THE NATIONAL PRISON PROJECT

# Journal

ISSN 1076-769X

Vol. 12 No. 3, Spring/Summer 1998

## Friends and Colleagues Remember Activist Attorney Robert F. Bensing

Robert F. Bensing, a staff attorney with the Southern Center for Human Rights, died February 3 of injuries sustained in a car accident after meeting with inmate clients about a recently settled case at the Valdosta State Prison in Georgia. The state of Georgia agreed to pay $283,000 over charges of abuse and brutality committed by prison staff. Local press reported the inmates' victory in the case the same day Bensing died.

This issue of the *Journal* is dedicated to his life and work.

Bensing, who spent his entire career working in public interest law, recently received the ACLU of Georgia's 1997 Civil Liberties Award. He began practicing prison litigation 15 years ago with Prisoners' Legal Services of New York in Plattsburgh. In 1995, he moved to the Southern Center for Human Rights in Atlanta. Bensing also volunteered his services on behalf of refugee and immigrant rights.

In his most recent prison case, *Anderson v. Garner*, Bensing exposed the seemingly state-sanctioned horrors endured by prisoners during shakedowns at Hays and Walker State Prisons. Bensing's efforts brought a successful conclusion to a suit where 20 prison employees testified and corroborated the accounts of beatings and attacks carried out by prison guards on unresisting inmates. Many of the incidents were committed in the presence of the state's corrections commissioner, Wayne Garner.

Colleagues recall Bensing as a gentle, kind, and laid-back individual. He was a vegetarian with little concern for money or status. One colleague recalled, "He only cared about his clients and their interests. Bob exhibited not the slightest need to prove anything about himself to anyone. He was at ease with himself and with anyone else, from the high and mighty to the poorest person in the dingiest prison cell."

Family and friends also jokingly remembered his often "disheveled" dress and love of junk food. "Bob was not flashy. He wore clothes that looked like they had been bought at K-Mart ten years ago and slept in the night before. It pained him to wear a tie, and, given the collection of ties he had, it often pained us to see him wearing them." Fellow staff members say Bob always had a supply of Oreo cookies on hand, whether in the office or out interviewing clients, which he was "occasionally" willing to share.

Stephen B. Bright, Director of the Southern Center for Human Rights, delivered the eulogy for Bensing. Bright's tribute to his friend and colleague best and poignantly describes the wonderfully devoted and compassionate man the prisoners' rights community has lost:

> Bob's life was a ministry to those most in need. He traveled down that road seldom taken of trying to bring to life the dream of equal justice for all. He lived out his belief in human rights -- that all people are entitled to dignity, even those who have offended us most grievously. He was a great humanitarian. He knew that people were much more than the worst thing they ever did in their lives.

The Southern Center for Human Rights honored Bensing posthumously with the "Service to Prisoners Award" at its 1998 awards dinner held at the Washington Stouffer Renaissance Mayflower Hotel on October 6.

### INSIDE THE *JOURNAL*

# Case Law Report -- Highlights of Most Important Cases

by John Boston

## Court of Appeals Cases

**Prison Litigation Reform Act/In Forma Pauperis**

*Walp v. Scott*, 115 F.3d 308 (5th Cir. 1997). The plaintiff was denied IFP status by the district court, which interpreted the Prison Litigation Reform Act as barring the filing of a civil rights complaint by a prisoner who had failed to pay the costs--all of them--associated with filing a previous claim, which was still pending. (He was apparently broke; he had been assessed 14 cents as an initial filing fee and that is all he had paid.)

At 309: "Nowhere does the PLRA require a prisoner to pay the entire filing fee in a prior civil case before filing a second complaint." This result is also inconsistent with the balance struck by the PLRA, which provides that in no event shall prisoners be prohibited from suing because they have no means to pay the initial fee. In addition, it turns the "three strikes" rule into a "one swing" rule.

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

*McLaurin v. Cole*, 115 F.3d 408 (6th Cir. 1997). The plaintiff alleged that a disciplinary charge was filed in retaliation for his filing a grievance against the officer. The record reveals that the plaintiff had threatened to kill the officer, and it is therefore not surprising that the officer issued the charge. The plaintiff failed to prove that the filing of the grievance was a substantial or motivating factor, and the officer's actions were not shocking to the conscience. The court is not only wrong in adopting the "shock the conscience" test (see concurring opinion), but completely muddies the water as to why the officer's action did not meet the standard--because it was justified, or because it was not sufficiently egregious even if unjustified? It also seems to engage in appellate fact-finding, since the court granted judgment as a matter of law after the plaintiff's case, and it does not appear that the plaintiff admitted threatening to kill the officer.

**Religion/Damages--IntangibleInjuries**

*Warner v. Orange County Dept. of Probation*, 115 F.3d 1068 (2d Cir. 1997). The plaintiff was required to attend Alcoholics Anonymous as a condition of probation, which was recommended as a matter of routine by the county probation department for defendants with alcohol problems. He objected to the religious component of the program.

Compelled attendance at A.A. sessions violated the Establishment Clause. They had a substantial religious component and plaintiff's participation was coerced. The result would be different had he been offered a reasonable choice of therapy providers.

The damage award of $1.00 was proper. The court engages in a homily about the evils of a substantial damage award in these circumstances and the attractiveness of a good faith defense, which does not exist for municipalities.

**Use of Force/Verbal Abuse/Personal Involvement and Supervisory Liability/ Damages--Punitive**

*Estate of Davis by Ostenfeld v. Delo*, 115 F.3d 1388 (8th Cir. 1997). The plaintiff was slow in obeying instructions about handcuffing for a search. He asked for a higher-ranking officer to be present. Defendants convened a "movement team" to conduct a cell extraction. Movement teams generally were supposed to use no more force than necessary, and records of 200 movement team instances showed only two serious injuries. Movement team incidents are videotaped and all staff involved are supposed to submit reports, which are reviewed through the chain of command.

The officer responsible for restraining the plaintiff's head lunged onto him as he lay unmoving on his bed, struck him repeatedly about the head and face, and smashed his chin against the concrete floor. The other team members did not intervene and did not report this force or any injury to the plaintiff. The Superintendent reviewed the incident and observed from the video tape that the plaintiff was bleeding, but did not order any further investigation. The videotape was later lost.

There was no system for tracking complaints against officers, and the superintendent remembered none against the main defendant, but the court found that several such prior complaints had been dismissed without investigation.

The district court properly found that the main officer defendant violated the Eighth Amendment, based on its determination that the plaintiff was more credible. Its conclusion that force was used maliciously and sadistically is supported both by the disproportion between the force used and the force needed and by the fact that the defendant taunted and threatened the plaintiff the day after the incident. He was not entitled to qualified immunity. The court agrees that striking an unresisting inmate 20 to 25 times in the head while four other officers were restraining him and two

others were standing by is a violation of clearly established law. (The Superintendent testified that any blow would be excessive on these facts.)

The other members of the movement team were properly held liable for knowing failure to intervene. At 1395: "A prison official may be liable for failure to protect an inmate from a use of excessive force if he is deliberately indifferent to a substantial risk of serious harm to an inmate." This law was clearly established. Their failure to report the plaintiff's injury is evidence of deliberate indifference. The movement team supervisor was properly held liable for the same reason.

The Superintendent was properly held liable based on evidence that he knew of the main defendant's propensity to use excessive force, based on one incident in which he had authorized an investigation and others in which he took no action. These facts support a finding of deliberate indifference.

The plaintiff sustained numerous contusions and lacerations, including one laceration requiring internal and external sutures. The district court awarded $10,000 in compensatory damages jointly and severally against all the defendants and $5000 in punitive damages against the main officer defendant and the Superintendent. The award of punitive damages was proper against both defendants.

**Prison Litigation Reform Act/In Forma Pauperis**

*Santer v. Quinlan*, 115 F.3d 355 (5th Cir. 1997). The petitioner sought a writ of mandamus from the district court directing a state court to review his state writ on the merits, and appealed its denial. The Prison Litigation Reform Act does not apply because the action is not an appeal of a judgment in a civil case. Mandamus actions that seek relief analogous to civil cases should be treated as civil under the PLRA, while actions directed to criminal proceedings are not.

**Religion--Practices--Beards, Hair, Dress/Exhaustion of Remedies/ Standing**

*Jackson-Bey v. Hanslmaier*, 115 F.3d 1091 (2d Cir. 1997). The plaintiff alleged that he was precluded from wearing to his father's funeral white garments and a red fez as required by the Moorish Science Temple religion. As a result, he chose not to go to the funeral.

Departmental policy required prisoners to register their religious affiliations in order for these to be accommodated. The plaintiff was registered as a Muslim and not an MST adherent. Policy also said that prisoners may not wear religious garb of religions other than their own. Another policy required prisoners attending funerals to wear civilian clothing issued by the state, but defendants admitted that they will accommodate religious requirements in this respect.

The plaintiff lacked standing to challenge the refusal to let him wear his religious garb because he had refused to follow the standard procedure of registering his religion and failed to show that doing so would have been futile. He did not challenge the constitutionality of the registration requirement, which the court notes places a minor burden on religious rights while serving important purposes for prison officials. The court refuses to interpret DOCS documents indicating that only the Sunni and American Muslim Mission sects are recognized as meaning that the plaintiff would not have been accommodated, and weighs the fact that defendants made some accommodation after this lawsuit was filed.

At 1096: "As a general matter, to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy."

**Use of Force/Pre-Trial Detainees**

*Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997) (en banc). The plaintiff alleged that a police officer stuck a pen a quarter of an inch into his nose, threatening to rip it open, and slapped him across the face with "medium force."

The Fourth Amendment governs use of force during arrest, investigatory stop, or other "seizure" of a person, but this is not a Fourth Amendment case because the force was used two hours and ninety miles from the place of arrest. Also, the plaintiff was arrested pursuant to a valid warrant, and is therefore a pre-trial detainee under the law of the Fourth Circuit. The court rejects the holdings of several circuits that "arrest" extends through the period of custody by the arresting officers.

This is not a Fifth Amendment case because the plaintiff did not incriminate himself and the incident of which he complains was not an interrogation.

The claim is governed by the Due Process Clause of the Fourteenth Amendment, which does not prohibit *de minimis* uses of force. At 1167: "Punishment must mean something more than trifling injury or negligible force." The plaintiff made claims of psychological injury, but the record does not support them; his medical records show that he has made numerous complaints about all manner of medical and psychological claims *except* for the lingering effects of his treatment after arrest.

**Prison Litigation Reform Act/In Forma Pauperis/Protection from Inmate Assault/Pleading**

*Gibbs v. Roman*, 116 F.3d 83 (3d Cir. 1997). The plaintiff alleged that a prison

librarian permitted an inmate law clerk to read his legal papers, thereby disclosing that he had been a government informant, resulting in threats on his life and physical attacks by other inmates.

The district court erred in dismissing the claim under the "three strikes" provision; the plaintiff's allegations of threats and assaults met the statutory requirement of "imminent danger of serious physical injury." At the pleading stage, allegations in the complaint should be construed as true, and this principle applies to allegations of imminent danger. The defendants may subsequently challenge these allegations and the district court must then determine whether they are credible as of the time the alleged incident occurred, and not as of the time the complaint was filed. The court may rely upon sworn affidavits or depositions or may hold a hearing.

**Procedural Due Process—Administrative Segregation, Disciplinary Proceedings/Personal Involvement and Supervisory Liability**

*Sealey v. Giltner*, 116 F.3d 47 (2d Cir. 1997). The plaintiff was accused of assault, fighting and weapons possession. He was found not guilty at a disciplinary hearing, since there was no employee witness and a confidential informant's report was unsubstantiated, but he was placed in administrative segregation based in part on the confidential information indicating involvement in extortion and strong arming. The determination was reversed on administrative appeal but on rehearing he was put back in segregation, and this time the determination was upheld. However, he had been transferred and released from segregation.

At 51, citing *Williams v. Smith:*

> A supervisory official is liable for constitutional violations if he or she (1) directly participated in the violation; (2) failed to remedy the violation after learning of it through a report or appeal; (3) created a custom or policy fostering the violation or allowed the custom or policy to continue after learning of it; or (4) was grossly negligent in supervising subordinates who caused the violation.

A letter to the Commissioner that was referred to the Director of Special Housing for review did not render the Commissioner liable under this standard.

The plaintiff should have the opportunity to show that he was deprived of liberty under *Sandin* based on the fact that he faced an indefinite term in SHU and actually served 152 days. At 52 n. 1: "Prior to *Sandin*, we assessed an inmate's entitlement to procedural protections in light of the potential penalty he or she faced."

On remand, the court should also consider whether the defendants "acted in bad faith, labeling as administrative a confinement that only could be justified as punitive and if so whether the notice Sealey received was adequate." (52-53) If the segregation was administrative, the court should consider whether the initial notice and explanations at later hearings sufficed to justify the full term of the segregation.

**Pre-Trial Detainees/Medical Care--Standards of Liability--Serious Medical Needs/State Officials and Agencies/State Law Immunities**

*Lancaster v. Monroe County, Ala.*, 116 F.3d 1419 (11th Cir. 1997). The decedent was arrested for DWI. He fell out of a top bunk and hit his head on the floor and died a couple of days later of an intra cranial hemorrhage. His condition was consistent with seizures. His family had repeatedly warned everyone in sight that he had a seizure disorder and that seizures would likely be triggered by alcohol withdrawal.

It was clearly established that "an official acts with deliberate indifference when he knows that an inmate is in serious need of medical care, but he fails or refuses to obtain medical treatment for the inmate," or "intentionally delays providing an inmate with access to medical treatment, knowing that the inmate has a life-threatening condition or an urgent medical condition that would be exacerbated by delay." (1425) A prior decision established that "sheriffs and jailers cannot place or keep a chronic alcoholic in jail without any medical supervision, when the defendants are aware that the alcoholic is suffering from a severe form of alcohol withdrawal." (1426) *Id.:* "... [A] jail official who is aware of but ignores the dangers of acute alcohol withdrawal and waits for a manifest emergency before obtaining medical care is deliberately indifferent to the inmate's constitutional rights."

At 1426: "Whether each of the defendants had the requisite knowledge of the seriousness of Lancaster's medical needs is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." All the defendants here could be found to have the requisite knowledge and to have planned to keep him in jail without medical supervision or treatment until he had a seizure.

The county sheriff was a final policymaker, but whether for the state of Alabama and not the county is at issue in another case; the court defers resolution of the issue. (*McMillian v. Monroe County, Ala.*, 117 S.Ct. 1734 (1997) has held that Alabama sheriffs are state officials in their law enforcement capacity.)

Jailers sued in their official capacities are state officials in Alabama, and entitled to Eleventh Amendment

immunity.

Sovereign immunity bars state law claims against the Sheriff for negligent performance of the statutory duty to provide medical care. The court reaches the same conclusion about jailers.

**Prison Litigation Reform Act/In Forma Pauperis**

*Williams v. Roberts*, 116 F.3d 1126 (5th Cir. 1997). Under the Prison Litigation Reform Act, appellate courts must assess fees from IFP litigants at the moment the appeal is filed, even if it is later dismissed.

**Prison Litigation Reform Act/In Forma Pauperis**

*Williamson v. Mark*, 116 F.3d 115 (5th Cir. 1997). Financial screening under the Prison Litigation Reform Act is to be done in the district court; this appeal is held in abeyance and the question of the plaintiff's financial status, assessment of filing fee, etc., is remanded to the district court. The substance of his appeal concerns the district court's assessment of the PLRA filing fee in that court; if the court finds any merit to that claim, it will remand to the district court for reassessment of the district court filing fees. If the plaintiff is ultimately dissatisfied with the resolution of that issue and wants to appeal from it, he can file a new notice of appeal and proceed without paying a second appellate filing fee.

**Religion/Publications/Damages--Intangible Injuries, Punitive**

*Williams v. Brimeyer*, 116 F.3d 351 (8th Cir. 1997). A blanket ban on materials from the Church of Jesus Christ Christian is unconstitutional. The defendants had a publication review procedure but didn't use it. The plaintiff was entitled to the particular materials he was denied. At 354: "The incoming publications did not counsel violence, and there is no evidence that they have ever caused a disruption. Certainly the views expressed in the publications are racist and separatist, but religious literature may not be banned on that ground alone." The material expressed opposition to integrated celling, and inmates have no right to insist on segregation, but that doesn't mean they give up their religious beliefs or that these materials necessarily cause violence or refusal to occupy cells as ordered. Also, when the Publications Review Committee examined the same materials, it voted to approve them. Id.: "Prison authorities . . . have not been consistent in rejecting these materials, a fact which leads us to believe that rejection, when it occurred, was an exaggerated response."

The district court awarded $1.00 in compensatory damages and $500.00 in punitive damages. The award of punitive damages is upheld; the court's finding that the defendants were callously indifferent to plaintiffs' right to read the materials was not clearly erroneous. The court had already held the blanket ban unconstitutional at the time these materials were rejected, and a defendant here was a defendant in the earlier action.

**Color of Law/Mental Health Care/Pre-Trial Detainees**

*Buckner v. Toro*, 116 F.3d 450 (11th Cir. 1997). The plaintiff was arrested and subsequently developed a "conversion reaction" and was unable to walk. He received treatment from Prison Health Services, Inc., and alleged that his condition went undiagnosed and has become permanent.

At 452: "When a private entity like PHS contracts with a county to provide medical services to inmates, it performs a function traditionally within the exclusive prerogative of the state. . . . In so doing, it becomes the functional equivalent of the municipality." Therefore the policy requirement of *Monell* and progeny apply. This requirement is not an immunity which arguably does not apply to a private defendant; it is a limitation on municipal liability to cases where the entity actually caused the violation.

**Criminal Proceedings**

*Turk v. White*, 116 F.3d 1264 (9th Cir. 1997). A statute providing for life imprisonment without parole for state prisoners convicted of assault likely to produce great bodily injury committed while the prisoner was already serving a life sentence did not deny equal protection, even as applied to a prisoner whose underlying life sentence was later vacated. The prisoner's status was used to define the offense and not to enhance the penalty. The interest in stopping prisoners serving life sentences from attacking guards provided a rational basis for the classification.

