisor's signature, and properly document his reports did not deny due process or make the evidence inadmissible. The "spartan" notice the plaintiff received was sufficient given the simplicity of the allegations against him. A recanted witness statement could suffice as some evidence if there is some evidence of reliability. Allegations of corroboration by a voice stress analysis and a witness statement are insufficient absent evidence that these actually existed; there was a material factual question on that point.

The hearing officer must explain why he chose to reject the witness's recantation; he may not arbitrarily refuse to consider exculpatory evidence because other evidence suggests guilt. The explanation that he relied on a voice stress analysis and a witness statement was sufficient assuming these actually existed.

Equal Protection/Temporary Release/Equal Protection

Vargas v. Pataki, 899 F.Supp. 96 (N.D.N.Y. 1995). A prohibition against granting work release to inmates convicted of homicide did not deny equal protection, since it was rationally related to minimizing the risk to public safety. The fact that homicide convicts already on work release were permitted to remain on it did not establish an equal protection violation. The prohibition does not violate the Ex Post Facto Clause because it affects a privilege rather than a right and because it is not intended to punish but to regulate participation in the work release program.

Disabled/Procedural Due Process--Disciplinary Proceedings/Procedural Due Process/Equal Protection/Women /Medical Care--Standards of Liability--Deliberate Indifference/ Medical Care--Refusal of Treatment/ Medical Care--Communication of Medical Needs/ Programs and Activities/ Rehabilitation

Clarkson v. Coughlin, 898 F.Supp. 1019 (S.D.N.Y. 1995). The plaintiffs, a class of hearing-impaired state prisoners, are entitled to summary judgment under the Americans with Disabilities Act and the Rehabilitation Act, as to the following:

-- The failure to provide information concerning the protections of the statute adn the existence and location of accessible services, activities and facilities.

-- The denial, failure to respond, or failure to respond timely to requests for auxiliary aids and services.

-- The failure to evaluate programs and facilities for ADA compliance. (They've done physical plant and personnel but not inmate housing, programs or services, and they admit that they don't have the staff to do it.)

-- The failure to create and maintain a coherent procedure for making and having granted requests for accommodations and services. (Grievances resulted in a referral to someone else or a statement that the

assistance sought was not available.)
-- The failure to provide interpretive services during reception and classification.
-- The failure to provide telephone devices for the deaf and closed caption decoders wherever other inmates have the right to use telephones and televisions, and the failure to provide safety alarms adequate for deaf inmates.
-- The failure to provide proper accommodations for vocational and academic education and alcohol and drug rehabilitation counseling.
-- The failure to provide interpretive services during disciplinary, grievance and parole proceedings (this also denies due process) (1050).

Transfer from the Sensorily Disabled Unit for disciplinary, safety, and/or medical reasons to units without necessary accommodations. Placement in the SDU is a "conditional" accommodation, which the statute forbids.

The exclusion of deaf inmates from education programs denied due process by depriving them of their state-created interest in education (which is limited to no education or education "grossly unsuited to the goals of a particular inmate's socialization and rehabilitation" (1048)). This is a property interest (1041).

The absence of interpreters during medical encounters denies deaf inmates the due process right to avoid the unwanted administration of medical treatment and to informed consent, and constitutes a "systemic pattern of inadequacy of treatment . . . which is causing class members unwarranted suffering." (1049) At 1042: "Repeated examples of delay or denied medical care, haphazard or ill-conceived medical practice can serve to demonstrate deliberate indifference by prison officials. " The use of persons as interpreters who are not under a duty to maintain medical confidentiality violates plaintiffs' privacy rights.

The absence of a Sensorily Disabled Unit for women denies equal protection. The larger number of male than female deaf inmates does not justify this disparity; nor do allegations of administrative convenience or savings of time, money and effort. The court endorses the "parity" standard (1043).

Procedural Due Process--Temporary Release

Williams v. Moore, 899 F.Supp. 711 (D.D.C. 1995). The plaintiff had no liberty interest based on D.C. regulations in admission to a work furlough program; though the regulations contained rigorous criteria for eligibility, they did not contain mandatory language requiring admission of those who met the criteria. The court questions whether *Sandin* would bar this claim, noting that work release provides benefits "that relate not only to the terms of confinement itself but to life outside the prison." (713) However, it need not reach this question because of its conclusion that the plaintiff loses under the pre-existing liberty interest analysis. This approach indicates that the *Sandin* standard adds to rather than replaces the liberty interest analysis.

Res Judicata and Collateral Estoppel/Hygiene/Plumbing/Negligence, Deliberate Indifference and Intent/Fire Safety/Food/HazardousConditionsand Substances

Masonoff v. DuBois, 899 F.Supp. 782 (D.Mass. 1995). Prior consolidated state court actions raising similar issues to the present suit did not preclude this suit either by claim preclusion or issue preclusion, since the named plaintiffs were not parties to the prior suit and it was not a class action. This conclusion is reached under Massachusetts law.

The use of chemical toilets which prisoners must empty into slop sinks violates the objective test of the Eighth Amendment. Summary judgment is granted for the plaintiffs. Defendants do not refute plaintiffs' allegations of disgusting conditions and health problems resulting from the toilets, which use toxic substances. At 797: "The manner in which the inmates at SECC must dispose of their bodily waste results in a condition of confinement more bestial than human; or to put it in constitutional terms, the use of the chemical toilets at SECC is 'indecent' and 'uncivilized.'" There are triable issues as to defendants' knowledge and therefore their deliberate indifference.

Plaintiffs are not entitled to summary judgment as to fire safety in a prison that lacks automatic locks and a functioning sprinkler system. At 799: "A court may look to state codes with respect to prison hazards in its effort to determine society's standard of decency, but these standards do not necessarily reflect the constitutional minimum."

Plaintiffs are not entitled to summary judgment on their claim that water provided to them in pitchers is discolored and has a disagreeable taste and smell, since defendants said that water tests were favorable. There is a triable issue.

Plaintiffs are not entitled to summary judgment on their claim of exposure to friable asbestos, since the defendants said there wasn't any. There is a triable issue.

Plaintiffs are not entitled to summary judgment on their claims of vermin infestation, but there is a triable issue.

Correspondence--Legal and Official/ Access to Courts--Postage and Materials/ Procedural Due Process--Disciplinary Proceedings

Dawes v. Carpenter, 899 F.Supp. 892 (N.D.N.Y. 1995). The elimination of free postage for non-privileged mail "did not overly restrict most prisoners' ability to conduct non-privileged communication with people outside the prisons," since prisoners may still receiving incoming mail and visitors and buy stamps with money earned in prison. At 899:

Like free citizens, inmates have

> a constitutionally protected interest in conducting non-legal correspondence. . . . However, the Constitution does not require the State to subsidize inmates to permit such correspondence to be conducted by mail when other means of communication are available to the general prison population. [Citations omitted]

The court notes that the policy has been relaxed to permit one free stamp a month to inmates who have no money because they are confined in special housing, but says that the failure to notify the plaintiff was not unconstitutional because this stamp is not constitutionally required. The regulation says "may," so there is no entitlement to it.

A defendant hearing officer is not entitled to qualified immunity for denial of an assistant, since the defendants provide no information as to his state of mind, precluding the court from determining whether his beliefs as to the legality of his conduct were reasonable. The court also rejects the claim that additional pre-deprivation procedures could not have prevented the deprivation, since the hearing officer could have postponed the hearing or obtained the information that the plaintiff wanted for the hearing.

The plaintiff was properly excluded from one hearing, since he had threatened violence before it. Exclusion from the hearing of the plaintiff's witnesses did not deny due process.

The refusal to comply with procedures for naming witnesses constituted a waiver of the right.

Restitution penalties supported by no evidence deny due process. The court rejects defendants' claim that additional process could not have altered the result, since the defendants could have put more evidence in at the hearing. A standardized schedule of costs would meet the some evidence standard.

Procedural Due Process--Disciplinary Proceedings/ Qualified Immunity

Delany v. Selsky, 899 F.Supp. 923 (N.D.N.Y. 1995). Even where disciplinary confinement is similar to administrative confinement,

> . . . [A]n inappropriate *duration* of disciplinary confinement still raises due process concerns. . . . This Court is not prepared to say that as a matter of law, 365 days' SHU confinement is a sufficiently typical and insignificant hardship on Mr. Delany, relative to the ordinary incident of life in the Coxsackie Correctional Facility, to permit the State to deprive him of procedural protections before imposing that sanction.

However, a decision reducing the duration to 197 days would probably result in summary judgment for the defendants, except for the plaintiff's conditions complaint: because he is almost seven feet tall, the bed was too short, and he only got out for an hour a day, he had "back problems."

The defendants are not entitled to qualified immunity; the fact that the law changed in 1995 does not indicate that it was unclear in 1991.

Procedural Due Process--Disciplinary Proceedings/ Mental Health Care

Zamakshari v. Dvoskin, 899 F.Supp. 1097 (S.D.N.Y. 1994). At 1106: "The impact of *Sandin* on cases of disciplinary confinement for a period greater than 30 days, however, remains unclear at this time." The loss of good time in this case means that the question need not be reached.