**Prison Litigation Reform Act/In Forma Pauperis**

*Gay v. Texas Dept. of Corrections State Jail Div.*, 117 F.3d 240 (5th Cir. 1997). The filing fee requirements of the Prison Litigation Reform Act apply to prisoners who file a notice of appeal while incarcerated but are subsequently released. (The Second Circuit has reached the opposite conclusion.)

**Sexual Abuse/Municipalities**

*Sewell v. Town of Lake Hamilton*, 117 F.3d 488 (11th Cir. 1997). The plaintiff alleged that she was sexually molested by a police officer after arrest. A jury awarded $452,000 in damages.

The municipality is not liable for failure to train and supervise, since the proper behavior (refraining from sexual abuse) was obvious to all without training or supervision.

**Prison Litigation Reform Act/In Forma Pauperis/Appeal**

*Baugh v. Taylor*, 117 F.3d 197 (5th Cir. 1997). The district court dismissed the plaintiff's claims as frivolous based on answers he provided to a questionnaire, and certified that an appeal was not taken in good faith.

At 200: "A prisoner litigant who has been denied IFP status for appeal, or whose appeal has been certified as taken in bad faith, must pay the full filing fee and other costs when due, without the benefit of the accommodating assessment procedures found in section 1915(b)." The court rejects the Sixth Circuit's conclusion in *Floyd v. United States* that district courts may only certify non-prison appeals as not taken in good faith.

A district court's certification that an appeal is not taken in good faith is subject to appellate review; the court harmonizes 28 U.S.C. § 1915(a) with Fed.R.App.P. 24(a), *contra Floyd*, which held that the rule was repealed in part. The district court is required under Rule 24(a) to state the reasons for its certification. The litigant may then, within the time prescribed by Rule 4, pay the full filing fee and costs and proceed with the appeal, or contest the certification decision by filing a motion for leave to proceed IFP with the court of appeals. Such a motion, if successful, will be deemed to be a timely notice of appeal. The motion must be directed solely to the certification decision and not the merits. At 202 (footnote omitted): "The said motion and deemed notice of appeal shall be a filing for purposes of the PLRA and will trigger the financial screening and assessment procedures thereof." If such a motion is successful, the court will order briefing on the merits of the appeal. However, if the merits of the IFP decision and the appeal are so intertwined as to constitute the same issue, the court may decide the merits as well as the IFP issue. (Will they give notice and ask for briefing of the merits in such a case? They don't say.) If the prisoner persists in appealing despite an adverse decision on the motion, the filing fee must be paid within 30 days or the appeal will be dismissed for lack of prosecution.

**Transfers**

*Poland v. Stewart*, 117 F.3d 1094 (9th Cir. 1997). At 1098: "The Attorney General may, at her discretion, waive the federal sovereign's strict right to exclusive custody of a prisoner and transfer a federal prisoner to a state sovereignty to enable the state to subject the prisoner to conviction for a crime against it." Here, the petitioners were turned over to state authorities so they could be prosecuted for a capital crime.

**Protection from Inmate Assault/ Classification/Appointment of Counsel**

*Hamilton v. Leavy*, 117 F.3d 742 (3d Cir. 1997). The plaintiff has a long history of being assaulted and has been placed in protective custody and transferred out of state. He was returned to Delaware to prosecute civil actions in the state courts and a *guard* denounced him as a snitch in the presence of inmates. The Multi-Disciplinary Team (MDT) unanimously recommended that he be placed in protective custody, but they took no immediate action to protect him; they forwarded their recommendation to the Central Institutional Classification Committee (CICC), which did nothing. Less than two months later he was assaulted by another prisoner, who pled guilty and said he did it because the plaintiff was a snitch.

The district court erred in granting summary judgment to the chair of the CICC based on her affidavit that said there was no danger to the plaintiff at the prison where he was held. The MDT's recommendation, which considered the plaintiff's history of assaults and acknowledged that his safety concern was statewide, constituted evidence of a substantial risk of harm and provided the CICC chair with knowledge of the risk. Since she knew he had been labeled a snitch, a fact-finder could infer that she knew the threat was imminent. The circumstantial evidence was sufficient to support an inference of knowledge and the "no action" decision demonstrated conscious disregard of the risk.

The MDT defendants acted reasonably in forwarding their recommendation to the CICC per prison procedure, but they did not necessarily act reasonably in doing nothing after their recommendation was rejected.

At 747 n. 1: The district court's suggestion that the plaintiff must give advance notice of his safety concerns is inconsistent with *Farmer*; the question is whether the defendants knew about the risks.

The district court should have appointed counsel. It erred in concluding that the plaintiff did not have a colorable claim, and he appears to be ill-equipped to litigate in light of medical evidence that he suffers from a paranoid delusional disorder.

**Publications**

*Owen v. Wille*, 117 F.3d 1235 (11th Cir. 1997). The plaintiff was denied publications containing nude photos. The defendants did not dispute that a blanket ban on such photos would be unconstitutional. Uncontradicted evidence showed that each publication sent to a prisoner was reviewed by at least three prison officials. Summary judgment for the defendant was proper. There is no examination of the individual publications by the court; however, there

is no indication that such examination was sought. The censorship regulations are not described and the court does not pass on their constitutionality, much less whether the publications actually violated them.

**Habeas Corpus/Procedural Due Process**

*Woratzeck v. Arizona Bd. of Exec. Clemency*, 117 F.3d 400 (9th Cir. 1997). The plaintiff argued that the procedural deficiencies in his clemency hearing denied due process and he should not be executed just yet.

The plaintiff's claim was appropriately brought via § 1983 and not habeas corpus, since a favorable decision would not necessarily imply the invalidity of the punishment imposed; it would merely provide him with another clemency hearing.

The involvement of his former defense attorney and the Attorney General in opposing his clemency petition did not deny due process. Since there are no substantive limitations in the Arizona clemency scheme, there is no liberty interest arising from state law. However, the court applies the Sixth Circuit's decision that clemency plays an integral part in a state's criminal justice procedure and therefore must be conducted with due process even if clemency itself is not required, and finds that due process was not violated because the proceeding did not "shock the conscience" even if the involvement of attorney general and former defense counsel were "unfortunate and inexcusable."

**Prison Litigation Reform Act/In Forma Pauperis**

*Kincade v. Sparkman*, 117 F.3d 949 (6th Cir. 1997). The Prison Litigation Reform Act's filing fee requirements and three strikes provision do not apply to petitions for habeas corpus or post-conviction relief; these are not civil actions for PLRA purposes. Persons seeking such relief are required only to file a statement of assets and inability to pay the fees to proceed IFP. At 952: "... [A] prisoner may not attempt to cloak another civil action, such as an alleged civil rights violation, under the auspices of § 2254 and § 2255." In such a case the district court must assess the filing fee.

**In Forma Pauperis**

*Marts v. Hines*, 117 F.3d 1504 (5th Cir. 1997) (en banc). At 1506: "... [W]e now hold that dismissals as frivolous or malicious should be deemed to be dismissals with prejudice unless the district court specifically dismisses without prejudice. . . . Unexplained dismissals without prejudice will necessitate a remand." The appeals court has the authority to change dismissal without prejudice to dismissal with prejudice even in the absence of a cross-appeal. The "Analysis" section of this opinion begins (1505): "Once again we consider the application of limited judicial resources to an ever increasing number of prisoner *pro se* filings." Eight out of 18 judges dissent from this holding.

The PLRA is not considered.

**Appeal/Modification of Judgments/ Contempt/Class Actions--Settlement of Actions/Intervention/Access to Courts--Punishment and Retaliation**

*Twelve John Does v. District of Columbia*, 117 F.3d 571 (D.C.Cir. 1997). A contempt motion was to be settled with some of the heavy fines held in abeyance and ultimately returned if the District met required staffing levels. Prisoners filed *pro se* motions asking the court to oust class counsel, permit them to intervene as a subclass, appoint a receiver, and grant an anti-retaliation order. Subsequently 1100 of 1300 prisoners in the jail signed petitions supporting the dissidents. All motions were denied except for the anti-retaliation order and allowing dissident class members to be added to the group that meets with class counsel.

A modified consent decree is an order granting, continuing, modifying, refusing or dissolving an injunction and is therefore appealable.

The named interveners had all been transferred to other jails and were not even seeking retransfer. However, they have standing on appeal. At 575: "A party certified as class representative may pursue the class claim even after his purely individual claim becomes moot, . . . and a named plaintiff who has merely asked for class certification may appeal the denial of class certification even after his individual claim becomes moot."

The district court did not abuse its discretion in denying the motion to intervene as a subclass. The question is whether the dissidents were adequately represented by class counsel. The claim that class counsel failed to maintain adequate communication with, and to be sufficiently responsive to, class members is rejected; the dispute relates to counsel's failure to embrace the dissidents' agenda, which went beyond the scope of the consent judgment that counsel was enforcing.

**Work Assignments/Pre-Trial Detainees/Class Actions--Certification of Classes/Mootness**

*Wade v. Kirkland*, 118 F.3d 667 (9th Cir. 1997). The plaintiff challenged working conditions of "chain gang" labor. He was transferred from the jail while class certification was pending and the district court dismissed as moot without ruling on certification. The court remands for a ruling on certification,

including a determination whether the plaintiff may remain as the class representative or whether other class members with live claims should be allowed to intervene.

Had the plaintiff's claims become moot after certification, mootness would have had no effect on the action or the plaintiff's status as class representative. Had they become moot after denial of class certification, he would have standing to appeal the denial. By analogy, this plaintiff also has standing under *Geraghty*.

In some cases it may be appropriate to resolve a motion on the merits before deciding a class certification motion, but not in this case. The plaintiff "purported to represent short-term inmates in a county jail, presenting a classic example of a transitory claim that cries out for a ruling on certification as quickly as possible." (670) The district court must, of course, determine the merits of the "transitory claim" argument. If the claims are "inherently transitory," the action is not moot regardless of lack of evidence that anyone will be subject to the acts that gave rise to the claims. In addition, the court may certify a class in such an action, based on the plaintiff's standing at the outset of the case, under the relation back doctrine.

**Searches--Person--Arrestees**

*Foote v. Spiegel*, 118 F.3d 1416 (10th Cir. 1997). The plaintiff was stopped in traffic and arrested because she was believed to be under the influence of marijuana. She was strip searched pursuant to a policy that applied to all persons arrested on drug charges. No drugs were found.

The defendant was not entitled to qualified immunity for the strip search. At 1425:

> It is not clearly unconstitutional to strip search persons arrested for possession of drugs but not placed in the general inmate population, at least if there is reasonable suspicion that they have additional drugs or weapons on their persons. . . . However, it was clearly established in May 1994 that a strip search of a person arrested for driving while under the influence of drugs but not placed in the general jail population is not justified in the absence of reasonable suspicion that the arrestee has drugs or weapons hidden on his or her person.

**Pre-Trial Detainees/Suicide Prevention/Use of Force--Chemical Agents**

*Monday v. Oullette*, 118 F.3d 1099 (6th Cir. 1997). The plaintiff called a mental health hotline; the person he talked to thought he might have overdosed and called the police. He refused to go to the hospital with them. The police said they would have to pepper spray him if he didn't go with them. He didn't, and they did. The plaintiff spent about five days in the hospital as a result.

The defendant had probable cause to believe that plaintiff was attempting to commit suicide. The use of pepper spray to arrest him was reasonable given the plaintiff's size, the fact that he had been drinking, and his adamant refusal to go to the hospital. The defendant testified that it would have been more dangerous to put his hands on the plaintiff.

**Habeas Corpus/Good Time/Procedural Due Process--Disciplinary Proceedings/ Ex Post Facto Laws**

*Hallmark v. Johnson*, 118 F.3d 1073 (5th Cir. 1997). A 1993 administrative policy abrogated the former policy that gave prison officials discretion to restore good time that had been forfeited as a result of disciplinary proceedings. The policy applied to good time already forfeited. The directive does not violate the Ex Post Facto Clause. It does not present a retroactive denial of an opportunity to reduce a prison sentence, not does it involve the cancellation of good time credits already earned. It presents only a "speculative" possibility of extending the prisoners' terms, since there had been only a speculative possibility of getting the good time back.

No liberty interest in forfeited good time credits exists because Texas law previously made restoration of good time discretionary.

One petitioner alleged that he was denied the names of his alleged co-conspirators' names when charged with conspiracy to create a work stoppage; however, he did not explain how the lack of that piece of information prejudiced his defense. There is no right to cross-examination at disciplinary hearings. The refusal of state courts to consider prison disciplinary proceedings via habeas corpus does not state grounds for relief in federal court.

**Prison Litigation Reform Act**

*In re Stone*, 118 F.3d 1032 (5th Cir. 1997). A petition for a writ of mandamus addressed to the plaintiff's federal sentence credit was not subject to the fee provisions of the Prison Litigation Reform Act because in substance it was not a civil action but an appeal. The nature of the underlying action governs the nature of the mandamus, and since the underlying action was for post-conviction relief, it wasn't civil and didn't invoke the PLRA.

**Access to Courts--Punishment and Retaliation**

*Oliver v. Fauver*, 118 F.3d 175 (3d

Cir. 1997). The plaintiff alleged that legal mail had been returned without mailing and in one case opened. *Lewis v. Casey* overruled this circuit's prior holding in *Bieregu v. Reno* that mail-opening denies court access without regard to actual injury. This plaintiff showed no injury, since his papers arrived in court and his appeal was adjudicated.

**Suicide Prevention/Pre-Trial Detainees**

*Barrie v. Grand County, Utah*, 119 F.3d 862 (10th Cir. 1997). A claim on behalf of a prisoner who committed suicide before he was taken before a magistrate is to be adjudicated under the deliberate indifference standard and not Fourth Amendment objective reasonableness. Contrary authority arising from alleged intentional physical assaults by police is distinguished. Claims based on jail suicide "are considered and treated as claims based on the failure of jail officials to provide medical care for those in their custody." Summary judgment is granted to defendants on the merits.

**Sexual Abuse/Pendent and Supplemental Claims; State Law in Federal Courts**

*Downey v. Denton County, Texas*, 119 F.3d 381 (5th Cir. 1997). The plaintiff was sexually assaulted by an employee of the Sheriff's Department and bore a child as a result. The employee was convicted of "official oppression." A jury awarded $100,000 against the county and $1 million against the assailant.

The district court did not err in granting the individual defendants supervisory judgment on partial findings on the ground that there was no evidence that the Sheriff knew of a substantial risk of harm to the plaintiff or disregarded such a risk.

The plaintiff could recover under the Texas Tort Claims Act because her claim arose out of the negligence of the employee who left her alone with the assailant in an unsupervised location, not out of the assailant's intentional tort. The employee's negligence was a proximate cause of the injury, and the assailant's criminal act was foreseeable.

**Medical Care**

*Logan v. Clarke*, 119 F.3d 647 (8th Cir. 1997). The plaintiff complained of substantial back pain and a painful fungal skin infection. Defendants were not deliberately indifferent to his medical needs. Prison doctors attempted to treat him on numerous occasions, though their choice of medications was limited by his history of drug abuse. The pain-killers he was offered were not completely ineffective. He was denied a bottom bunk because he did not meet the prison's criteria for medical assignment. The delay in sending him to a specialist for his skin condition was not deliberate indifference.

**Procedural Due Process--Disciplinary Proceedings/Habeas Corpus**

*Stone-Bey v. Barnes*, 120 F.3d 718 (7th Cir. 1997). The plaintiff claimed that his placement in segregation violated due process because there was no evidence to support his guilt. His claim was not cognizable under § 1983 because his conviction had not been invalidated via state process or called into question via federal habeas corpus. The court says that in its previous decisions, applying *Heck v. Humphrey*, it treated the "judgments" of prison disciplinary committees in the same manner as criminal judgments, and that *Edwards v. Balisok* "confirmed the correctness of our view."

This is not quite right. *Balisok*--a case involving loss of good time--relied on *Preiser v. Rodriguez*, another good time case, which emphasized habeas corpus after exhaustion of state remedies as the exclusive remedy when immediate or earlier release is sought. *Heck v. Humphrey*, a criminal case, had emphasized the analogy between a § 1983 claim of unfounded criminal prosecution and the tort of malicious prosecution, which requires as an element that the prosecution have been terminated favorably to the defendant. *Balisok* and *Heck* were both authored by Justice Scalia, but the *Balisok* opinion studiously avoids reliance on *Heck*'s malicious prosecution analogy with its emphasis on the judgment in the criminal case.

In this case, which involves no loss of good time, the court entirely glosses over the analytical question of the relation of *Heck's* and *Balisok's* holdings:

> Does it make any difference in applying *Heck* that the sentence imposed was one of disciplinary segregation alone, as opposed to segregation coupled with a loss of good-time credits? . . . In our view, it does not. The Supreme Court was concerned in *Heck* not only with the particular sentence imposed, but also with the fact of the prisoner's conviction itself. . . . The "conviction" in the prison disciplinary sense is the finding of guilt on the disciplinary charge, and if success on the plaintiff's section 1983 claim necessarily would imply the invalidity of that finding, then *Heck* bars the claim until such time as its requirements are satisfied.

**Administrative Segregation/ Procedural Due Process--Disciplinary Proceedings/Cruel and Unusual Punishment/Sanitation**

*Beverati v. Smith*, 120 F.3d 500

(4th Cir. 1997). The plaintiffs were placed in disciplinary segregation for a month and retained there for five or six months after these terms ended after being found in possession of escape paraphernalia. Their treatment was not "atypical and significant" and therefore they were not deprived of liberty under *Sandin*. The regulations state that conditions are mostly similar to those in general population and that "even those conditions that are more restrictive are not particularly onerous. Indeed, the differences in conditions specified in the prison regulations appear to be fairly common ones, leading the other courts of appeals to conclude that confinement to administrative segregation does not implicate a liberty interest." (504) The plaintiffs alleged that the conditions of confinement do not match the regulations:

> . . . [T]heir cells were infested with vermin; were smeared with human feces and urine; and were flooded with water from a leak in the toilet on the floor above. . . . In addition, Inmates maintain that their cells were unbearably hot and that the food they received was cold. . . . [They] did not receive clean clothing, linen or bedding, as often as required by the regulations governing administrative segregation; that they were permitted to leave their cells three to four times per week, rather than seven, and that no outside recreation was permitted; that there were no educational or religious services available; and that food was served in considerably smaller portions. . . . Accepting Inmates' version of the conditions in administrative segregation, as we must for purposes of review of the grant of summary judgment, we conclude that although the conditions were more burdensome than those imposed on the general prison population, they were not so atypical that exposure to them for six months imposed a significant hardship in relation to the ordinary incidents of prison life.