The failure to provide a gallery listing in the plaintiff's disciplinary hearing did not deny due process; the listing was "unavailable" and the plaintiff's assistant secured the testimony of the five witnesses the plaintiff requested.

The failure to consider a prisoner's mental health status did not violate clearly established law as of 1988.

The magistrate judge recommends that a claim of 60 days of segregation be considered barred by *Sandin*. Alternatively, defendants are entitled to qualified immunity, since a failure to take mental health professionals' testimony *in camera* did not violate clearly established law in 1990. At 1110: "The mere fact that an inmate informed [the Commissioner] of an alleged constitutional violation by letter is insufficient to support a finding that he had notice of that deprivation." Besides, the affirmance of plaintiff's conviction was signed by the Director of Special Housing and not by the Commissioner.

The failure to track down a witness who had left the employ of the prison system and who had written a statement describing the incident was at most harmless error.

Pre-Trial Detainees/Protection from Inmate Assault/Use of Force/Pre-Trial Detainees

Fickes v. Jefferson County, 900 F.Supp. 84 (E.D.Tex. 1995). The court notes the conflict among Fifth Circuit opinions as to whether pre-trial detainees must meet the Eighth Amendment deliberate indifference standard in failure to protect cases. The issue need not be resolved in this case. The defendant officer was not liable under either the deliberate indifference or the *Wolfish* standard for leaving mops and brooms with inmates after a cell area was flooded, even though they used them to beat the plaintiff. The plaintiff's allegation that the officer saw the beating but walked by and let it resume raises a triable issue of fact.

The plaintiff was told by jail medical personnel that he suffered from anxiety related to the beating. He asked to be sent out and was diagnosed with two herniated disks, a perforated eardrum and permanent

nerve damage to his inner ear resulting in his having to use a hearing aid. However, he did not sufficiently allege a municipal policy, and he did not name the right individual defendants.

The plaintiff's allegation that he was placed in a headlock and kept in one after he told the officers he had a neck injury, and that he was beaten sufficiently to leave him unconscious for an hour, barred summary judgment for the defendants.

Ex Post Facto Laws

Shabazz v. Gabry, 900 F.Supp. 118 (E.D.Mich. 1995). Administrative regulations changing the frequency of parole hearings are "laws" for purposes of the Ex Post Facto Clause, since they are promulgated after an opportunity for public comment and have the force of law. Internal procedures and policy directives of the Department of Correction and the parole board are not "laws" for Ex Post Facto purposes. The plaintiffs failed to show that all discretion to modify them was lost. Also, it is unlikely that these internal policies would play any significant role in influencing public expectations, and extending Ex Post Facto scrutiny to them would only discourage the formulation and publication of such policies.

Procedural Due Process--Disciplinary Proceedings/ Access to Courts--Punishment and Retaliation/Attorney Consultation

Lazoda v. Maggy, 900 F.Supp. 596 (N.D.N.Y. 1995). The plaintiff was shown a subpoena for his fingerprints and a handwriting exemplar and refused to comply until he had time to speak with his attorney and contest the subpoena's validity. He was then disciplined for refusing a direct order.

Although the plaintiff had a "clearly established constitutional right of access to the courts free from retaliation by prison officials," the defendants were entitled to qualified immunity because it was reasonable for them to believe that the plaintiff was obligated to comply with the order to comply with the subpoena. In this case the order was connected with a security interest, since the subpoena was part of an internal investigation of prison drug trafficking. It was reasonable not to permit the plaintiff to consult with his lawyer, since the right to counsel does not attach until the filing of formal charges.

Procedural Due Process--Disciplinary Proceedings, Administrative Segregation

Jones v. Moran, 900 F.Supp. 1267 (N.D.Cal. 1995). The plaintiff was sent to Pelican Bay SHU for a determinate period after a disciplinary conviction and was retained there pending transfer to a mental health facility after a psychiatric examination.

Sandin adds a threshold test (the atypical and significant standard) to the previous liberty interest analysis. *Sandin* leaves open the possibility that under different circumstances, freedom from segregation might constitute a liberty interest. The Court's comparison between segregation and other levels of confinement "suggests that the significance of a particular type of deprivation may very from one state's prison system to another." (1273) *Sandin* may do "no more than add the 'significant and atypical' threshold test . . . to the *Hewitt* analysis to ensure that due process protection is applied only to interests of 'real substance.'" *Id.* The court concludes that this is the case, based largely on Justice Breyer's opinion.

The court does not reach the question whether there is a liberty interest in avoiding segregation in California. There is sufficient limitation of official discretion in placement in segregation, but there is no factual record to determine whether it sufficiently disrupted the plaintiff's environment under *Sandin*. The court therefore decides the merits and determines that no liberty interest was taken because the regulations provide for retention in SHU past a previously set release date if release would endanger the lives of inmates or staff, and the plaintiff received *Hewitt* process. A written statement of reasons is not required. "Some evidence" will support the decision.

Pre-Trial Detainees

Chaney v. City of Chicago, 901 F.Supp. 266 (N.D.Ill. 1995). The plaintiff alleged that he had surgery on his feet immediately before he was arrested in December 1992, and that the necessary aftercare he requested was not provided until November 1993, resulting in suffering and the deterioration of his condition. He sufficiently alleged deliberate indifference to his serious medical needs. At 270: "Surgery on the feet is inherently a serious matter, and failure to provide necessary aftercare and follow-up could result in a lingering disability."

Procedural Due Process--Temporary Release

Hollingsworth v. Robinson, 901 F.Supp. 565 (E.D.N.Y. 1995). The plaintiff was arrested and jailed while in a work release program. All charges were dismissed. He was then transferred to another prison without notice or hearing. He did not get a hearing until two months later, after he filed suit in state court. The court rejects defendants' claim that no hearing was necessary because his failure to return to the work release center created a rebuttable presumption of absconding; the failure to return must be voluntary, which is not the case when the participant is in jail.

The fact that the deprivation was ultimately corrected by administrative appeal was no defense, since authority to that effect did not involve "a constitutional deprivation analogous to the removal of

an inmate without notice from a Work Release Program." (572) *Sandin* is not discussed.

Procedural Due Process--Disciplinary Proceedings

Lee v. Coughlin, 902 F.Supp. 424 (S.D.N.Y. 1995). The plaintiff was charged with assault. He was convicted and sentenced to two years in SHU. His administrative appeal was denied. He got the conviction reversed in an Article 78 proceeding after he had served 376 days.

At 431: "In relation to the ordinary incidents of prison life, I find that plaintiff Lee's confinement for 376 days in SHU imposed an atypical and significant hardship on plaintiff." *Sandin* was decided while this motion was pending. *Id.* n. 9: "I am hard pressed to believe that 376 days in SHU would not constitute an 'atypical and significant hardship' as defined by *Sandin* and I assume that is why defendants did not seek to supplement their papers." The court invites a motion for reconsideration, which was granted, and the issue is now being litigated.

The plaintiff designated several staff members as employee assistants, but the defendants assigned someone else, and after the plaintiff said he would rather have an assistant of his choice, the designated assistant did nothing. The plaintiff did not waive his right to assistance. He asked for assistance three times during a hearing that was adjourned five times over a period of 25 days, but was not given assistance, and no reason was given. The hearing officer could not be said to have played both roles, given that state regulations provide both for an impartial hearing officer and an assistant. In any case, an assistant is supposed to *prepare* a defense, not just assist after the hearing begins. At 433: "Were I to adopt defendants' position that a hearing officer and an inmate assistant could be the same person, the confined inmate's right to an assistant and an impartial hearing officer would be rendered meaningless."

The court does not reach whether the state court determination is binding. It is "persuasive evidence" of the lack of meaningful assistance. At 433: "As did the state court, I find that there were many issues raised by the reports relating to the underlying assault charges against plaintiff which an assistant could have aided plaintiff in investigating."

The defendant hearing officer is not entitled to qualified immunity.

Women/Visiting/Injunctive Relief--Preliminary/Ripeness

Bazzetta v. McGinnis, 902 F.Supp. 765 (E.D.Mich. 1995). The prison system instituted visiting restrictions forbidding visitors under 18 who are not children, step-children or grandchildren; forbidding visiting with natural children if the prisoner's parental rights have been terminated for any reason; limiting the visiting list to only 10 people who are not "immediate family"; requiring minor children to visit only with an adult legal guardian with proof of legal guardianship; limiting "members of the public" to only one prisoner's visiting list (i.e., "activists cannot visit more than one prisoner"); permitting denial of all visiting except from clergy and attorneys based on two major misconducts involving substance abuse; barring all former prisoners from visiting any one except "immediate family."

The court granted a temporary restraining order but denies a preliminary injunction. It concludes that prisoners have no First Amendment right of freedom of association and that the right to family integrity does not extend to prison visiting with persons other than immediate family. The court assumes that there is a fundamental right of parents and grandparents to associate with immediate family members in prison, but upholds the regulations under the *Turner* standard. Members of the public have no First Amendment right to visit because alternative means of communication are available.

The challenge to disciplinary deprivation of visiting is not ripe because it is discretionary and hasn't happened yet.

Procedural Due Process--Disciplinary Proceedings

Priest v. Gudmanson, 902 F.Supp. 844 (E.D.Wis. 1995). A 20-day extension of the plaintiff's mandatory release date is actionable under the due process clause under *Sandin*. The plaintiff's claim of lack of an impartial decision-maker, since one of the hearing panel members was a witness to the incident, was not frivolous.