The conditions described do not constitute a "grossly excessive punishment" under the Eighth Amendment. Even assuming administrative segregation can be viewed as a punishment, proportionality analysis is necessary only with respect to capital sentences and life without the possibility of parole. The court says the plaintiffs did not challenge the conditions as violating the Eighth Amendment.

**Suicide Prevention**

*Mathis v. Fairman*, 120 F.3d 88 (7th Cir. 1997). The decedent committed suicide. The defendants had seen him talking to himself; he had expressed fears that someone was going to kill him. They sent him to mental health staff, who concluded that no treatment was necessary; he denied suicidal impulses. He was checked every half hour.

The defendants were not deliberately indifferent. On these facts they had no knowledge that the decedent posed a danger to himself. Odd behavior by itself is not enough to confer knowledge of a risk of suicide.

**Damages--Assault and Injury/ Psychotropic Medication**

*Doby v. Hickerson*, 120 F.3d 111 (8th Cir. 1997). The plaintiff was administered antipsychotic medications involuntarily without the protections of *Washington v. Harper*, which was decided 22 days after the medication was commenced. The defendant psychiatrist was entitled to qualified immunity for the period before *Washington*. He was not entitled to qualified immunity for the period after *Washington*. The district court held that he should have known about *Washington* (decided February 27, 1990) by the time he examined the plaintiff on March 20, and the appeals court holds that this line is reasonable.

A damage award of $9,500 is not an abuse of discretion for a three-month period during which the plaintiff was first medicated and then experienced continuing symptoms after the medication was stopped. The court conclusorily rejects that argument that nominal damages are appropriate because the plaintiff would have received the same treatment regardless of the process he was provided.

**Religion--Services Within Institution/ Color of Law**

*Montano v. Hedgepeth*, 120 F.3d 844 (8th Cir. 1997). The plaintiff is a practitioner of "Messianic Judaism," which means that he is "a Christian who studies from a Jewish perspective." The sect is few in number and not officially recognized and its members receive only one hour a week in the chapel, like other unrecognized faiths. The "religious consultant for Judaism" asked the prison chaplain to exclude Messianic Jews from traditional Jewish observances, which he did, and then members of the Protestant group asked him to exclude the plaintiff from Protestant services on the ground of his nonconforming beliefs, which he also did, though only after convening a meeting of "mature Christian brothers" to question the plaintiff about his beliefs. (The court uses the word "excommunication" to describe this exclusion.) Later he was offered the right to return, but declined because his beliefs were unaltered and he feared that he

would be excluded again.

The district court held that the plaintiff's religious expression was not burdened by his exclusion from activities of religious groups he did not agree with. The appeals court does not reach this issue, holding instead that the chaplain did not act under color of state law. The court analogizes to *Polk County v. Dodson*, which it finds "profoundly instructive" in its holding that a public defender's job is marked by lack of state supervision and the exercise of independent judgment, the latter of which is mandated by the Sixth and Fourteenth Amendments. This analysis does not remove all professionals from the reach of § 1983. Prison doctors, held to act under color of law in *West v. Atkins*, do not face the state as adversaries. However, *Polk County* governs here. A prison chaplain is not a state actor when performing "inherently ecclesiastical functions" as opposed to "administrative and managerial tasks" (851). At 850 (footnote omitted):

> . . . In our nation, [the excommunication] is simply not the type of decision it falls upon the government to make. Absent any showing that Vande Krol relied upon religious doctrine as a subterfuge and deceptively used the excommunication process to impose the will of prison administrators, we cannot say that the expulsion of Montano from the Protestant group is fairly attributable to the state.

**Federal Officials and Prisons/Service of Process**

*Chester v. Green*, 120 F.3d 1091 (10th Cir. 1997). The case is dismissed without prejudice for failure to obtain service within 120 days. Certified mail receipts that did not have stamps indicating that they actually passed through the mails are not sufficient, and there are no receipts or acknowledgments showing actual delivery.

**Modification of Judgments/Personal Property/Monitoring and Reporting/ Appeal**

*Hook v. State of Arizona*, 120 F.3d 921 (9th Cir. 1997), *withdrawing* 98 F.3d 1177 (9th Cir. 1996). A 1973 consent decree provided that prisoners could receive three "holiday packages" a year. The district court abused its discretion in not granting the defendants' motion to modify. The enormous increase in prison population (1759 to 19,500) and the high proportion (70%) who were controlled substance abusers constituted sufficient changed circumstances to justify the modification. Mandatory sentencing legislation was enacted after the consent judgment was signed. The package provision is now an "excessive burden" on prison authorities that has diminished their ability to maintain security and safety and is therefore "detrimental to the public interest." (The fact that only 6 of 97,000 packages in a four-year period were found to have controlled substances did not weigh against modification; rather, it showed that prison officials needed to detail personnel to inspect the packages if they were allowed.) The case is remanded for the district court to determine a suitable modification. (The earlier opinion simply said the provision should be deleted.)

The district court erred in modifying the consent decree to require defendants to permit "hot pots." Though defendants had permitted them for some time, there is no evidence that the parties intended to include them as a contractual right within the consent decree, and "no one suggests the Constitution confers such a right." (925) There are no factual or legal changes to justify modifying the decree.

Appointment of a special master is generally an interlocutory order and not appealable, but it may be appealed in the course of an appeal from an order adopting or rejecting a master's recommendations. It is appealable here because it is inextricably intertwined with the appealable modification order. The appointment was justified here by exceptional circumstances consisting of the Department's history of noncompliance, which the court said it lacked resources to monitor constantly, and the complexity of the underlying litigation. The Prison Litigation Reform Act is not discussed.

**Prison Records/Habeas Corpus**

*Butterfield v. Bail*, 120 F.3d 1023 (9th Cir. 1997). The plaintiff complained that the defendants relied on false information in his prison file to find him ineligible for parole. His claim implicates the validity of the denial of parole and therefore his continuing confinement, and therefore is barred by *Heck v. Humphrey*. Although he seeks only damages, a ruling that the denial was procedurally defective would presumably result in his parole, and the only measure of his damages would be the extent of his unmerited confinement.

**Hazardous Conditions and Substances/Attorneys' Fees**

*Weaver v. Clarke*, 120 F.3d 852 (8th Cir. 1997). The plaintiff brought suit over exposure to environmental tobacco smoke; while a motion for a preliminary injunction was pending, the defendant imposed a smoking ban in the prisons, stating that "pending inmate litigation . . . are [sic] concerns that must be addressed."

The plaintiff was a prevailing party; the district court's finding that the suit was a "necessary and important factor"

in achieving the smoking ban is upheld.

The district court correctly found that the defendants were not deliberately indifferent, since the defendants took steps to house the plaintiff in a smoke-free cell and enforcing the smoking restriction.

**Work Assignments/Personal Property**

*Vignolo v. Miller*, 120 F.3d 1075 (9th Cir. 1997). The court previously held that Nevada prisoners have a property interest protected by due process in the interest earned on their accounts. The prison system then revised the "fiscal agreement" that prisoners are required to sign to provide "I understand that the funds on deposit in my savings will not accrue interest for my sole benefit." The plaintiff refused to sign and he was fired from his prison job. After he filed suit, the legislature amended state statutes to eliminate prisoners' rights to the interest on their accounts.

At 1078: ". . . [E]ven in a prison setting, the Constitution places some limits on a State's authority to offer discretionary benefits in exchange for a waiver of constitutional rights." Therefore the fact that there is no constitutional right to prison employment does not bar his claim that he was deprived of a benefit for failing to waive his (then) constitutional right to interest.

**Sexual Abuse/Damages--Assault and Injury, Punitive/Municipalities/Pre-Trial Detainees**

*Mathie v. Fries*, 121 F.3d 808 (2d Cir. 1997). The plaintiff was found to have been repeatedly sexually abused and assaulted by a jail official. The district court's findings are not clearly erroneous.

A compensatory damages award of $250,000 is not excessive in light of the emotional injuries found by the district court. The district court's statement that he realized that part of the plaintiff's emotional distress resulted from unrelated causes that were not compensable (like being sentenced to 10 to 30 years in prison) was sufficient to address the issues of multiple causation.

The district court held that it need not consider the defendant's personal finances in determining punitive damages since he would benefit from an indemnity agreement. At 816: "Although we do not decide the question of whether a fact-finder can rely upon the existence of an indemnity agreement in order to *increase* an award of punitive damages, we rule that a fact-finder can properly consider the existence of such an agreement as obviating the need to determine whether a defendant's limited financial resources justifies some *reduction* in the amount that would otherwise be awarded." This defendant did not present any evidence of his financial resources, so there was nothing before the court to support a reduction of punitive damages. Nonetheless, $500,000 is excessive; the court directs its reduction to no more than $200,000.

The damages should not have been awarded against the defendant in his official and individual capacities; an official capacity award is permissible only on a showing of municipal liability.

**Prison Litigation Reform Act**

*Alexander v. United States*, 121 F.3d 312 (7th Cir. 1997). The Prison Litigation Reform Act does not apply to collateral attacks on criminal convictions.

**Procedural Due Process--Property/ Federal Prisons and Officials/Prison Litigation Reform Act/In Forma Pauperis**

*Pena v. U.S.*, 122 F.3d 3 (5th Cir. 1997). A motion by a prisoner under Rule 41(e), Fed.R.Crim.P., for the return of seized property is a "civil action" subject to the filing fee requirements of the Prison Litigation Reform Act. Although no criminal charges were ever filed against this prisoner in connection with the property, the decision does not rest on that fact. The appeal is held in abeyance for the district court to rule on the plaintiff's IFP application and order the payment of fees under PLRA.

The district court had dismissed as moot because the government, after "considerable delay," filed an answer stating that the property had been destroyed, without explanation. At 4 n. 3: Three other circuits have held that destruction of the property does not moot the action because a damage claim remains.

**Prison Litigation Reform Act/In Forma Pauperis**

*James v. Madison Street Jail*, 122 F.3d 27 (9th Cir. 1997). The plaintiff's *pro se* action was dismissed for failure timely to provide a trust account statement pursuant to the Prison Litigation Reform Act. The prisoner submitted a sworn statement that he had mailed it within the 30-day period but it arrived late. The rule of *Houston v. Lack* applies to the filing of trust account statements, so the district court must either accept the allegation or make a factual finding to the contrary on a sufficient evidentiary showing by the adverse party.

**Prison Litigation Reform Act**

*Duvall v. Miller*, 122 F.3d 489 (7th Cir. 1997). The plaintiff alleged that his prison file contains erroneous information, which "patently fails to state a claim," and his suit was dismissed. The dismissal was a "strike" under the PLRA; this appeal is also a strike even though it is not taken *in forma pauperis*, since the statutory provision is not limited to IFP cases.

**Hazardous Conditions and Substances/Qualified Immunity**

*Rochon v. City of Angola, La.*, 122 F.3d 319 (5th Cir. 1997). The plaintiff alleged that he has been subjected to environmental tobacco smoke since 1981. The defendants are not entitled to dismissal on qualified immunity grounds because of the Supreme Court's holding in *Helling v. McKinney*. Qualified immunity requires a bifurcated analysis: (a) whether the plaintiff alleges a constitutional violation, based on current law, and (b) whether the defendants' conduct was "objectively reasonable," based on the law at the time of defendants' actions. It appears that the court is saying that the plaintiff meets requirement (a) and is remanding for further proceedings that would address requirement (b).

**Judicial Disengagement/Prison Litigation Reform Act**

*Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997). The judgment termination provision of the Prison Litigation Reform Act is not unconstitutional. It does not violate the rule against legislative abrogation of final judgments; Congress may alter the remedial powers of the judiciary, as well as the substantive law, and thereby affect pre-existing injunctive judgments. Although the judicial power embodied in Rule 60(b) does not confer a legislative power, the fact that a consent decree may be reopened means that it is not the "last word" of the judiciary and therefore is not final for separation of powers purposes. The distinction between public rights and private rights is irrelevant; the source of the underlying rights has nothing to do with the separation of powers issues.

The termination provision does not unconstitutionally prescribe a rule of decision because it leaves the judicial functions of interpreting the law and applying the law to the courts.

The termination provision does not deny equal protection. It does not burden the right of access to courts. At 1090: "The right to enforce a consent decree that goes beyond the bounds of constitutional necessity is not equivalent to the right to bring constitutional grievances to the attention of the courts." Therefore rational basis scrutiny applies. The provision is rationally related to promoting "principles of federalism, security, and fiscal constraint in the unique context of detentional and correctional institutions." (1090)

The termination provision does not deprive the plaintiffs of vested rights because application of the doctrine depends on the existence of a final judgment; a judgment not final for separation of powers purposes is also not final for due process purposes. Besides, "Congress may prevent a victorious party from enforcing in equity a valid judgment. *See Fleming v. Rhodes*. . . ." (1091) Plaintiffs are not unconstitutionally deprived of their contract rights; Congress may impair such rights if it has a rational basis.

**Prison Litigation Reform Act/Medical Care/Trial/Appeal**

*Norton v. Dimazana*, 122 F.3d 286 (5th Cir. 1997). The plaintiff has a chronic prolapsed rectum. Prison officials were not deliberately indifferent, since he got a lot of care. At 292: "Disagreement with medical treatment does not state a claim for Eighth Amendment indifference to medical needs."

The Prison Litigation Reform Act's filing fees do not deny access to the courts. That right extends no further than "the ability of an inmate to prepare and transmit a necessary legal document to the court." (290) Proceeding without payment of fees is a procedural privilege that Congress may extend or withdraw, and in any case no one is prevented from going to court because of lack of money. The provisions "level the playing field" between prisoners and other IFP litigants, since they make prisoners consider the cost of filing.

The district court held what amounted to a *Spears* hearing. The admission of an affidavit by a doctor whom the plaintiff was not able to cross-examine was harmless error because the court did not rely on it. The plaintiff was not entitled to a copy of the transcript of this hearing, since he has not shown why it is necessary and his appeal has been determined to be frivolous.

**Damages--Assault and Injury/ Protection from Inmate Assault/ Deference**

*Newman v. Holmes*, 122 F.3d 650 (8th Cir. 1997). The two plaintiffs were awarded $500 each by a jury after another inmate, who was supposed to be in disciplinary lockup, assaulted and cut them. The appeals court affirms. The lack of evidence that the assailant posed a known risk to the victims does not bar the claim. At 652 (emphasis in original): ". . . [W]hen prison administrators conclude that all inmates charged with rule violations should be isolated as dangerous, it would encroach upon the administrators' greater knowledge of prison conditions for us to hold *as a matter of law* that release of such inmates to the general prison population does not create a substantial risk that they will attack others."

The defendant officer's conduct in leaving the assailant's door unlocked presents a close question of deliberate indifference vs. negligence, "particularly since it is well-settled that Holmes's violation of an internal prison regulation does not by itself give rise to an Eighth Amendment claim." (653) The court defers to the jury's view of the evidence, which could be viewed as reflecting a lack of candor by the defense.

**Prison Litigation Reform Act/In Forma Pauperis**

*In re Washington*, 122 F.3d 1345 (10th Cir. 1997). A petition for a writ of mandamus is a civil action, and a prisoner subject to the PLRA's "three strikes" provision must pay the filing fee in advance in such a proceeding.

**Federal Officials and Prisons/ Deference**

*Roussos v. Menifee*, 122 F.3d 159 (3d Cir. 1997). The plaintiff completed a 500-hour drug treatment program in order to be eligible for early release. The Bureau of Prisons ruled him ineligible because his sentence had been enhanced two levels because of the finding of a gun in his vacation home, leading the BOP to classify his offense as a "crime of violence." That definition is contrary to the statutory definition and is invalid. The BOP program statement is entitled to "some deference" but not if it conflicts with the statute.

**Access to Courts--Assistance of Counsel/Habeas Corpus**

*Lamp v. State of Iowa*, 122 F.3d 1100 (8th Cir. 1997). The petitioner sought to avoid application of habeas corpus procedural default rules because he had not had adequate access to courts. In fact, he had had an attorney. The fact that he could only communicate with his attorney by mail and his attorney failed to raise claims that the petitioner directed did not make his access inadequate.

**Searches--Visitors/Qualified Immunity**

*Varrone v. Bilotti*, 123 F.3d 75 (2d Cir. 1997). The plaintiff, the son of a prisoner, was required to submit to a strip search in connection with a visit to his father based on information that he would be bringing in drugs.

A search of prison visitors without reasonable suspicion violates clearly established law. Although neither this circuit nor the Supreme Court had explicitly applied this standard, it was "clearly foreshadowed" in light of authority in other circuits and authority not precisely on point in this circuit.

Reasonable suspicion is stronger than a hunch but weaker than probable cause. The standard was met by information given to prison officials by an assistant district attorney who was deputy chief of the narcotics bureau that was "precise, specific and detailed," and circumstantially corroborated, as to the likelihood that the plaintiff would be bringing in drugs. There is no requirement that the person authorizing the search independently investigate the reliability of the informant.

The ministerial/discretionary distinction has been questioned in connection with qualified immunity but continues to be articulated. The court does not reach the question here, but holds that subordinates performing ministerial functions at the order, not facially invalid, of a superior officer with immunity, is also immune.

**Qualified Immunity**

*Naylor v. State of La. Dept. of Corrections*, 123 F.3d 855 (5th Cir. 1997). A prison "drill instructor" allegedly locked the two plaintiffs and 18 other inmates in a supply closet for three hours, placing a towel under the door to cut off ventilation. The two plaintiffs felt dizzy and nauseated and their requests to go to sick call were denied; one plaintiff defecated on himself. The magistrate judge denied defendant's motion for summary judgment based on qualified immunity because there were issues of material fact and the record was not sufficiently developed to decide whether the defendant's conduct was objectively reasonable. The case "fits squarely within that class of unappealable, fact-based qualified immunity orders" that are not appealable immediately.

**Prison Litigation Reform Act/In Forma Pauperis**

*Newlin v. Helman*, 123 F.3d 429 (7th Cir. 1997). If a district court finds that an appeal is not taken in good faith, the plaintiff cannot proceed *in forma pauperis*. This remains true under the Prison Litigation Reform Act, *contra* the Sixth Circuit's conclusion in *McGore v. Wigglesworth*. However, appellate review of the conclusion that the appeal is not taken in good faith may be had without prior assessment and collection of the PLRA fee. But if the prisoner simultaneously files a notice of appeal, indicating a desire to go forward regardless of IFP eligibility, the filing fee is irrevocably due--immediately if the appeals court affirms the finding of lack of good faith, in installments if it reverses. Appellate filing fees are to be assessed and collected by the district court.

Prisoners who lack assets but not "means"--i.e., who have an income--must be assessed an initial partial filing fee, and must pay it before the court considers the merits of his complaint. (I.e., it must be collected under the statute; neither the prisoner nor the prison has any control after the complaint or notice of appeal is filed.)

The fees for separate proceedings are to be assessed cumulatively (i.e., concurrently and not consecutively).

One plaintiff's appeal is in bad faith, since he seeks $20 million in damages from defendants who have absolute or qualified immunity, and since he suggests no reason why the district court was wrong to dismiss for having missed the statute of limitations.

Under the three strikes provision, a dismissal for failure to state a claim is one strike, and an unsuccessful appeal is a second one. At 433: "Obstinate or malicious litigants who refuse to take no for an answer incur two strikes." The court cites the deterrence of frivolous litigation, ignoring the fact that the statute

also extends to non-frivolous failures to state a claim.

The district court found that another plaintiff was barred from proceeding IFP by the three strikes provision. This plaintiff cannot appeal IFP. However, he can appeal the determination that the three strikes provision applies without partial prepayment of fees. If the court affirms, the plaintiff then owes two fees (for filing the complaint and the appeal), and both must be paid before the appeal can go forward. In addition, until the fees have been paid, no other civil litigation can be filed.

Complaints under 28 U.S.C. § 2241, the post-conviction remedy statute for federal prisoners, are civil actions under the PLRA insofar as they do not affect the validity of the criminal sentence.

**Dental Care/In Forma Pauperis/ Service of Process**

*Moore v. Jackson*, 123 F.3d 1082 (8th Cir. 1997). The district court directed the U.S. Marshals to serve the defendants, but only after the plaintiff completed waiver of service forms, and then dismissed many defendants for failure to serve process. This was error. 28 U.S.C. § 1915(d) says that the "officers of the court shall issue and serve all process and perform all duties" in IFP cases, so it is the Marshals' job to fill out the forms as long as the plaintiff furnishes the information necessary to identify the defendants, which he did in his complaint. The Marshals' failure to do their job is automatically good cause for failure timely to serve process.

The plaintiff complained that it took from April to December to get adequate treatment for a toothache, and he lost the tooth. (He only got care after he filed this lawsuit.) He repeatedly asked for medical service during this period. The district court erred in dismissing the dentist defendant for lack of evidence he knew of the plaintiff's problem; his knowledge could be inferred from the plaintiff's repeated complaints and entries in his medical records. The district court also erred in dismissing Correctional Medical Services, the contract provider, for failure to demonstrate a policy or custom of destroying or ignoring requests for care. However, there was a factual issue whether there was such a policy.

The court notes (1088 n. 5) that defendants chastise the plaintiff for repeatedly complaining about the same thing from April through August, then say that his complaining only once during the next three months indicated that his condition was not an emergency.

**Religion--Services Within Institution/ Prison Litigation Reform Act**

*Anderson v. Angelone*, 123 F.3d 1197 (9th Cir. 1997). Prison regulations prohibiting prisoners from acting as ministers of prison churches, and requiring leadership from outside clergy, do not violate the First Amendment. The defendants have concerns for giving inmates incentives to "inflame or exert influence" over others or to "advocate radical or inflammatory positions" to drum up support, and for inmates' using religious activity as a cover for gang or other unlawful activity. The plaintiff has other ways to exercise his religious rights, such as helping out the prison chaplain.

The appeals court dismisses the appeal under the Prison Litigation Reform Act, rather than affirming the district court's judgment, because it concludes that it does not state a claim.

**Mental Health Care/Disabled/State Officials and Agencies**

*Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997). Plaintiffs, a class of prisoners with developmental disabilities, brought suit under the Americans with Disabilities Act, the Rehabilitation Act, and § 1983.

Congress effectively abrogated the states' Eleventh Amendment protection in the Americans with Disabilities Act and the Rehabilitation Act under Section 5 of the Fourteenth Amendment, notwithstanding the holding in *Seminole Tribe v. Florida*. The Fourteenth Amendment gives Congress "the same broad powers as does the Necessary and Proper Clause. . . . [These powers] extend beyond conduct which is unconstitutional, and Congress may create broader equal protection rights than the Constitution itself mandates." (1270) Congress has previously held that the disabled are protected by the Equal Protection Clause, so these statutes are within the scope of appropriate legislation under the Fourteenth Amendment, and neither provides remedies so sweeping that they exceed the harms that they are designed to redress. The court refuses to restrict the scope of Congress's power under Section 5 to the protection of those classes afforded a higher level of scrutiny by the courts.

Under the Rehabilitation Act, California waived its Eleventh Amendment immunity when it accepted federal funds.

**Access to Courts**

*Greene v. Brigano*, 123 F.3d 917 (6th Cir. 1997). The petitioner elected to appeal *pro se*. The state refused to provide him a copy of his trial transcript, even though if he had accepted the offer of free appellate counsel his counsel would have been entitled to review the transcript filed in court without charge. The state's argument that this satisfied the right of court access required the petitioner to relinquish the constitutional right to proceed *pro se* in order to exercise the Fourteenth Amendment right to the basic tools of adequate appellate review. The court distinguishes its precedents holding that refusing an offer of counsel waives any right to access to a law library.

**Food**

*Phelps v. Kapnolas*, 123 F.3d 91 (2d

Cir. 1997). The plaintiff alleged *inter alia* that being placed on a seven-day diet of bread violated the Eighth Amendment. The district court dismissed the claims against most defendants as frivolous without making specific reference to this claim. The court cannot say that there are no facts under which the allegation might constitute an Eighth Amendment violation. The case is remanded for further proceedings.

**Telephones/Consent Judgments**

*Gilday v. DuBois*, 124 F.3d 277 (1st Cir. 1997). The plaintiff obtained a consent judgment in 1984 prohibiting interception of his telephone calls except as specifically authorized by statute and court order. In 1994, after having contracted with a private firm for prison telephone services, the Department of Corrections promulgated new regulations which provide for recording and authorize real-time surveillance of all calls except authorized legal calls. The plaintiff refused to accept a PIN number under these conditions and moved for contempt.

An earlier decision in *Langton v. Hogan* refusing to modify a similar injunction to permit monitoring and recording in the absence of evidence of telephone abuse by the plaintiffs in that case did not preclude the defendants; the court did not rule on the legality under the injunction of monitoring and recording. Another decision concerning the *Langton* injunction does not preclude the defendants because the injunctions are not identical.

The court construes the injunction to preclude only unlawful monitoring of calls and validates the defendants' telephone system under the injunction and the relevant statutes.

**Disabled/Appeal/State Officials and Agencies**

*Armstrong v. Wilson*, 124 F.3d 1019 (9th Cir. 1997). The district court entered an injunction remedying violations of the Americans with Disabilities Act and the Rehabilitation Act.

A judgment requiring the submission of detailed remedial plans is generally not an appealable injunction. This one is appealable because it substantially prescribes the contents of the plan and because entry of a more specific order will not alter the court's "appellate perspective" on the questions presented for review.

The Rehabilitation Act and the Americans with Disabilities Act apply to state prisons. They do not contravene the Eleventh Amendment; the *Ex parte Young* fiction applies to injunctive relief against state officials under these statutes. The applicability of *Young* is not affected by the complexity of the remedy or by the statutory nature of the claims.

**Prison Litigation Reform Act/Judicial Disengagement**

*Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997). The Prison Litigation Reform Act's termination provision is constitutional, but only if it is construed to end the prospective enforcement of consent decrees in federal court. "The underlying contract, in its time made into a judgment, is left untouched" and may be enforced in state court. The statute's reference to termination of prospective relief is ambiguous and can be read either to bar the future enforcement of consent decrees, except insofar as they are tailored to a federal right, or to render them null and void unless they met the narrow tailoring requirement. The court adopts the first interpretation, both on its merits and to avoid the serious constitutional questions that the second, judgment-annulling interpretation would raise.

Under the court's construction, the termination provision does not violate the *Plaut* rule concerning the legislative vacation of judgments because the judgments are untouched. Congress has merely limited the federal courts' jurisdiction to enforce them prospectively. The provision does not prevent the enforcement of constitutional rights because constitutionally required relief can still be enforced. The provision does not prescribe a rule of decision because it changes the underlying law, i.e., the powers of the federal courts.

Under the court's construction, the termination provision does not deny equal protection. Strict scrutiny is not applicable because the "initial right of access to the courts" is not burdened. The statute meets the rational basis test because the purpose of avoiding the entanglement of federal courts in prison litigation is legitimate, and the provision is rationally related to it. *Romer* does not govern because the plaintiffs in that case were barred from relief from all three branches of government.

The termination provision does not deny due process by impairing contract rights; the rational basis test is applicable. It does not terminate vested rights because there is no vested right in the prospective enforcement of the judgments.

The district court erred in vacating the consent decrees. Plaintiffs have the option to seek to show entitlement to continuing federal court relief under § 3626(b)(3), or to seek enforcement in state court. The panel continues the stay that had kept the Consent Decrees in effect pending decision, until such time as the Supreme Court acts on any possible petition for certiorari.

**Women/Visiting**

*Bazzetta v. McGinnis*, 124 F.3d 774 (6th Cir. 1997). 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); 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." These restrictions apply only to contact visits.

These restrictions are all reasonably related to legitimate interests and are upheld.

**Access to Courts/Prison Litigation Reform Act/In Forma Pauperis**

*Church v. Attorney General of Com. of Va.*, 125 F.3d 210 (4th Cir. 1997). The Prison Litigation Reform Act's filing fees provisions do not apply to cases pending when the statute was passed. At 212: "Under the standard of *Landgraf*, if we require Church to now pay a filing fee that he was not required to pay when he filed his appeal, we 'impair [a] right [he] possessed when he acted.'. . . Although the increased up-front cost imposed by § 804(b) may deter prisoners from pursuing claims that they may otherwise have pursued--one of the arguments for enacting the PLRA--their right of access to the courts has nevertheless been diminished. . . ." This change in law is not merely procedural.

Under pre-PLRA law, the court erred in dismissing the plaintiff's action as frivolous after he had paid a partial filing fee.

**Transfers/Procedural Due Process--Transfers**

*Israel v. Marshall*, 125 F.3d 837 (9th Cir. 1997). A California statute provides that when a prisoner has been convicted of two or more crimes, the last sentence shall be served concurrently with the others unless the sentencing court determines they should run consecutively. State courts have held that this entitles a California prisoner to be transferred to the custody of a state in which he or she owes time on a prior sentence if that state will not credit the California time. California officials wrote to Missouri officials on behalf of the petitioner, but they refused to accept the petitioner, rendering his California and Missouri sentences effectively consecutive.

The plaintiff's state law right to be permitted to return to Missouri--which the court assumes without deciding is a liberty interest under *Sandin*--does not imply a right to require Missouri to accept him. The California Department of Correction's letter stating that the petitioner was available for transfer constituted all the process that was due (even though it was not on the proper form); California was not required to offer to deliver him to Missouri all expenses paid. In any case, Missouri's refusal to accept him was unconditional.

**Procedural Due Process--Disciplinary Proceedings/Cruel and Unusual Punishment**

*Leslie v. Doyle*, 125 F.3d 1132 (7th Cir. 1997). The plaintiff was placed in disciplinary segregation for 15 days for what he alleged were baseless charges; an administrative review board agreed.

At 1135: "We agree with Leslie that the Eighth Amendment embodies a principle of proportionality. . . . We also agree with Leslie that a punishment imposed for no offense at all is, as a matter of mathematics, disproportionate. But the Eighth Amendment does not mandate a precise formula applying to all punishment." Punishments must be objectively sufficiently serious to implicate the Eighth Amendment.

Placement in segregation for false charges does not constitute an illegal seizure. The Fourth Amendment applies only where there is a deprivation of "some meaningful measure of liberty to which [a person is] entitled," and the *Sandin* analysis applies. Under it, 15 days in segregation is not atypical and significant.

The court suggests that the plaintiff's claim is not so much a procedural due process claim as one for malicious prosecution, which may implicate substantive due process concerns. For prisoners, one approach to this problem is that procedural due process is all they are entitled to. There might also be an Eighth Amendment violation in the deliberate abuse of power for purposes of calculated harassment. At 1137 (emphasis in original): "Broadly speaking, the Constitution does not create a cause of action for arbitrary and purposeless acts by officials per se, . . .; it prohibits the abuse of power that effects a *significant* deprivation." The court equates this term with "shocking the conscience," a standard that 15 days' segregation does not meet. The court then suggests that "punishment" is an inappropriate rubric for arbitrary and vindictive acts, and returns to the Due Process Clause. At 1137 (footnote omitted): "Perhaps a useful approach is to say that a frame-up or malicious prosecution is in and of itself an inchoate breach of substantive due process, which matures into a viable claim if the consequences are sufficiently severe." (I.e., if they affect a liberty interest.) Id.: "We do not try today to sort out this bog of legal theories" since the plaintiff got procedural due process and his deprivation did not impinge on a liberty interest under *Sandin*.

**Religion--Services Within Institutions/ Use of Force--Restraints/Equal Protection**

*Freeman v. Arpaio*, 125 F.3d 732 (9th Cir. 1997). The plaintiff alleged that prison officials refused sometimes to let Muslim prisoners attend weekly services, that only Muslim inmates were handcuffed or shackled on their way to services and required to sign attendance

sheets, that Muslims were not given notice of services as were other inmates and that they were subjected to abusive epithets by prison officials.

The claim of refusal to permit attendance at services raised a material issue of fact under the *Turner* standard. Defendants' claim that services were actually canceled because the Imam didn't show up, which arguably would satisfy *Turner*, merely raised a factual dispute; plaintiffs claimed that defendants simply did not open Muslims' cell doors. The other complaints do not raise constitutional issues under *Turner*, separately or in the aggregate; to do so, interference with religious practice must be "more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine." (737, *quoting Graham v. C.I.R.*, 822 F.2d 844, 851 (9th Cir. 1987)). This Ninth Circuit standard is more rigorous than that followed in most other courts.

The claims of denial of services and of shackling on the way to services raise equal protection claims. Defendants' explanation of their shackling practice is incoherent and does not address the claimed inequality, leaving a factual issue in dispute. Note that this practice is upheld under *Turner* but not equal protection; the court says that equal protection rights are limited by "legitimate penological interests" but does not cite the *Turner* test.

**Medical Care--Standards of Liability--Deliberate Indifference/Appointment of Counsel**

*Parham v. Johnson*, 126 F.3d 454 (3d Cir. 1997). The plaintiff complained of a ringing ear. Tinnitus was diagnosed after a "simple exam," though it is generally not diagnosed without a comprehensive diagnosis (sic) (citing a medical journal article). The doctor prescribed Cortisporin, even though the PDR says nothing about using it for Tinnitus. The doctor continued it for 114 days although the PDR says it should be used for no more than 10 and the plaintiff experienced symptoms that should have resulted in its discontinuation. During this time the plaintiff was found to have a laceration of the eardrum; he requested repeatedly to be allowed to see an ear specialist, but the doctor refused. The plaintiff now has severe hearing loss.

The magistrate judge directed the appointment of counsel, but two years later the clerk had not acted, and the district court denied a renewed motion, reasoning that since no expert testimony was involved the plaintiff could competently present his case. The district court then directed a verdict for the defendant, in part because of the lack of expert testimony.

There is no constitutional or statutory right to appointment of counsel. However, this court has rejected the "exceptional circumstances" test for discretionary appointment of counsel. *Tabron v. Grace*, 6 F.3d 147, 155-57 (3d Cir. 1993). The plaintiff's case was arguably meritorious. He did not have the ability to present an effective case, as shown by the failure to present a *prima facie* case at trial. His inability to introduce the Cortisporin bottle into evidence exemplified the need for counsel. Complex discovery rules and medical issues requiring expert testimony support the need for counsel.

At 458-57 n. 7: Medical malpractice is not deliberate indifference. However, the facts alleged could support a finding of deliberate indifference. The rule that courts do not second-guess treatment decisions assumes that an informed judgment has been made. When a prisoner is denied access to a physician capable of evaluating the need for treatment, deliberate indifference is shown. Inappropriate treatment for no valid reason states a claim for deliberate indifference.

The appellate court's resort to medical treatises and journals not in the record is extremely unusual.

**Mootness/Religion/Pre-Trial Detainees/Class Actions--Certification of Classes**

*Muhammad v. City of New York Dept. of Correction*, 126 F.3d 119 (2d Cir. 1997). The plaintiff, who alleged inadequate accommodation for the Nation of Islam in the City jails, had been released by the time this case was filed. His claim is moot. The fact that the defendants agreed not to seek dismissal on the grounds of standing, ripeness, or mootness is beside the point, since these matters are jurisdictional. Such agreements "disserve the court." The "capable of repetition, yet evading review" exception is usually invoked to preserve a class action after the named representatives' claims have become moot. Here, no class was certified, nor could it be *after* the mootness of the named plaintiff's claim. While the exception may also be invoked where the challenged action is too brief in duration to be litigated before it ends, and there is a reasonable expectation the complaining party will be subjected to it again, this plaintiff did not attempt to litigate until he was out of jail. Nor can he state any basis for an expectation that he will be in jail again.