Searches--Urinalysis/Procedural Due Process--Administrative Segregation, Disciplinary Proceedings/Visiting

McDiffett v. Stotts, 902 F.Supp. 1419 (D.Kan. 1995). Repeated urinalysis testing based on individualized suspicion concerning drug use does not violate the Fourth Amendment.

The plaintiff's placement in segregation after a positive urinalysis did not deny due process; "*Sandin* makes clear that an inmate's segregated confinement is not [an atypical and significant] deprivation."

The failure to follow prison regulations during disciplinary hearings does not deny due process.

Holding a hearing, withdrawing the finding of guilt, then proceeding with a second hearing does not violate the Double Jeopardy Clause.

A 90-day deprivation of contact visits after a positive drug test does not violate the Constitution.

Procedural Due Process--Transfers/ Publications/Law Libraries and Law/ Books/Emergency Protection from Inmate Assault/Verbal Abuse/Access to Courts--Punishment and Retaliation/ Deference/Procedural Due Process--Disciplinary Proceedings

Knecht v. Collins, 903 F.Supp. 1193 (S.D.Ohio 1995). Transfers between prisons do not deprive prisoners of liberty under *Sandin*.

The plaintiff spent "months" in disciplinary segregation; his disciplinary proceeding was initially reversed because the appeals officer was not provided with a complete file, then affirmed when the file turned up after the 30-day time limit for issuing decisions. The court cannot determine on this record whether the plaintiff suffered an atypical or significant hardship.

Under the *Turner* test, defendants improperly censored an issue of *Prison News Service* which "does not incite unrest or an overthrow of the penal system, but instead encourages peaceful protests" (e.g., letters to the Governor or prison officials). A second issue stating that "[t]he affirmative defense of self defense/justification should be a viable option for the Brothers to illustrate that the conditions were so oppressive that the takeover was necessary to save their lives," and another advocating that prisoners "break the walls down," were properly censored. An article encouraging people to "act" and "resist" and overthrown the white supremacist regime, which includes prison authorities, was properly censored. An issue for which no reason for censorship was given should be given to the prisoner. Another publication described as "anti-government" and "anti-establishment," which allegedly "could provoke violence," was improperly censored since none of the articles incite violence. At 1200:

> The substantial deference accorded prison officials, however, does not relieve federal courts from their duty to ensure that prison officials' actions are not exaggerated responses to prison concerns. . . . This is especially true in the First Amendment area, where prison officials may attempt "to eliminate unflattering or unwelcome opinions [and] apply their own personal prejudices and opinions. . . ." Additionally, the First Amendment plays a unique and special role in the prison environment. Such freedoms taken for granted in the free world, assume great significance behind bars. Prisoners of ten remain in their cells between fifteen and twenty hours a day with very little to do. The opportunity to read and write allows a prisoner to remain in tough with the outside world, and provides the opportunity for a prisoner to nourish his mind despite the bleakness of his environment. Most importantly, it allows prisoners to channel tensions and frustrations into something positive and peaceful.

Two paralegals and a paging system provide adequate law library access for "administrative control" inmates. A denial of all access to the library, without paralegal assistance, would have been unconstitutional under ordinary circumstances, but since it occurred during a post-riot lockdown, it was not.

Allegations that two staff members have issued death threats and harassment to the plaintiffs and have told other inmates that they are snitches state a claim when it is alleged that these actions were done in response to plaintiffs' filing lawsuits and writing newspaper articles. The allegation that the plaintiffs were labelled snitches is actionable under *Farmer v. Brennan*.

At 1204: "Prison authorities cannot frame and then improperly discipline prisoners for exercising their constitutional rights."

Rights of Staff/Evidentiary Questions

Sagendorf-Teal v. County of Rensselaer, 904 F.Supp. 95 (N.D.N.Y. 1995). Past and present jail employees are not equally available to plaintiff and defendant in a case where the plaintiff is a former jail employee suing over her discharge. At 97: "Testimony described corrections officers as a group to be close and binding." The officers "bore significant interest in a favorable outcome for the defense: through their support of former co-workers and through their own personal involvement."