**Procedural Due Process--Disciplinary Proceedings**

*Walker v. McClellan*, 126 F.3d 127 (2d Cir. 1997). A prisoner did not in 1990 have a clearly established right to have witnesses interviewed when the prisoner was unwilling to state the relevance of their proposed testimony and did not offer a defense to the charges at the hearing. Under those circumstances testimony may be deemed irrelevant or unnecessary.

**Federal Officials and Prisons/Deference**

*Venegas v. Henman*, 126 F.3d 760

(5th Cir. 1997). Federal statute provides for sentence reductions for nonviolent offenders who complete a substance abuse program. The Bureau of Prisons did not exceed its authority in excluding from the program's benefits those prisoners who had been convicted of weapons possession by a felon or of drug offenses enhanced because of weapons possession. The Bureau of Prisons' internal agency guidelines are entitled to the same deference from the judiciary as are regulations promulgated under the Administrative Procedure Act as long as they are based on a permissible construction of the authorizing statute.

**Procedural Due Process--Disciplinary Proceedings/Habeas Corpus**

*Lusz v. Scott*, 126 F.3d 1018 (7th Cir. 1997). The plaintiff lost good time in a disciplinary proceeding and sued in federal court for due process violations. His claim is barred under *Heck*, which "applies to judgments handed down in prison disciplinary proceedings." (1021) Even though he was convicted of more than one charge, invalidating one of the charges would "likely" imply the invalidity of the loss of some of his good-time credits. The court acknowledges that a disciplinary case could involve claims not barred under § 1983 by *Heck* that could be extricated from claims that are barred, but the argument is waived in this case.

## District Court Cases

**Federal Officials and Prisons/ Unsentenced Convicts and Convicts Held in Jails/Service of Process/ Mootness/Injunctive Relief/Transfers/ Protection from Inmate Assault/Law Libraries and Law Books/ Rehabilitation**

*Dodson v. Reno*, 958 F.Supp. 49 (D.P.R. 1997). The plaintiff was transferred to a federal jail in Puerto Rico so he wouldn't be killed by his former cohorts in the Aryan Brotherhood. He wanted to go somewhere nearer his home in Washington to serve his ten-year sentence, but efforts to transfer him to a state prison failed. Defendants proposed to transfer him to Marion, where he would have to go back into segregation.

It is not necessary to serve the United States in a *Bivens* action against individual federal defendants.

Defendants disclaimed any present intention to transfer the plaintiff to Marion; the claim is moot, notwithstanding the usual rule about voluntary cessation in the face of litigation, since the plaintiff conceded that the transfer had become unlikely.

The plaintiff has not alleged a constitutional violation; placing him in segregation for his safety is within defendants' discretion and courts must defer to their decisions. Since he would be relatively safe in the Marion segregation unit, and since the defendants had taken some action to protect his safety, were not deliberately indifferent. A single stray callous remark by a prison official does not establish deliberate indifference.

The plaintiff is not entitled to an injunction prohibiting his incarceration in a pre-trial detention facility, even though it lacks the programs that a penitentiary would have. There is no constitutional or statutory right to rehabilitation programs.

There is no constitutional right to physical access to a law library; delivery of the materials is sufficient.

**Pre-Trial Detainees/Searches--Person--Prisoners/Pre-Trial Detainees**

*Richerson v. Lexington Fayette Urban County Government*, 958 F.Supp. 299 (E.D.Ky. 1996). A blanket policy requiring strip searches of all detainees upon return from court to the jail's general population, even those held on minor misdemeanor charges or traffic offenses, is unconstitutional.

**Habeas Corpus/Federal Officials and Prisons/Standing**

*Martinez v. Ensor*, 958 F.Supp. 515 (D.Colo. 1997). The *Heck/Preiser* exhaustion rule applies in suits against federal defendants.

Private citizens lack authority to initiate a federal criminal prosecution and therefore lack standing to seek such relief.

**Religion--Practices--Beards, Hair, Dress/Equal Protection/Law Libraries and Law Books/Recreation and Exercise/Cruel and Unusual Punishment/Programs and Activities**

*Davie v. Wingard*, 958 F.Supp. 1244 (S.D.Ohio 1997). The plaintiff alleged that he is a Nazarite, who has taken the Nazarite vow not to cut his hair (Numbers 6:5). He was disciplined for refusing to get his hair cut and then forced to cut his hair. He was also placed in the "PRIDE" unit ("Progressive Readjustment Inmate Development Environment"), a behavioral modification training program.

The haircut policy serves the compelling interests of contraband control, suppressing gang identifiers, and promoting identification of escapees, and is the least restrictive means of doing so. Allowing religious exceptions would promote manipulative behavior and cause resentment by other inmates. Therefore the policy does not violate the Religious Freedom Restoration Act or the First Amendment.

Barring long hair for male prisoners but allowing it for females does not deny equal protection. The court applies intermediate scrutiny to this gender-based distinction. The haircut rule passes muster because male inmates pose different issues of safety, security, and discipline than do females; they are less likely to be violent offenders, to be classified as high security, to commit prison violence, to escape or to use drugs.

The plaintiff's claim of denial of law library access is dismissed in the absence of a showing that the defendants were responsible for it. However, he met the injury requirement by alleging that he was unaware of certain court rules because the prison provided him with books with pages missing.

A claim of limited recreation, based on a rule that barred gymnasium privileges, did not provide sufficient information to determine whether there had been a constitutional violation.

Placement in the PRIDE unit, which defendants claim not to be punitive but designed to assist in adjustment and improved attitudes, is not a punishment within the meaning of the Eighth Amendment. (Wrong, though the result may be right in this case.)

**Prison Litigation Reform Act/Judicial Disengagement/Equal Protection/ Crowding**

*Jensen v. County of Lake*, 958 F.Supp. 397 (N.D.Ind. 1997). A jail conditions suit was filed in 1974 and settled in 1980 and again (after a contempt motion) in 1982. The defendants moved to terminate under PLRA.

The PLRA's termination provision does not violate the separation of powers. Congress has power to modify the remedial powers of the federal courts, as well as the substantive law, and thereby affect previously entered injunctions. Such changes constitute circumstances justifying modification under Rule 60(b). The result may decrease the utility of consent decrees, but that is a policy matter for Congress.

The PLRA's termination provision does not deny equal protection. The rational basis test governs and is satisfied by the interest in preserving state sovereignty from overzealous federal court supervision in prison litigation. For the same reason, the statute does not unconstitutionally impair contractual obligations, assuming a consent judgment is a contract. The fact that the contract was designed to protect constitutional rights does not matter.

The motion to terminate is taken under advisement because the plaintiffs alleged that dangerous overcrowding persists and has unconstitutional consequences such as violence. The plaintiffs will be given an opportunity to show ongoing constitutional violations. The court does not explain how the automatic stay fits into the picture.

**Access to Courts--Law Libraries and Law Books/Color of Law**

*Kain v. Bradley*, 959 F.Supp. 463 (M.D.Tenn. 1997). The plaintiff was transferred to a Corrections Corporation of America facility that did not provide a full law library; instead, a local attorney was contracted to help inmates file complaints, supplemented by a limited law library. The attorney would also provide copies of cases and statutes for pending litigation.

The plaintiff's argument that had he had access to an adequate law library he might have presented a winning argument does not establish actual injury as that term is used in *Lewis v. Casey*. After all, he did file a response to the defendants' motion to dismiss. The court also notes that the plaintiff did not identify the legal issue he is concerned with when he did have access to a law library in a state prison. Another plaintiff who had blown the statute of limitations before he got to the CCA facility also failed to show prejudice. These plaintiffs therefore lacked standing; the court does not hold that CCA's arrangement is constitutional.

**Medical Care--Serious Medical Needs/ Equal Protection--Race**

*De la Paz v. Peters*, 959 F.Supp. 909 (N.D.Ill. 1997). The plaintiff is incontinent as a result of a spinal cord injury. The Medical Director recommended that he be permitted to take daily showers and be given an adequate supply of clothing and bedding. However, prison medical staff only gave him a permit to shower three times a week. He asked to go to the honor block, which had shower facilities designed for handicapped persons, but was denied because he did not meet the security criteria.

The plaintiff's incontinence is a serious medical need. However, defendants were not indifferent to it. The fact that a doctor said a long time ago that plaintiff should have daily showers shows no more than a disagreement with the course of treatment. The defendants did give him more shower privileges than other inmates. In any case they were entitled to qualified immunity, since there is no case law supporting more frequent showers.

The small number of Hispanic prisoners in the honor dorm is insufficient to show he was excluded for racial reasons; the court grants summary judgment despite evidence that other prisoners who did not meet the formal criteria had been admitted. An "isolated and perhaps unfair event, or a mere inconsistency in prison management" does not deny equal protection.

**Medical Care--Fees/Equal Protection/ Procedural Due Process/Ex Post Facto Laws**

*Gardner v. Wilson*, 959 F.Supp. 1224 (C.D.Calif. 1997). A $5.00 copayment requirement for medical visits, not applicable to inmates with no money, life-threatening or emergency situations, or follow-ups initiated by medical staff, does not violate the Eighth Amendment. Defendants did not fail to provide medical care or delay it.

The co-payments do not deny equal protection because there is a rational basis for the policy.

Taking funds from the plaintiff's account to pay for medical visits did not deny due process. He had notice of the

law and he initiated the medical visit, and the prison grievance system permitted challenge to erroneous charges. At 1229: "Due Process requires no more than notice and the post-deprivation grievance process."

The co-payment requirement is not an ex post facto law, since it is not punishment and does not apply to events occurring before its initiation, and it is not a bill of attainder either.

**Theories--Due Process/Equal Protection**

*Jubilee v. Horn*, 959 F.Supp. 276 (E.D.Pa. 1997). The plaintiff alleged that defendants had intentionally delayed completing the paperwork for his parole application, deliberately used erroneous and incorrect information in reviewing his status, and maliciously used their procedures to prevent him from being timely considered for parole. These allegations state a substantive due process claim. A legislative grant of discretion does not amount to a license for arbitrary behavior *even in the absence of a protectable liberty interest.* The allegation that this treatment deprived the plaintiff of the process afforded to similarly situated prisoners stated an equal protection claim.

**Food/Use of Force/Hygiene/Medical Care**

*Dennis v. Thurman*, 959 F.Supp. 1253 (C.D.Calif. 1997). The plaintiff refused to leave his cell for a search. An officer shot a 37mm gas gun, which shoots rubber blocks, at the floor; the ricochet fractured the plaintiff's leg. Use of the gun was justified by the plaintiff's refusal to leave the cell.

At 1261: "Water and functioning plumbing are basic necessities of civilized life." The shut-off of water to the segregation unit for 36 hours did not violate the Eighth Amendment. Deprivation of sanitation for short times during violent episodes is acceptable. Defendants had a legitimate reason for turning off the water: prisoners had in the past used the water to flood the cell block.

A 45-minute delay in treatment for the plaintiff's leg injury did not constitute deliberate indifference.

**Work Assignments/Medical Care--Serious Medical Needs**

*Jones v. Hannigan*, 959 F.Supp. 1400 (D.Kan. 1997). The plaintiff had epididymitis, which was treated with antibiotics and an athletic supporter, with direction to avoid strenuous activity. He was given a medical restriction form but his work supervisor nevertheless insisted that he perform heavy lifting, and he hurt himself.

The plaintiff's epididymitis and back injury were serious needs. They had been diagnosed and treated, a lay person could be expected to recognize the need for treatment, and they affected the plaintiff's daily activities and caused pain. However, there was no deliberate indifference; at most, there was inadvertence in sending him back to work. His criticisms of his treatment amounted to no more than differences of opinion with the treatment.

**Pre-Trial Detainees/Use of Force/ Summary Judgment**

*Cole v. Pence*, 960 F.Supp. 157 (N.D.Ill. 1997). The plaintiff alleged that a deputy sheriff hit him for passing a cigarette to another detainee. The defendant is not entitled to summary judgment, even though the plaintiff's deposition is contradictory in some respects.

**Rights of Particular Groups/Non-English Languages/Medical Care--Standards of Liability--Deliberate Indifference/Medical Care--Staffing, Medical Records, Examinations/Mental Health Care/Medical Privacy/ Programs and Activities/Equal Protection/Classification--Race/ Injunctive Relief--Changed Circumstances/Procedural Due Process/Procedural Due Process--Disciplinary Proceedings/Religion--Services Within Institutions/Pendent and Supplemental Claims; State Law in Federal Courts/Classification--Race**

*Franklin v. District of Columbia*, 960 F.Supp. 394 (D.D.C. 1997). Because of the lack of bilingual staff and staff's ignorance of or failure to follow directives concerning provision of interpreters, Hispanic prisoners who speak no or limited English have difficulty accessing the medical and mental health care system in the D.C. jails; receive inadequate care; and are not provided with adequate information that they can understand concerning diagnoses, treatment plans, and risks. Continuity of care is "sadly lacking." Confidentiality is routinely violated by requiring other inmates or correctional staff to interpret. Hispanics are not provided information on how to request HIV tests and the HIV counseling they receive is inadequate.

At 428: "Systemic deficiencies in access to medical and mental health care may constitute deliberate indifference under the Eighth Amendment." Deliberate indifference may be shown by repeated examples of negligent acts or by proving systemic and gross deficiencies in staffing, facilities, equipment or procedures.

At 429: "To satisfy the Constitution, a medical facility must be adequately staffed." Inadequate bilingual staff were provided. At 430:

> While the right to confidentiality of medical communications is qualified in a prison setting, . . . a prisoner's right to privacy is only limited by valid penological interests. . . . Outside of emergencies, however, there is no valid penological justification for disclosing an inmate's

> medical condition through the use of correctional officers or other inmates as interpreters in medical encounters.

At 430: "A correctional facility must provide health care screening to identify potential medical problems and communicable diseases, . . . and medical records must be marked and sufficiently organized to allow the provision of adequate care."

Defendants fail to identify Hispanic prisoners in need of mental health services, to make necessary and appropriate treatment available to them, to monitor and insure continuity of care for them, to obtain informed consent to administration of psychotropic drugs, and to protect their confidentiality. These systemic failures constitute deliberate indifference.

The court declines to award injunctive relief under the D.C. Code provision imposing a duty of care on the Department of Correction, although it has been construed to extend the common law of torts to prisoners; it is not settled that injunctive relief is available under it.

There is a lack of programs for Hispanic prisoners who speak limited English; they lose both the benefit of the programs and the opportunity to earn good time credits for participating in them. However, prisoners have no right to vocational, rehabilitative or educational programs or to parole, and there is no equal protection violation because there is no evidence prisoners are denied access to programs because they are Hispanic. The failure to offer the same range of programs in Spanish as in English does not deny equal protection.

Religious programming for Hispanic prisoners is limited. However, the record does not establish a violation of the Religious Freedom Restoration Act.

The plaintiffs failed to establish a pattern of racially motivated harassment or a racially hostile environment. Staff generally responded appropriately to such incidents. At 432: "The defendant's failure to provide qualified interpreters at disciplinary hearings and parole hearings is an affront to due process." Due process protects the right "to participate *meaningfully* in critical proceedings." At 433: "While prisoners may have no liberty interest in parole *per se*, . . . that is not say [sic] that inmates can be deprived of a fair hearing once the District of Columbia determines that a hearing will be held. . . . Once the defendant decides to conduct a parole hearing, due process demands that the hearing be conducted in a fair and meaningful manner."

At 406 (footnote omitted):

> While the defendant offered evidence regarding a flurry of activity within the Department of Corrections in the weeks prior to trial, the record as a whole establishes that these meager steps, taken five years after the District was placed on notice of the underlying problems, were nothing more than a weak attempt to shield its deliberate indifference from judicial scrutiny once it became clear that this case was going to trial.

**Prison Litigation Reform Act/In Forma Pauperis/Use of Force**

*Kane v. Lancaster County Dept. of Corrections*, 960 F.Supp. 219 (D.Neb. 1997). The plaintiff, a former detainee, sued defendants including Officers John Doe, Richard Roe, Donald Duck, Daffy Duck, Mickey Mouse and Minnie Mouse, for beating, starving, and robbing him while he was jailed. The complaint is not frivolous, even though the use of cartoon character names is not good pleading practice.

The plaintiff is not a prisoner for purposes of the PLRA *in forma pauperis* amendments, since the statute speaks in the present tense and he was out of jail when he filed suit; the court may not screen *sua sponte* to determine if the complaint states a claim.

**Medical Care/Personal Involvement and Supervisory Liability/Disabled**

*Saunders v. Horn*, 960 F.Supp. 893 (E.D.Pa. 1997). The court affirms the magistrate judge's recommendations reported at 959 F.Supp. 689 (E.D.Pa. 1996). The Commissioner and Superintendent could be held liable for the deprivation to plaintiff of medically recommended orthopedic shoes, since he had written to them to complain. This is not a case where correctional officials rely on medical professionals who are caring for the prisoner; rather, correctional staff took the plaintiff's shoes and their supervisors acquiesced.

The Americans with Disabilities Act applies to state prisons.

**Suicide Prevention/Mental Health Care/Color of Law/Qualified Immunity**

*Hartman v. Correctional Medical Services, Inc.*, 960 F.Supp. 1577 (M.D.Fla. 1996). The decedent was identified as a suicide risk by a person who had the title, but not the qualifications, of clinical psychologist. He recommended a "later medical referral." No such referral was conducted; he authorized the decedent's removal from suicide watch three days later without having had any mental health consultation; he documented the decedent's depression at that time. The decedent committed suicide without ever having seen a mental health professional or having been provided any treatment.

The "clinical psychologist" is not entitled to qualified immunity; the court notes evidence that he was more interested in getting people out of suicide watch quickly because of pressure from the corporation that employed him, and about his upcoming vacation, than the decedent's welfare.

Correctional Medical Services, Inc., is entitled to raise the defense of qualified immunity. (Probably wrong--if municipalities are not entitled to it, corporations, which also can only be held liable based on corporate policies, should not be either.) However, CMS is not entitled to summary judgment, since evidence that it permitted a person with only a master's degree and no professional licenses to have authority over mental health referrals and suicide precautions raised a factual issue as to a policy of deliberate indifference.

**Use of Force--Restraints, Chemical Agents/Mental Health Care/Pendent and Supplemental Claims; State Law in Federal Courts**

*Price v. Dixon*, 961 F.Supp. 894 (E.D.N.C. 1997). The plaintiff was maced the placed in four-point metal restraints for 28 hours after throwing urine on officers. His condition was checked every 15 minutes and he was released regularly for bathroom breaks.

The court rejects his claim that he was unlawfully denied mental health care; he had been treated and diagnosed repeatedly by mental health professionals. He had been thrown out of the mental health unit and placed in segregation at the time of the incident, but his complaint about this merely demonstrates a difference of opinion about treatment.

The use of mace and restraints did not violate the Eighth Amendment. At 900: ". . . [I]t is accepted that prisoners may be subdued with mace when acting disorderly as long as the use is neither excessive nor applied solely for the purpose of inflicting pain or punishment." Four-point restraints are not improper if other control methods don't work. The defendants are entitled to qualified immunity for keeping him in them for 28 hours because based on his long history of disruption, defendants believed that safety required it. The defendants are also entitled to qualified immunity for allegedly failing to let the plaintiff wash the mace off. The court does not rule on the constitutionality of this treatment.

A state statute requiring medical examination before assignment of prisoners does not apply to placement in restraints.

**Searches--Person--Prisoners/Religion/ Use of Force**

*Collins v. Scott*, 961 F.Supp. 1009 (E.D.Tex. 1997). The Muslim plaintiff complained that he had been strip searched by a female officer over his religious objection and shocked with a stun shield to conduct the search forcibly. (By the time this happened, there were several male officers in the area who could have conducted the strip search.)

The plaintiff did not establish a violation of the Religious Freedom Restoration Act. Although he has a sincere religious belief in modesty, the Koran's prohibition is against nudity before either sex. The plaintiff's "willingness to forego his religious belief in some contexts is one indicator that the belief is not central or fundamental to the religion." (1014) The court finds it "ironic" that the plaintiff is willing to forego his religious beliefs to the extent that the prison's written policy requires. The departure from the prison system's rules was "a rare exception. An isolated incident of unremarkable proportions does not rise to the level of a constitutional violation." (1014) "It should further be noted that the Plaintiff acknowledged that Allah understands the situation." *Id.*

The defendants have shown a compelling interest in maintaining security and the strip search practice is the least restrictive means of furthering that interest. The prison also has a valid security concern that inmates not dictate policy. Note that the court is holding that the defendants have a compelling interest and have used the least restrictive means in doing something that is *contrary to their own policy*. It gets better: defendants said that they had changed their policy to make sure male employees were on hand. This "should be commended. The ability to find an accommodation does not, however, undermine the conclusion of the Court that the old practice was the least restrictive means of carrying out policy." The prison was also constrained by a class action judgment requiring gender-neutral assignments of staff.

The use of a stun shield did not violate the Eighth Amendment, since the plaintiff was repeatedly given the opportunity to comply with orders and did not do so. The use of the shield was less potentially harmful than the use of pepper gas or bare hands.

**Federal Officials and Prisons/ Rehabilitation/Law Libraries and Law Books**

*Amen-Ra v. Department of Defense*, 961 F.Supp. 256 (D.Kan. 1997). The plaintiffs are inmates in the United States Disciplinary Barracks. They challenged the Inmate Treatment Plan Program, which allegedly violated their privilege against self-incrimination by requiring them to take responsibility for their criminal behavior. The court rejects their claim.

Claims of limited access to the law library do not establish a constitutional violation in the absence of injury.

**Access to Courts--Punishment and Retaliation/Communication and Expression**

*Talbert v. Hinkle*, 961 F.Supp. 905 (E.D.Va. 1997). The plaintiff alleged that he was fired from his law library job because he filed a class action complaint. His claim is rejected because he did not show that his discharge adversely affected his right of court access. (This misses the point; if accepted, it essentially abolishes retaliation claims.) His

placement in segregation was not shown to have resulted from his litigation activities; if it resulted from his showing to other inmates a letter from a state senator about the abolition of parole, it would have been justified because defendants had reason to believe this activity would increase tensions in the prison.

**Access to Courts--Punishment and Retaliation/Typewriters/Procedural Due Process--Property**

*Spruytte v. Govorchin*, 961 F.Supp. 1094 (W.D.Mich. 1997). The plaintiff won a state court suit to be permitted to possess a particular word processor. Two days after its final resolution, the plaintiff filed this suit, alleging that prison officials' decision to deny him a substitute word processor late in the state court litigation constituted retaliation for the earlier stages of the litigation, and seeking a ruling on the alleged practice of reaching decisions in such cases before a hearing.

The plaintiff, who had resolved all of his claims in the state court litigation, had no standing to bring this claim either as to the right to have a word processor (which he had won) or the alleged practice of decision before hearing in the grievance process.

There was no access to courts claim because there is no constitutional right to a typewriter or word processor. Any problem arising from noncompliance with orders in the state court litigation should have been addressed in the state court litigation.

The plaintiff had no retaliation claim, but the magistrate erroneously applied a standard requiring "egregious abuse of governmental power." At 1102: "Retaliation against an individual for exercise of his First Amendment rights is itself a First Amendment violation." The matter is not one of substantive due process.

The plaintiff's claim of a tainted hearing that obstructed his obtaining the word processor denied due process is barred by the *Parratt* rule, since he had a post-deprivation remedy and used it successfully.

**Protection from Inmate Assault/ Survival of Actions and Wrongful Death Litigation/Personal Involvement and Supervisory Liability/Class Actions--Effect of Judgments and Pending Litigation**

*Velazquez-Martinez v. Colon*, 961 F.Supp. 362 (D.P.R. 1997). The decedent was murdered by other prisoners.

The Corrections Administrator who started seven days before the murder could not be held liable for conditions that may have caused the murder. The Commandant of Custody Officers who knew that there were no locks on the doors and inadequate staff surveillance, and who did nothing about it, could be held liable. The fact that there were orders in place in class action litigation did not absolve him of responsibility.

**In Forma Pauperis/Discovery**

*Rivera v. DisAbato*, 962 F.Supp. 38 (D.N.J. 1997). A *pro se* litigant is not entitled to a free copy of *his own deposition* taken by defendants in the action. The court cites the Prison Litigation Reform Act, which says nothing about deposition transcripts, for the proposition that prisoner litigants are generally to bear their own litigation costs. Besides, the prisoner was there, and he knows what he said and could have taken notes. The court apparently did not consider Rule 26(b)(3), Fed.R.Civ.P., which provides: "A party may obtain without the required showing [of need] a statement concerning the action or its subject matter previously made by that party."

**Personal Property/Typewriters/ Procedural Due Process--Property**

*Bannan v. Angelone*, 962 F.Supp. 71 (W.D.Va. 1996). A regulation restricting the personal property that prisoners may possess, and giving them a period of time to dispose of property authorized under the former regulation but not the new one, is not unconstitutional. At 74: "Unless other rights such as religion or speech are involved, jails may thus constitutionally disallow the possession of personal property."

Disallowing word processors or typewriters does not violate the plaintiff's right of court access in the absence of a specific showing of injury. The court takes judicial notice that most inmates file civil actions with nothing more than pen and paper.

A rule requiring prisoners to release prison officials from civil liability for property loss does not deny due process. Prison regulations provide for recovery of property or compensation for its loss through the grievance process. (This is limited to $50 except in specified circumstances.) The court apparently also considers the compulsory release a "knowing and intelligent waiver."

Providing prisoners notice of the new policy and up to 12 months to dispose of nonconforming property, along with notice of confiscation and a right to appeal, satisfies due process.

**Emergency/Procedural, Jurisdictional and Litigation Questions/Procedural Due Process/Work Assignments/ Programs and Activities/Visiting**

*Alley v. Angelone*, 962 F.Supp. 827 (E.D.Va. 1997). The plaintiffs challenged prison officials' conduct during a lockdown under RICO. However, conclusory allegations of conspiracy are insufficient. RICO plaintiffs must allege that they have been injured in their business or property as well as identifying specifically two or more predicate acts of "racketeering." Injury to business does not encompass loss of prison employment because prisoners do not have a constitutional right to work assignments.

There is no liberty interest in prison employment under *Sandin*. (What about a property interest? The court glosses over the question.)

Lockdowns do not impose atypical and significant hardship under *Sandin*, since a lockdown is essentially institution-wide segregation. Therefore no hearing is required.

The potential effect on good time of restrictions on employment and program participation is not a liberty interest protected by due process.

The Constitution does not protect "unfettered" visitation.

**Psychotropic Medication**

*Enis v. Dept. of Health and Social Services of Wisconsin*, 962 F.Supp. 1192 (W.D.Wis. 1996). The plaintiff, who was acquitted on grounds of insanity in 1974 and has been incarcerated ever since, was entitled to a determination that he was dangerous to himself or others and that administration of psychotropic drugs was in his best medical interest. His procedural rights are generally governed by *Washington v. Harper*; even though incompetent he is not entitled to appointment of a guardian.

Further medication is enjoined until the necessary findings are made by an independent decision-maker.

**Class Actions--Certification of Classes, Conduct of Litigation/Law Libraries and Law Books**

*Gomez v. Vernon*, 962 F.Supp. 1296 (D.Idaho 1997). The defendants moved for summary judgment and to decertify the plaintiff class in a court access suit after *Lewis v. Casey*. They alleged that the named plaintiffs lacked standing because they could not show actual injury.

Once a class has been certified, if the named plaintiffs had legitimate cases at that time, their transfer does not moot the case. Plaintiffs have provided sufficient evidence that several class members have lost their claims because of deficiencies in the law libraries. Defendants' claim that these prisoners were able to file actions and did not suffer injury would require weighing of facts not appropriate at the summary judgment stage. The court also need not hold a mini-trial on each claim to determine whether it is meritorious; no such evidence was submitted in *Lewis*. Plaintiffs will be allowed to join new named plaintiffs.

*Lewis* does not require decertification of the class, since plaintiffs have shown that there are plaintiffs who meet the new injury criteria.

The court declines to order new notice of the litigation to be posted in the prisons to assist plaintiffs' counsel in identifying inmates who have been injured by lack of court access.

**Prison Litigation Reform Act/Verbal Abuse/Grievances and Complaints about Prison/Protection from Inmate Assault/Equal Protection**

*Thomas v. Hill*, 963 F.Supp. 753 (N.D.Ind. 1997). An officer was arrested for dealing drugs to inmates, and he communicated to other officers and prisoners that the plaintiff had set him up. The plaintiff was threatened and harassed.

At 755: "Verbal harassment or abuse of prisoners by guards does not state a constitutional deprivation under § 1983." However, informing other prisoners that the plaintiff had taken action that impacted the availability of drugs may indicate deliberate indifference to his safety. The facts alleged also state a claim of retaliation for exercising his First Amendment rights (presumably the right to report illegal conduct) and of an attempt to prevent him from testifying against the officer.

Unfair treatment of the plaintiff as an individual does not violate the Equal Protection Clause; the treatment must result from his membership in a particular class.

The Prison Litigation Reform Act's prohibition on claims for mental or emotional injury without a showing of physical injury does not bar this suit. The court assumes that the claim is one for "mental or emotional injury," but it declines to apply the statute retroactively because to do so "attaches new legal consequences to events completed before the provision's enactment." (758)

**Summary Judgment/Federal Officials and Prisons/Personal Property**

*Melvin v. United States*, 963 F.Supp. 1052 (D.Kan. 1997). The plaintiff was supposed to move to another housing unit; he moved most of his property and left the rest hidden behind the bed. An officer, not seeing the property, left the cell unlocked and his property was taken.

At 1056: "Failure of a pro se litigant to timely respond to the defendant's motions must amount to a 'clear record of delay and contumacious conduct' before dismissal is justified." The plaintiff's untimely response is considered.

Under the Federal Tort Claims Act, plaintiff's claim is adjudicated under Kansas law. Loss of property is compensable. At n. 1: Although prison officials may restrict the property a prisoner may possess, once the inmate is allowed to possess it, a protected interest in the property arises. The court reviews the law of conversion and bailment as applied to prisoners in various states. It concludes that bailment relationships in a prison are "based on mutual benefit" (as opposed to gratuitous bailments, bailments for hire, and bailee as insurer). Since theft is a danger against which a bailee must protect, and since a mutual benefit bailment is governed by a standard of ordinary care, the plaintiff has established a prima facie case of liability.

**Procedural Due Process--Disciplinary Proceedings/Punitive Segregation/ Hygiene**

*Porter v. Coughlin*, 964 F.Supp. 97 (W.D.N.Y. 1997). The plaintiff was charged with participation in the 1991 Southport riot and sentenced to 36 months in segregation; he was also indicted, convicted and sentenced to additional prison time. A state court invalidated his disciplinary conviction because the hearing officer had failed to make certain findings; it is unclear whether a new hearing was ever held. He was then given a new misbehavior report based on the criminal conviction for the same acts and was sentenced to five years in SHU, reduced administratively to 36 months. He also received other charges at various times and spent about five years in SHU cumulatively.

The 36 months segregation imposed after the criminal conviction is atypical and significant under *Sandin*. However, the plaintiff received due process. The denial of two witnesses (the county judge and the prosecutor involved in his criminal prosecution) and the denial of others because they had no involvement in the underlying actions were justified. In any case the purpose of the hearing was to determine whether the plaintiff had been found guilty of a criminal offense, not to reargue the merits of the underlying charge. The criminal trial provided the process due. The Double Jeopardy Clause is not applicable in prison disciplinary proceedings.

The plaintiff's SHU confinement might constitute cruel and unusual punishment if, as he asserts, he was "placed in a cell in close proximity to feces-throwing inmates, inmates threw feces in plaintiff's cell or directly at him, and this conduct was condoned, encouraged, or permitted by the prison authorities . . . then plaintiff seems to have a strong argument that he was subjected to barbarous treatment, posing a substantial risk of serious harm." (104)

**Procedural Due Process--Disciplinary Proceedings**

*Gomez v. Kaplan*, 964 F.Supp. 830 (S.D.N.Y. 1997). At 835: After September 1993, "the clearly established law in this Circuit required prison disciplinary hearing officers to make an independent assessment of the reliability of confidential informants, and to create and preserve a record of that assessment." This rule applies if the hearing officer relies "to any degree" on confidential informant testimony.

**Protection from Inmate Assault/ Personal Involvement and Supervisory Liability/Service of Process/ Municipalities**

*Watson v. McGinnis*, 964 F.Supp. 127 (S.D.N.Y. 1997). The plaintiff alleged that an officer told other inmates that he had snitched on them; he had complained to the superintendent; and subsequently he had been slashed by another inmate.

The Superintendent and a captain could not be held liable because he forwarded the plaintiff's letter immediately to a captain, who informed the plaintiff that the matter would be investigated. At 130: "The law is clear that allegations that an official ignored a prisoner's letter are insufficient to establish liability."

The officer who labeled the plaintiff a snitch to other inmates could be held liable for the resulting assault.

The Magistrate Judge recommended that the complaint be dismissed for lack of service, but the district judge declines to do so because the plaintiff's objection shows that efforts to serve have been made.

**Use of Force/Medical Care/Use of Force--Restraints/Recreation and Exercise/Procedural Due Process**

*Dawes v. Coughlin*, 964 F.Supp. 652 (N.D.N.Y. 1997). The court finds for the defendants on the facts of two use of force incidents in which the plaintiff sustained cuts, swelling and scrapes and which the court finds the plaintiff initiated.

The court rejects the plaintiff's claim that he was denied an x-ray of his ribs for two months on the ground that he was fully examined after the use of force in question and no injury was observed to his ribs. He was not taken to scheduled x-rays on four separate occasions because he continued to act in a threatening and offensive manner toward staff. When he was finally x-rayed, there was no damage to his ribs. His medical need was not serious.

The defendants issued various restraint orders and deprivation orders depriving the plaintiff of all out-of-cell activities because of his violent and threatening behavior. They did not deny due process; the daily review of deprivation orders, the availability of the grievance program, and the availability of a judicial remedy in state court provide the process due. Restraining the plaintiff during his recreation periods did not violate the Eighth Amendment when done for security and safety purposes.

**Hazardous Conditions and Substances**

*Simmons v. Sager*, 964 F.Supp. 210 (W.D.Va. 1997). The plaintiff complained that although his prison living units had a designated smoking area, the ventilation system did not prevent some smoke from filtering into the rest of the dorm, and that his requests for assignment to a non-smoking housing unit were refused.

The defendant is granted summary judgment. The plaintiff, though he complained generally about childhood respiratory problems, alleged no specific medical symptoms resulting from ETS and made no complaints to medical staff at the prison. He also did not show that the level of exposure he experienced was one society would not tolerate. At 213:

"As society has not yet demanded that all public areas be kept free of ETS, the court cannot find that society would require prisons to do so." The defendant was not deliberately indifferent, having taken some steps to protect the plaintiff, and having had good reasons for not taking other measures he requested like opening the outside doors.

**Statutes of Limitations/Parties Defendant/Protection from Inmate Assault**

*Byrd v. Abate*, 964 F.Supp. 140 (S.D.N.Y. 1997). The plaintiff was stabbed by another inmate in a mental observation unit and lost his eye. At the time of the attack, the officer assigned to supervise the area was relieving another officer who was in the bathroom. He was sued as John Doe. The Corporation Counsel delayed identifying him for months until after the statute of limitations had run.

The amended complaint identifying the new defendant relates back to the filing of the initial complaint. The court construes the inability to identify the defendant as a "mistake" under Rule 15(c), Fed.R.Civ.P., contrary to Second Circuit precedent, because in this case the plaintiff sought timely to join the defendant and the Corporation Counsel failed to disclose his identity or to produce discovery. The defendant had constructive knowledge of the claim because he and the other defendants were represented by the same attorney.

**Attorneys' Fees/Prison Litigation Reform Act**

*Clark v. Phillips*, 965 F.Supp. 331 (N.D.N.Y. 1997). The plaintiff was awarded $10,000 by a jury for an unspecified Eighth Amendment violation.