Protection from Inmate Assault

Knowles v. New York City Dept. of Corrections, 904 F.Supp. 217 (S.D.N.Y. 1995). The plaintiff, a segregation inmate, was slashed in the jail yard. Allegations that prison officials were aware of a "war" between Jamaican and Hispanic inmates, that a Hispanic inmate who had been cut had been transferred to the jail where plaintiff was held, and that the plaintiff, "due to his physical characteristics and accent, belonged to an identifiable group of prisoners for whom risk of . . . assault [was] a serious problem of substantial dimensions." (222, citations and internal quotation marks omitted)

The court notes that "the defendants have failed to come forward with some of the most obvious evidence to attempt to show that there is no genuine issue of material fact," e.g., no "affidavit from any guard or prison official explaining the circumstances of the attack on the plaintiff and attesting to the lack of awareness of the particularized risk to the plaintiff. . . . The defendant appears to seek to take advantage of the *pro se* plaintiff's failure to obtain the evidence from the prison guards." (222)

Religion--Services Within Institution

Muhammad v. City of New York Dept. of Corrections, 904 F.Supp. 161 (S.D.N.Y. 1995). The plaintiffs complained of restrictions on their religious practice as members of the Nation of Islam. The City defended by emphasizing its policy of "generic services."

Under the Religious Freedom Restoration Act, plaintiffs must show a "substantial burden" on their religious rights, i.e., pressure to commit an act forbidden by the religion or prevention of conduct or experience mandated by the religion.

The failure to employ a Nation of Islam minister does not substantially burden free exercise, since there are numerous Muslim imams and various Muslim religious accommodations. Inmates may have personal visits from Nation of Islam clergy, NOI "personal development workshops" are provided, and NOI clergy have appeared as guest speakers.

The failure to have separate NOI services does not substantially burden free exercise; although NOI beliefs are different from orthodox Muslim beliefs, the plaintiff failed to show that the generic service "offends or ignores particular practices or beliefs that are *mandated* by NOI teachings." (191, emphasis in original)

The court finds no factual support for various other claims of burdens on religious exercise.

The logistical, administrative and security concerns underlying the policy of generic services are compelling and justify the defendants' practices.

The plaintiffs' First Amendment claims fail *a fortiori* for the same reasons as the RFRA claims. At 196: "[T]here does not appear to be a clear consensus in the courts as to whether RFRA's heightened standard is limited in application to statutory claims brought pursuant to RFRA itself or whether it also applies to constitutional claims brought under the First Amendment."

The defendants' decisions as to what religions they recognize and provide services for do not violate the Establishment Clause.

The plaintiffs' state law and city regulations claims are also rejected.

False Imprisonment

Hoover v. Snyder, 904 F.Supp. 232 (D.Del. 1995). Claims challenging state court interpretations and applications of state court sentencing statutes are not cognizable under § 1983.

Disabled

Staples v. Virginia Dept. of Corrections, 904 F.Supp. 487 (E.D.Va. 1995). The Americans with Disabilities Act does not apply to prisons.

A paraplegic's *pro se* claims are dismissed. The plaintiff did not respond to the summary judgment motion and his complaint was not sworn to, so the court relies on the defendants' statements that their medical treatment of him was appropriate, that delays in helping him defecate and cleaning him up were his own fault because he didn't go during the daytime when more staff were available, and that his medical and physical therapy treatment are appropriate.

Rights of Staff/Classification--Race

Wittmer v. Peters, 904 F.Supp. 845 (C.D.Ill. 1995). In a challenge by white staff to the race-based promotion of an African-American staff member in a boot camp, the defendants argued that given the 60-70% African-American composition of the inmate population, the operational needs of the camp provided a compelling interest that was served by the promotion. The court says the defendant's consideration of race in the promotion was prudent but that this conclusion is not sufficient to support summary judgment as to the *necessity* of consideration of race under strict scrutiny. However, they are entitled to qualified immunity.

The court declines to order the next available promotions for the plaintiffs because there was no evidence that any of them would have been promoted in place of the African-American had race not been a factor.

Procedural Due Process--Disciplinary Proceedings/Use of Force/Discovery

Carter v. Carriero, 905 F.Supp. 99 (W.D.N.Y. 1995). Disciplinary confinement in special housing does not deny liberty under *Sandin* because the restrictions involved are imposed on all SHU inmates, whether or not they are there for disciplinary purposes. The fact that the plaintiff was sentenced to 360 days, with 90 suspended, did not matter because it did not exceed similar administrative confinement.

The prisoner was not denied due process in any case. The hearing officer's refusal to ask witnesses particular questions about the incident was appropriate because the witnesses said they had no personal knowledge of the incident. The failure to produce a baton at the hearing did not deny due process because there was no claim that the prisoner broke it. The plaintiff's claim that the hearing officer was biased is unsupported.

ProceduralDueProcess--Classification/ Procedural Due Process--Temporary ReleaseClassification/EqualProtection/ Negligence, Deliberate Indifference and Intent/Rehabilitation/Ex Post Facto Laws

Neal v. Shimoda, 905 F.Supp. 813 (D.Haw. 1995). Under *Sandin*, there is no liberty interest in furlough or in freedom from being labeled as a sex offender.