The attorneys' fees sought by the plaintiff were for time spent in proving and seeking redress for an actual violation of the plaintiff's rights. A fee of $7921.96 is "proportionately related" to the $10,000 award. The statute permits awards of up to 150% of the damages, which the court suggests is the outer limit of proportionality.

The PLRA fixes fees at 150% of CJA rates, which are $45 an hour out of court and $65 an hour in court in this district, yielding $67.50 and $97.50 respectively. Travel time is compensated at $40 as suggested by the defendants.

The court applies 25% of the plaintiff's judgment to satisfy the fee award.

**Grievances and Complaints about Prison/Verbal Abuse/Procedural Due Process--Disciplinary Proceedings**

*Brown v. Coughlin*, 965 F.Supp. 401 (W.D.N.Y. 1997). The plaintiff alleged that officers fabricated disciplinary charges in retaliation for his administrative complaints. These allegations make out a constitutional claim and are sufficiently supported by evidence to withstand summary judgment. Recourse to administrative forums is protected by the right to petition for redress of grievances; administrative complaints enjoy as much constitutional protection as does litigation.

False disciplinary charges do not deny due process in the absence of evidence that they were made in retaliation for the exercise of constitutional rights.

Vague threats of harm do not state an Eighth Amendment violation; the court distinguishes a case involving threats of death.

**Unsentenced Convicts and Convicts Held in Jails/Protection from Inmate Assault**

*Earrey v. Chickasaw County, Miss.*, 965 F.Supp. 870 (N.D.Miss. 1997). The plaintiff, an accused parole violator, was beaten by other inmates in jail. Nighttime checks are not made in the jail. Some or all of the door locks are inoperative. There was no direct visual surveillance, only an intercom microphone and an emergency switch, which the plaintiff was kept from reaching by his assailants.

The plaintiff not entitled to the *Wolfish* due process standard in the absence of evidence that defendants actually intended to punish him for his alleged crime. An inference of punitive intent from the conditions of confinement is not warranted for a parolee.

It is unclear whether the *Farmer v. Brennan* subjective deliberate indifference standard is applicable to a claim against a municipality. Some courts have assumed that municipal liability requires only a policy of objective deliberate indifference but that a judgment against the municipality requires a showing of subjective deliberate indifference by an official. This court adopts that position.

The facts alleged by the plaintiff are sufficient to withstand summary judgment under the *Farmer* deliberate indifference standard.

**Attorneys' Fees/Prison Litigation Reform Act**

*Hadix v. Johnson*, 965 F.Supp. 996 (W.D.Mich. 1997). The Prison Litigation Reform Act's restrictions on attorneys' fees do not apply to services performed before the statute's passage; to hold otherwise would result in an impermissible retroactive effect. The attorneys had an expectation on prior law that they would receive reasonable fees if they prevailed, and $112.50 is not reasonable because it is not the market rate.

The court uses as a basis for calculation of PLRA fees the $75 rate authorized by the Judicial Conference for attorneys with their offices in Detroit or Washington, D.C.

**Procedural Due Process--Disciplinary Proceedings**

*Hayes v. McBride*, 965 F.Supp. 1186

(N.D.Ind. 1997). A substance was confiscated from the petitioner's cell and the officer said he admitted it was polyurethane, an intoxicant. The petitioner denied making such an admission. The failure of officials to produce the substance at the hearing did not deny due process. However, the failure actually to identify it as an intoxicant, combined with the lack of any *uncontroverted* evidence that it was an intoxicant, meant that there was insufficient evidence to sustain a disciplinary conviction. The court says this is not reweighing the evidence, but insisting upon "some evidence" that possesses "sufficient indicia of reliability." (Citing *Meeks v. McBride*, 81 F.3d 717, 720 (7th Cir. 1996)).

**Use of Force/Federal Officials and Prisons/Pre-Trial Detainees**

*Santiago v. Semenza*, 965 F.Supp. 468 (S.D.N.Y. 1997). The defendant officer is entitled to summary judgment in this use of force case; even accepting the plaintiff's story that the defendant attacked him, his first blow missed ("An attempted blow does not rise to the level of a constitutional violation.") Considering that the plaintiff had slipped his cuffed hands to the front and that there was a melee going on in the cell, the defendant's actions, which at most inflicted bruises or a scratch, did not deny due process. The court applies the *Johnson v. Glick* standard.

**Prison Litigation Reform Act/Judicial Disengagement/EqualProtection/Due Process**

*James v. Lash*, 965 F.Supp. 1190 (N.D.Ind. 1997). The court earlier applied the judgment termination provisions of the Prison Litigation Reform Act a 1982 consent decree requiring recognition of the American Muslim Mission. 949 F.Supp. 691 (N.D.Ind. 1996). On this motion by plaintiffs under Rule 60(b), the court adheres to its decision and upholds the statute against the constitutional challenges that were not raised in the initial proceeding.

At 1196: "... [T]he specific relief granted by a consent decree never becomes 'final' to the extent that it is beyond reconsideration." *Id.*: "Had Congress enacted § 3626(b)(2) to read 'vacate' or 'rescind' rather than 'terminate,' and 'Judgment' rather than 'prospective relief' the court's conclusion in regard to the separation of power challenge might likely be different." Under Rule 60(b) and equity principles, the plaintiffs never had the right to expect that the prospective relief would continue in perpetuity.

The rational basis test applies to plaintiffs' equal protection argument, and the interest in preserving state sovereignty from overzealous federal court supervision is legitimate.

The court assumes that a consent decree is subject to an impairment of contract challenge, and upholds the statute under the rational basis test.

**Prison Litigation Reform Act/In Forma Pauperis**

*Johnson v. Hill*, 965 F.Supp. 1487 (E.D.Va. 1997). The plaintiff alleged that he was incarcerated for a week after the Parole Board had ordered his release and that he was beaten by another inmate while confined. He paid the full filing fee.

The plaintiff's complaint is subject to pre-screening under the Prison Litigation Reform Act even though he is no longer a prisoner, since he was a prisoner when he filed and he brought the suit "in his capacity as a prisoner; that is, it advances his concerns about alleged misconduct by prison officials and injuries received at the hands of another inmate." (1488 n. 2)

The complaint is subject to pre-screening even though the paid the entire filing fee; the relevant PLRA provision applies to all prisoner cases even if they are not *in forma pauperis*. The court dismisses on statute of limitations grounds.

**Prison Litigation Reform Act/In Forma Pauperis**

*Witzke v. Hiller*, 966 F.Supp. 538 (E.D.Mich. 1997). The plaintiff had three "strikes" under the Prison Litigation Reform Act and was barred from proceeding without prepayment of the filing fee. The application of the PLRA based on strikes occurring before its passage does not have an impermissible retroactive effect.

**ProceduralDueProcess--Disciplinary Proceedings/Habeas Corpus/Equal Protection**

*Hester v. McBride*, 966 F.Supp. 765 (N.D.Ind. 1997). Amendments to the habeas corpus statute restricting the scope of review apply to determinations made by administrative bodies including prison disciplinary boards.

Witness statements corroborating the accusation constituted "some evidence" notwithstanding a statement obtained by the plaintiff that contradicted them. The failure to use a polygraph in interviewing witnesses did not deny due process. The failure to provide witness statements by confidential informants did not deny due process.

The fact that another prisoner got a lesser sentence did not establish an equal protection violation; the other prisoner was charged with a less serious offense and there is no evidence of discriminatory purpose.

Failure to comply with prison regulations concerning timeliness of the disciplinary hearing does not violate the Constitution.

There is no due process claim for ineffective assistance by an inmate advocate.

**Procedural Due Process--Disciplinary Proceedings**

*Terrell v. Godinez*, 966 F.Supp. 679 (N.D.Ill. 1997). Segregation for 60 days is not atypical and significant under *Sandin*. Even if it was, this plaintiff received due process. He failed to identify witnesses, so denial of witnesses did not deny due process. There was "some evidence" in the fact that contraband was found in a ventilation duct that was accessible from eight different cells including his own; the court can't weigh the strength of the evidence. He also failed a polygraph test (which he had requested); that is evidence against him.

**Use of Force/Verbal Abuse**

*Brown v. Croce*, 967 F.Supp. 101 (S.D.N.Y. 1997). The plaintiff alleged that an officer called him racial names and slapped him twice in the face. He was not injured. The use of force was *de minimis*. Malice is not shown, since the slaps and use of racial epithets occurred after the plaintiff "interfered with and harassed an officer." (He stated at his disciplinary hearing that he was screaming as loudly as he could. This occurred in the mental health office, where he was trying to see his doctor.) Racial slurs and epithets are not actionable.

**Use of Force/Res Judicata and Collateral Estoppel**

*Caridi v. Forte*, 967 F.Supp. 97 (S.D.N.Y. 1997). The plaintiff's conviction for resisting arrest precluded his claim for excessive force during the arrest, since proving the resisting arrest claim requires proving that force was needed to effectuate the arrest. The court relies on *Pastre v. Weber*, 907 F.2d 144 (2d Cir. 1990). The court seems to exclude the possibility that some force was needed but the force used was excessive.

Force used at the station house was also not excessive; the defendant officer "displayed commendable calm in the face of outrageous abuse from a one-man crime wave." The court reaches this conclusion on a summary judgment motion without being very clear about what the plaintiff's story actually was.

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

*Walker v. Roth*, 967 F.Supp. 250 (E.D.Mich. 1997). The plaintiff alleged that he was subjected to a false disciplinary charge because he threatened to file a grievance. Such retaliation against prisoners must "shock the conscience" or "egregiously abuse governmental authority" to be actionable. There is a conflict in this district court on that point and the court (253 n. 6) rejects the contrary analysis of *Riley v. Kurtz*, 893 F.Supp. 709 (E.D.Mich. 1995).

False disciplinary charges do not deny due process. In any case, this plaintiff was convicted of insolence and the facts support the charge.

**Drug Dependency Treatment/ Rehabilitation/Religion/Prison Litigation Reform Act**

*Kerr v. Puckett*, 967 F.Supp. 354 (E.D.Wis. 1997). The plaintiff alleged that a prison drug rehabilitation program violated the Eighth Amendment because of its intellectually coercive nature (my characterization of his claim) and the Establishment Clause because of its religious content.

The defendants are entitled to qualified immunity because the Seventh Circuit decision in point was not decided until after the conduct complained of. In addition, to the extent that his damage claims are for mental or emotional injury, they are barred by the Prison Litigation Reform Act. This provision applies even though the plaintiff was no longer a prisoner when he filed.

**Dental Care/Medical Care--Standards of Liability/Pendent and Supplemental Claims; State Law in Federal Courts/Prison Litigation Reform Act**

*Gindraw v. Dendler*, 967 F.Supp. 833 (E.D.Pa. 1997). The plaintiff alleged that a prison dentist pulled the wrong tooth and subsequently, trying to pull another tooth damaged in the first extraction, broke that tooth and chipped another.

At 836: ". . . [T]he exercise by a doctor of his professional judgment is never deliberate indifference." The plaintiff's complaint about the quality of treatment does not establish deliberate indifference. The number of examinations conducted, the extensive treatment given, the referral to another physician and the prescription of medication is enough to negate deliberate indifference.

Generally, a medical malpractice claim must be supported by expert testimony, but there is no such requirement where the matter is so simple and the lack of skill or care is so obvious to be within a lay person's understanding. Breaking a tooth and leaving the roots in the jaw is not evidence of malpractice absent an expert report. The same is true of using more force than necessary to extract a tooth. The court notes that it gave the *pro se* plaintiff plenty of opportunity to get an expert.

The claim for removing the wrong tooth cannot be dismissed on the state of the record, though the court does not decide that no expert testimony is required. This claim may also constitute an assault and battery. At 840: "Performing a medical procedure without informed consent is a technical assault and battery."

The provisions of the Prison Litigation Reform Act for dismissal at any time it is determined that a complaint fails to state a claim apply to cases filed before the statute was passed; the provisions are wholly procedural, and there is no right to have a court hear a

complaint that does not state a claim.

**Habeas Corpus/Procedural Due Process--Disciplinary Proceedings**

*Rice v. McBride*, 967 F.Supp. 1097 (N.D.Ind. 1997). The petitioner was disciplined for threatening to kill his wife and her live-in boyfriend. His habeas corpus petition is governed by the Anti-Terrorism and Effective Death Penalty Act's restrictions, which presume the correctness of facts found by state courts and require a showing of unreasonably application of clearly established federal law as determined by the Supreme Court. This provision is applicable to determinations made by administrative bodies.

There was some evidence to support the conviction despite the fact that the petitioner presented conflicting evidence (an officer's statement that the petitioner and his wife appeared to be on good terms). The evidence relied on is reliable, although some of it came from a confidential source.

The failure to obtain a witness statement from the petitioner's wife did not deny due process; she was not present when the officers heard the petitioner utter his threat, and there was other evidence that the threat was made.

**Prison Litigation Reform Act/ Exhaustion of Remedies**

*Morgan v. Arizona Dept. of Corrections*, 967 F.Supp. 1184 (D.Ariz. 1997). The court lacks jurisdiction over a complaint by a prisoner who failed to exhaust the prison grievance system before filing. The court has no discretion under the Prison Litigation Reform Act to grant a continuance to permit exhaustion. The fact that prison officials did not respond timely does not excuse exhaustion. The action is dismissed without prejudice.

The plaintiff's complaint of an assault by another inmate constitutes a "prison conditions" complaint and is subject to the exhaustion requirement.

**Protection from Inmate Assault**

*Dowling v. Hannigan*, 968 F.Supp. 610 (D.Kan. 1997). Prison authorities received an anonymous note stating that the plaintiff would be attacked by his assailant because he had informed on the assailant for his drug activities. The assailant and his cell were searched and he was denied yard privileges, but the plaintiff was not told of the threat. The next day the plaintiff was attacked with a razor blade. He alleged that one of the defendants saw the attack and did nothing.

These allegations are sufficient to withstand summary judgment.

**Pre-Trial Detainees/Personal Involvement and Supervisory Liability**

*Ingalls v. Florio*, 968 F.Supp. 193 (D.N.J. 1997). The court addresses summary judgment motions in 43 consolidated actions brought by detainees and sentenced inmates at a county jail in 1992-93, which the court stayed pending resolution of a class action. At 197 n. 1: "The standards under the Due Process Clause are the same as standards under the Eighth Amendment for measuring conditions and medical treatment."

Allegations that supervisory defendants had direct knowledge of allegedly unconstitutional conditions or that they persisted in promoting the policies that resulted in those unconstitutional conditions are sufficient to support their personal liability. Since litigation and negotiations had been going on about the disputed conditions for a decade before the events complained of, a jury could find that their level of knowledge indicated deliberate indifference.

*Crowding* (198): Extreme overcrowding, resulting in five or six inmates in cells designed for one or two and inmates routinely sleeping on the floor, made out a constitutional claim.

*Sanitation* (198): "Deplorable conditions of sanitation," including toilet paper in such short supply that inmates fought over it, made out a constitutional claim.

*Food* (198): Food storage and preparation areas infested with vermin leading to contamination of food made out a constitutional claim.

*Recreation* (198): Recreation opportunities so limited as to deny inmates any physical exercise, and denial of outdoor recreation for periods in excess of a year, made out a constitutional claim.

*Use of Force, Protection from Inmate Assault* (199-200): "repeated serious assaults . . . by both guards and other inmates," including a riot plus more isolated instances (including an officer's poisoning an inmate's food with soap containing lye and placement of one plaintiff, who had an order for segregation, in general population where he was assaulted), made out a constitutional claim. The various allegations "tend to have a mutually reinforcing effect in establishing the possible existence of a risk of harm from such violence. That is, the chronologically earlier instances of assaults may reasonably be considered by a jury as indicating a serious risk which defendants did not act to eliminate." (200) The lack of evidence of steps that the County defendants took to lessen these risks means that they could be found deliberately indifferent.

*Statutes of Limitations, Medical Care* (200-01): Allegations of denial of medical care are treated as continuing violations not barred by the statute of limitations.

*Medical Care* (202): Constitutional claims are made out by allegations that: (a) a screw came loose from the steel plate in a prisoner's jaw, causing infection, and it took two weeks to see even a nurse; (b) an inmate contracted

tuberculosis but received no treatment for a month; (c) an inmate fractured his hand but did not see a doctor for fifteen days and did not receive an x-ray for over five weeks; (d) an inmate who was urinating blood and in excruciating pain was not taken to the hospital until he contacted a newspaper.

*Medical Care--Denial of Ordered Care* (202): A prisoner who broke his hand and was advised to sleep with his hand elevated to permit proper healing of the fractures was forced to sleep on the floor without any means of elevating his hand; he was also denied pain medications. These allegations made out a constitutional claim.

*Law Libraries and Law Books* (202-03): Allegations of denial of law library access are dismissed for lack of proof of harm. Inability to assist one's criminal defense attorney does not meet this requirement because defendants generally assist their attorneys only with fact issues, not legal research. Plaintiffs must allege under *Lewis v. Casey* that some nonfrivolous action "was dismissed or could not be filed because of library restrictions." 203 n. 1: A plaintiff must be "completely unable to present his claim in the sense required by *Casey*."

*Telephones, Attorney Consultation* (203-04): Limited telephone access to counsel is not a constitutional violation as long as inmates can communicate with counsel in writing or by visits.

*Religion* (204-05): The plaintiffs' religious claims are all dismissed because none of them indicate what sincerely held religious beliefs were substantially burdened by limitations on religious services that prevented them from going as often as they wanted. At 205: in any case, "the fair apportionment of access to prison resources for the benefit of inmates of all faiths constitutes a compelling governmental interest, accomplished in the least restrictive manner. . . ." Allowing Muslims to gather only on their own tier rather than jail-wide is not shown to have substantially burdened their exercise and the defendants had a compelling interest in security in limiting gatherings.