The Sex Offender Treatment Program does not deny equal protection. At 819:

> Given the high probability that an untreated sex offender will

> commit another offense, the state's policy of denying parole, furlough and minimum security classification to untreated offenders is rationally related to the government's interest in protecting the public. Denying untreated offenders placement in minimum facilities also furthers the state's interest in maintaining safety and security in its prison facilities.

The fact that the program extends to persons who were not convicted of sex offenses, based on the "offense facts," does not make it unlawfully overinclusive. *Id.*: "The consequences of releasing untreated sex offenders back into society is the same, regardless of whether they have been convicted of the offense."

Requiring that sex offenders "not be in denial about their crimes" does not violate the Fifth Amendment prohibition against self-incrimination, since the program is not a proceeding in which the answers might subsequently incriminate him.

The sex offender program does not violate the Eighth Amendment. Under *LeMaire*, since prison officials must balance other important responsibilities against the plaintiff's rights, they must be shown to have acted maliciously and sadistically. Here, they have acted with concern for his welfare.

The sex offender program is not an ex post facto law with respect to its prohibition on placing untreated offenders in minimum custody, since it was created to treat inmates, not to punish them. It is also not a "law"; rather, it is a non-binding policy.

John Boston is the Director of the Prisoners' Rights Project, Legal Aid Society of New York. He regularly contributes this column to the NPP Journal.

National Prison Project Publications

The National Prison Project ***Journal***, a quarterly publication, $30/year ($2 for prisoners), send check or money order to the NPP.

The Prisoner Assistance Directory, identifies and describes various organizations and agencies that provide assistance to prisoners. Lists national, state and local organizations and sources of assistance including legal, AIDS, family support and ex-offender aid. 11th Edition, published July 1996. Paperback, $30 prepaid from NPP.

A Primer for Jail Litigators is a detailed manual with practical suggestions for jail litigation. It includes chapters on legal analysis, the use of expert witnesses, class actions, attorneys' fees, enforcement, discovery, defenses' proof, remedies, and many practical suggestions. 1st Edition, February 1984 (case citations and correctional standards updated 1995). 180 pages, paperback, $20 prepaid from NPP. (Note: this is not a "jailhouse lawyers" manual.)

ACLU Handbook, The Rights of Prisoners. Guide to the legal rights of prisoners, parolees, pre-trial detainees, etc., in question-and answer-form, contains citations. 4th Edition, 1988, paperback, 136 pages, $7.95 plus shipping. NOT available directly from the National Prison Project. Order from the ACLU by phone, 1-800-775-ACLU, or through the ACLU web site: www.aclu.org.

1997 AIDS in Prison Bibliography **NEW EDITION** -- revised and greatly expanded, lists resources on AIDS in prison available from the NPP and other sources, including corrections policies on AIDS, educational materials, medical and legal articles, and recent AIDS studies. $25 prepaid from NPP.

AIDS in Prisons: The Facts for Inmates and Officers is a simply written educational tool for prisoners, corrections staff and AIDS service providers. The booklet answers commonly asked questions concerning the meaning of AIDS, the medical treatment available, legal rights and responsibilities. Also available in Spanish. Single copies free, call for bulk order pricing -- 202/234-4830.

TB: The Facts for Inmates and Officers answers commonly-asked questions about tuberculosis (TB) in a simple question-and-answer format. Discusses what tuberculosis is, how it is contracted, its symptoms, treatment and how HIV infection affects TB. Single copies free, call for bulk order pricing -- 202/234-4830.

NPP and ACLU On-Line

For information on National Prison Project publications, current cases and other items of interest, visit the NPP web page: www.NPP.org. For information about other activities of the ACLU, visit the ACLU web page: www.ACLU.org

Prison News

The Sentencing Project issued a new international study in June which reveals that Russia and the United States have reached record levels of incarceration and are far ahead of other nations in their use of imprisonment. In 1995, the rate of incarceration in Russia was 690 per 100,000 and in the U.S. 600 per 100,000, about 6-10 times that of other industrialized nations and an all-time high. Drug offenders constituted more than a third (36%) of the increase in state prisoners in the U.S. from 1985 to 1994 and more than two-thirds (71%) of the increase in federal prisoners.

The study also found that a 92% increase in the U.S. rate of incarceration had little overall impact on crime rates in the ten-year period between 1985 and 1995. Despite declines in crime in the last several years, overall crime rates in 1995 remained virtually the same as in 1985 and violent crime was up by 23%. The relationship between incarceration and crime rates has been inconsistent with an increase in crime from 1985 to 1991, and a decrease for 1991-95, despite a continuous rise in incarceration.

The report also examined the dramatic reductions in crime in New York City in recent years and found no indication that an increase in imprisonment was responsible. During the 1990-95 period when crime was declining in New York, the jail population in the city actually declined and the state prison population increased at a substantially lower rate than other states. Changes in policing strategies, demographics, the drug trade, and other factors appear to be more promising explanations.

The report also looked at the impact of education in prison on crime control. Surveys have shown that 41% of state prisoners have not completed high school or obtained a GED, and that participation in prison education programs leads to reductions in recidivism. Despite this, prison education programs have been reduced substantially, due to Congressional action in cutting Pell grants for prisoners in 1994 and, in 16 states, through state budget actions.

The full report, *Americans Behind Bars: U.S. and International Use of Incarceration, 1995*, is available for $8 from The Sentencing Project, 918 F Street, NW, Washington, DC 20004; (202) 628 0871.

The Justice Policy Institute reported that from 1987 to 1995, state corrections spending increased 30% while spending on higher education decreased 18%. 1995 marked the first year in which money spent on building prisons exceeded university construction funds. Between 1994 and 1995, construction funds for higher education *dropped* by $954 million, while prison construction *increased* by $926 million.

The situation was particularly bleak in the District of Columbia where in the 1980's alone, correction expenditures increased at a rate almost seven times that of higher education spending and the per capita spending for corrections outpaced higher education by a margin of four to one.

The report, *Trading Classrooms for Cell Blocks: Destructive Policies Eroding D.C. Communities*, can be obtained from The Justice Policy Institute, 2208 Martin Luther King, Jr. Ave., SE, Washington, DC 20020.

The Supreme Court ruled on RFRA, in *City of Boerne v. Flores*, 65 U.S.L.W. 4612 (June 25, 1997). The Court struck down the 1993 Religious Freedom Restoration Act which was enacted by Congress in response to the Supreme Court's earlier decision in *Employment Division v. Smith*. Under RFRA, the government must provide a compelling justification whenever it places a burden on religion. The Court saw RFRA as an attempt to supersede the constitutional ruling in *Smith* --which held that the Free Exercise Clause did not require strict scrutiny under those circumstances --and thus beyond the scope of congressional authority under § 5 of the Fourteenth Amendment. While acknowledging that Congress has broad authority to enforce the Fourteenth Amendment under § 5, it may not "enforce a constitutional right by changing what the right is." While the decision takes RFRA away from state prisoners, there is some argument that it may still be applicable to federal prisons. Discussions have begun in Congress about introducing a new version of RFRA, but there will undoubtedly be a strong move to deny prisoners coverage under any new act.

Highlights from the Prison Project's Docket

Following are some new developments in our litigation over the past few months.

Young v. Harper --On March 18, the U.S. Supreme Court, in a unanimous opinion written by Justice Thomas, affirmed the opinion of the Tenth Circuit that preparole was sufficiently like parole to entitle a program participant to the procedural protections set forth in the earlier landmark case of *Morrissey v. Brewer*. Oklahoma prisoner Ernest Harper had participated successfully in a prerelease program for five months (living at home and working at two jobs) when his participation in the program was abruptly terminated because the governor decided that he was not eligible for parole.

Harper maintained that the circumstances of the prerelease program created a liberty interest protected under the 14th Amendment which entitled him to a due process hearing, and he should not have been summarily returned to prison. He lost his case in the district court but won on appeal.

The NPP was appointed to represent Harper before the Supreme Court for the case that was argued on December 9, 1996.

Amatel v. Reno--On August 12, a judge in U.S. District Court for the District of Columbia found that new Federal Bureau of Prisons' regulations banning sexually explicit materials (the so-called "Ensign Amendment") are unconstitutional. The NPP, together with lawyers from Jenner & Block and the ACLU National Office, filed suit in April on behalf of three Federal prisoners, the publishers of Playboy and Penthouse magazines, and a publishers' trade association.

Following plaintiffs' request for a preliminary injunction, the judge granted a permanent injunction against enforcement of the new regulations by the Bureau of Prisons.

Shumate v. Wilson-- The NPP, together with local counsel, filed suit in April 1995 on behalf of over 5,000 women prisoners at the Central California Women's Facility and the California Institution for Women, charging that prisoners with serious illnesses were being denied crucial medical care and were suffering needlessly. Prisoners with HIV and AIDS claimed that policies and practices resulted in routine disclosure of their HIV positive status.

On July 1997, just before trial was scheduled to begin, the parties agreed on a comprehensive settlement. If the settlement is approved by the court, an Assessor will monitor health care in the two prisons with the assistance of four medical experts over a sixteen month period to determine if the state is in compliance with requirements.

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