**Recreation and Exercise**

*Davidson v. Coughlin*, 968 F.Supp. 121 (S.D.N.Y. 1997). At 129:

Because exercise is one of the basic human needs protected by the Eighth Amendment, prisoners must be afforded some opportunity for exercise. . . . Although a prisoner may satisfy the objective component of the Eighth Amendment rest by showing that he was denied meaningful exercise for a substantial period of time, . . . temporary denials of exercise may be constitutional.

Providing less than one hour a day of outdoor exercise repeatedly over a 30-day period did not violate the Eighth Amendment, since it was of limited duration and only a partial deprivation; the plaintiff was allowed other out-of-cell activities and had the opportunity for in-cell exercise; and the deprivation was imposed as a sanction to encourage compliance with prison rules. The complete denial of exercise was for no longer than 14 days.

Allegations that the plaintiff was repeatedly provided with less than a full hour's recreation and occasionally denied his yard period entirely over a period of four and a half months did not make out an Eighth Amendment violation.

The defendants were entitled to qualified immunity because at the time of the violations the Second Circuit had "only vaguely outlined the Eighth Amendment right to exercise." (134)

**Personal Property/Standing/Equal Protection**

*Grove v. Kadlic*, 968 F.Supp. 510 (D.Nev. 1997). The plaintiff was billed $630 for 18 days in jail under a state statute requiring non-indigents to pay for being jailed.

The plaintiff had standing to challenge the statute, since under it he owes the county money and has actually paid some.

The plaintiff did not have standing to challenge an alleged county practice of sending indigent offenders to jail for non-payment of fines, since he was no longer incarcerated.

The plaintiff stated a claim under the Excessive Fines Clause. The imposition of costs of incarceration under the statute is punishment; it is imposed only on those convicted of crimes, and not those detained before trial, so it cannot be analogized to a user fee. However, on the merits, the court holds that the fine is not unconstitutional because it is not disproportionate to the fine imposed for the offense or to fines imposed in contempt cases generally.

The plaintiff stated a claim under the Double Jeopardy Clause, but loses on the merits because the fine is not disproportionate to the damage caused to the government.

The plaintiff's equal protection claim is rejected because the indigency standard used by the defendants is not a standard of absolute indigency but is the same as used for indigent medical and financial assistance programs.

**Legal Assistance Programs/Standing**

*Smith v. Armstrong*, 968 F.Supp. 40 (D.Conn. 1996). This class action about court access was *sub judice* when *Lewis v. Casey* was decided.

The Department of Correction terminated its contract with Legal Assistance to Prisoners, which provided representation to prisoners, and contracted with a new program, which gives advice and assists in preparing papers, but does not represent inmates, is forbidden to discuss with them the "operation of the institution," and must disclose any information involving safety or security. The prisons apparently have law libraries.

No plaintiff established actual injury;

they all managed to file claims and no one had a complaint dismissed for failure to meet a technical requirement or a claim they could not get into court.

The lack of independence of the new program does not rise to the level complained of in *Smith v. Bounds*. Why the court rules on this question in the absence of standing is unclear.

**Heating and Ventilation/Prison Litigation Reform Act/Exhaustion of Remedies/Service of Process/Pro Se Litigation/Negligence, Deliberate Indifference and Intent**

*Mitchell v. Shonig*, 969 F.Supp. 487 (N.D.Ill. 1997). The plaintiff alleged that temperatures in his cell ranged from 32 to 50 degrees because his cell was at the end of the gallery and the windows were improperly installed. The plaintiff states a claim to the extent that he alleged extended exposure to temperatures 50 degrees or lower. The lack of significant injury is not fatal to his claim; "the Eighth Amendment requires protection from severe discomfort as well as frostbite and hypothermia." (490)

Allegations that the plaintiff informed defendants of the conditions, they were in a position to alleviate them, and they did nothing are sufficient to allege deliberate indifference. The court accepts the statement to this effect in this *pro se* litigant's brief as part of the complaint. The plaintiff need not show that the defendants intended or desired the resulting harm; all he needs to show is that the official acted or failed to act despite the knowledge of a substantial risk of harm.

The Prison Litigation Reform Act's exhaustion of administrative remedies requirement is not applicable to pending cases. The fact that it is procedural does not mean it should be so applied; it would attach new legal consequences to completed events and would violate the Seventh Circuit's "no mousetrapping" principle. The court notes that the defendants did not move to dismiss until after the plaintiff's time had expired to appeal the grievance.

The plaintiff's reliance on the Marshal to serve process and on the Marshal's statement that process had been served constituted good cause for failing to accomplish service within 120 days.

**Attorneys' Fees and Costs/Prison Litigation Reform Act**

*Blissett v. Casey*, 969 F.Supp. 118 (N.D.N.Y. 1997). A week's delay in filing a fees motion is deemed excusable neglect.

The Prison Litigation Reform Act's limitations on fees do not apply to services performed before the statute became effective. Nor do they apply to work done after the statute was passed in a case in which the attorneys agreed to represent the plaintiff before then; the opposite holding would "fail[] to take into account the [attorneys'] reasonable expectations" as of the time they took the case and would impose a new obligation on the plaintiff, to pay a proportion of his recovery as attorneys' fees. Fees are awarded at up to $150 an hour, with smaller amounts for non-legal work.

**Federal Officials and Prisons/ PsychotropicMedication/Magistrates/ Injunctive Relief/Exhaustion of Remedies**

*United States v. McAllister*, 969 F.Supp. 1200 (D.Minn. 1997). The respondent sought judicial review of a determination that he should be involuntarily medicated. The magistrate judge ordered that he not be medicated pending further order of the court, but now states that he erred because magistrates lack that authority; they may only issue a Report and Recommendation.

The federal regulations concerning forcible medication of prisoners are consistent with the requirements of *Washington v. Harper*. Since there is no right to counsel in a medication proceeding, it was not unconstitutional to fail to notify the respondent's court-appointed lawyer first.

The administrative record does not substantiate the reasons for medicating the respondent; though there was evidence that might have supported medication, the doctor who reviewed the medication proposal did not make a finding of necessity, and it is not clear whether the treating/evaluating psychiatrist/clinician presented clinical data and background information relative to the need for medication as the regulations require.

Injunctive relief is not appropriate because prison personnel have stopped forcibly medicating the respondent and therefore he has not established the necessary imminent risk of harm. The medication order is reversed and remanded for reconsideration by the agency.

The court has jurisdiction to consider this case under the Administrative Procedures Act, which provides for judicial review of all federal agency actions unless a statute provides otherwise. Mandamus does not lie because medication decisions are not ministerial.

The respondent exhausted his administrative remedies. The usual Bureau of Prisons administrative process was not available to him because there was an alternative procedure, which he utilized, and the regulations exclude such cases from the regular administrative remedy.

The court declines to appoint a "health care guardian" for the respondent.

*John Boston is the Director of the Prisoners' Rights Project, Legal Aid Society of New York.* ❧

# NPP AIDS In Prison Project Update
# Prison Systems Change HIV-Testing Policies

by Jackie Walker, Project Coordinator

For the past eight years, HIV testing in prisons has largely been conducted on a voluntary basis. Currently, only 16 state systems and the Federal Bureau of Prisons (FBOP) conduct mandatory HIV testing. Similarly, the response of correctional health organizations and many correctional doctors has been against mandatory testing. The National Commission on Correctional Healthcare has consistently supported voluntary testing since 1987 as the best means of managing HIV in corrections. Additionally, the American Public Health Association and the World Health Organization have also encouraged voluntary testing.

Earlier this year a roundtable of correctional doctors issued the publication, "Management of the HIV-Positive Prisoner," which discusses a variety of issues from HIV-testing policies to women's issues. The roundtable noted a number of disincentives for prisoners seeking HIV testing, including the distribution of medication, medical segregation or clustering, lack of access to job opportunities, and prohibition against conjugal visits. The doctors urged policy makers to remove these obstacles by creating an atmosphere that encourages voluntary HIV testing. They proposed actively offering prisoners HIV testing, access to HIV testing on demand throughout incarceration, and appropriate follow-up care for prisoners testing positive.

Despite widespread support for voluntary HIV testing, some systems are moving towards mandatory testing. In 1998 HIV-testing policies have changed or are set to change in Texas, South Carolina, and the FBOP. The Texas Department of Criminal Justice (TDCJ) revised its HIV-testing policy to include routine testing of all prisoners. The South Carolina Department of Corrections recently also began mandatory HIV screening of prisoners. Similarly, congressional legislation, H.R. 2070 the Corrections Officer and Safety Act of 1998, institutes the mandatory HIV testing of all prisoners in the FBOP. Changes in Texas, South Carolina, and the FBOP may foreshadow the future of HIV-testing policies in other systems across the country.

In the fall of 1997, the TDCJ reviewed and amended its HIV/AIDS policies. Changes included the implementation of a routine HIV-testing policy. Dr. Lannette Linthicum, TDCJ's Interim Medical Director, explains, "We felt it was essential to identify our HIV-positive offenders early in the course of their illness and start antiretroviral therapy before extensive immune damage occurs." According to Dr. Linthicum, the TDCJ's revised testing policy includes screening all consenting prisoners for high-risk behaviors and HIV testing of high-risk groups. Pre- and post-test counseling is provided based on Texas Department of Health and Centers for Disease Control models.

The Texas HIV-testing process is currently divided into two phases. In the first phase, prisoners in highest risk categories are being tested. The second phase will include testing of all prisoners. Public health nurses have until May 1999 to screen all prisoners at their facilities.

The TDCJ's new HIV-testing policy seems to have initiated a trend. The FBOP is following suit by imposing its own mandatory HIV-testing policy. The original purpose of the proposed legislation, H.R. 2070 the Corrections Officer and Safety Act of 1998, was to protect correctional staff from possible transmission of the HIV virus by identifying infected prisoners through testing. However, several amendments expanded the scope of the bill. Under the amended H.R. 2070, anyone convicted of a federal offense and sentenced to serve six or more months would be tested for the HIV virus. The FBOP currently offers voluntary HIV testing during incarceration and performs mandatory HIV testing for everyone exiting the system. If the amended H.R. 2070 passes, counseling, health care, and support services must be provided for both prisoners and staff who test HIV positive.

In the midst of these changes, prisoners' advocates are raising a variety of concerns from access to adequate medical care to the availability of HIV testing. Although most systems say that prisoners will have access to treatment, complaints from prisoners living with HIV/AIDS indicate continuing problems. For instance, preliminary results from a recent survey by the Correctional HIV Consortium found that only 18% of prisoners living with HIV/AIDS are receiving the appropriate anti-retroviral therapy. These figures prompt some advocates to question whether mandatory testing will actually result in the treatment of infected prisoners. Mike Haggerty of the Correctional HIV Consortium says, "I would be in favor if [testing] was tied to mandatory treatment as the community standard. And if resources were in place for that purpose only. Other than that, [the new testing policies] smack of political expedience, separate but unequal and get to the back of the bus." He also reminds us, "It's so negative and horrendous to be HIV-positive in prison. It's one of the reasons people are staying

out of treatment."

Prisoners' advocates also raise concerns about access to HIV testing. In New York, a program funded by the New York AIDS Institute permits community-based organizations to provide HIV testing to select prisons. Jack Beck of the Prisoners' Rights Project reports that he has seen a decline in complaints from prisons covered by this program. However, he still receives complaints about delays in HIV testing and inadequate counseling performed within the correctional system. For Beck, mandatory HIV testing is problematic: "It's using funds that could be more effectively used in HIV/AIDS education programs. These programs are more effective in getting folks into HIV testing. It's not just a bad idea, but its diverting funds from a more effective program."

Cultural and linguistic issues also impact access to HIV testing. Romeo Sanchez of the Latino AIDS Commission explains, "Latinos comprise 34% of the prison population in New York. But there is a lack of Spanish-speaking health care providers and Spanish-language interpreters in the correctional system. This makes it very difficult or impossible forSpanish-language-dominantprisoners to receive access to testing information, pre/post test counseling and preventive treatment options." He also feels any HIV-testing program must include other services such as staff training in the delivery of pre/post test counseling and accommodations to facilitate adherence to treatment regimens. Ultimately, Sanchez feels the internal aspects of prisons make it difficult for mandatory HIV testing to have an impact. "There is a lack of confidentiality in prisons and this information could be misused against the prisoner. The fact is prisons lack the necessary resources, support systems, trained personnel, medical staff, etc., to provide appropriate responses to all those testing positive."

## PRISON NEWS

Several books have been published this year that acknowledge and celebrate prison writers and literature. Each publication stresses the importance of inmate expression and the role it plays in educating those within as well as outside prison walls.

***Jailhouse Journalism: The Fourth Estate Behind Bars***, written by James McGrath Morris, recounts the historical movement and modern day struggle of inmates who report, write, and publish their own newspapers and magazines in American prisons. Morris emphasizes the impact of prisoners publications on correctional reform and the culture of an incarcerated community. The book also details the stories of many of the most prominent prisoner journalists. Copies can be obtained through McFarland & Company, Inc., Box 611, Jefferson, NC 28640.

***Prison Writing in 20th-Century America***, edited by H. Bruce Franklin, contains stories, poems, and articles collected from nearly 40 former and current inmates in America's correctional institutions and presents an insightful history of prisons over the last 100 years. Writers include: Malcolm X, Mumia Abu-Jamal, Assata Shakur, and Jack London. The publisher is Penguin Group, Penguin Putnam, Inc., 375 Hudson Street, New York, NY 10014.

***The Ceiling of America: An Inside Look at the U.S. Prison Industry***, edited by Daniel Burton-Rose and the editors of Prison Legal News, Dan Pens and Paul Wright, compiles essays and articles from the highly regarded prisoner publication, *Prison Legal News*. The writings provide informed critiques on various criminal justice issues, including the correctional industrial complex, public and media perceptions of crime and prisoners, conditions of confinement, and prison labor. For more information, contact Common Courage Press, Box 702, Monroe, ME 04951.

***The Federal Prison Guidebook***, 1st. edition, by Alan Ellis, includes information designed to educate defense attorneys and defendants on various aspects of prison life in the Bureau of Prisons system. It catalogues each facility within the federal system and describes the programs, policies, and history for inmates. Ellis covers issues such as vocational and educational opportunities, library facilities, counseling services, housing accommodations, and visiting hours for each facility. For information on ordering, contact the Law Offices of Alan Ellis, P.O. Box 2178, Sausalito, CA 94966-2178.

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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.

The reprinting of *Journal* material is encouraged with the stipulation that the National Prison Project *Journal* be credited as the source of the material, and that a copy of the reprint be sent to the editor.

Subscriptions to the *Journal* are $30 ($2 for prisoners) prepaid by check or money order.

The *Journal* is published quarterly by the National Prison Project of the ACLUF:

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## Highlights from the National Prison Project Docket

***Onishea v. Herring*** (Alabama): This class action challenges the segregation and exclusion of all HIV-positive prisoners from all prison programs and activities available to other prisoners. Following trial, the district court ruled against plaintiffs on every issue. The Eleventh Circuit Court of Appeals reversed and remanded for trial before a new judge. The court subsequently granted rehearing before all the judges of that circuit, which is scheduled for argument on October 20, 1998.

***Amatel v. Reno*** (D.C.): This case challenges the "Ensign Amendment," passed by Congress in 1996, which prohibits the Federal Bureau of Prisons from allowing prisoners to receive publications featuring nudity. On August 12, 1997, the district court held the statute unconstitutional and granted a permanent injunction against its enforcement by the Bureau of Prisons. The defendants appealed to the District of Columbia Court of Appeals. By a 2-1 vote, the court, in August 1998, reversed and remanded for further proceedings.

***Gomez v. Vernon*** (Idaho): This case challenges retaliation and the denial of access to courts. Plaintiffs completed an eight-week trial on the retaliation claim in March of 1998 and are awaiting a decision.

***Amos v. Maryland Dept. of Public Safety and Correctional Services*** (Maryland): NPP represents several wheelchair-bound plaintiffs at the Roxbury Correctional Institution in their damages actions against the State for its failure to accommodate their disabilities in the design and operation of the facility. The Fourth Circuit Court of Appeals had ordered the case dismissed. In June 1998, the Supreme Court granted plaintiffs' writ of certiorari and vacated the decision dismissing the case. The plaintiffs have now rebriefed the issue in the court of appeals.

***Hadix v. Johnson*** (Michigan): This cases involves medical and mental health care and access to courts at the State Prison of Southern Michigan. In one of the most important victories against PLRA, the NPP won a decision in May 1998 from the Sixth Circuit Court of Appeals holding that courts were not to apply the PLRA "automatic stay" (suspension of relief) provision except under ordinary equitable principles; any other statutory construction would be unconstitutional.

***Cody v. Hillard*** (South Dakota): This class action challenges medical and mental health care, physical plant and sanitation, shop safety, legal access, and overcrowding at the South Dakota State Penitentiary. A consent decree was entered in 1985. In 1996, the defendants filed a motion to vacate the consent decree, which the district court granted in April 1997. The Eighth Circuit reversed and remanded in March 1998.

## National Prison Project Publications

**ORDERING INFORMATION:** NPP publications are available prepaid. Send check or money order to: NPP, 1875 Connecticut Ave., NW, #410, Washington, DC 20009, (202) 234-4830.

***The National Prison Project Journal***, a quarterly publication highlighting prison litigation and other prison issues. $30 annual subscription ($2 for prisoners).

***The Prisoners' Assistance Directory***, lists local, state, national, and international organizations that provide services to prisoners, ex-offenders, and their families. 11th edition, July 1996. (12th edition, 1998, forthcoming late fall 1998.) $30.

***1998 AIDS in Prison Bibliography***, revised and greatly expanded. Lists resources on AIDS in prison available from the NPP and other sources, including correctional policies on AIDS, educational materials, medical and legal articles, and recent AIDS studies. $10.

***AIDS in Prison: The Facts for Inmates and Officers***, is an educational tool for prisoners, corrections staff, and AIDS service providers. The booklet answers questions concerning the meaning of AIDS, available medical treatment, and legal rights and responsibilities. Available in English and Spanish. Single copies free; call for bulk order pricing.

***TB: The Facts for Inmates and Officers***, answers commonly asked questions about tuberculosis (TB) in a simple question-answer format. Discusses what tuberculosis is, how it is contracted, symptoms, treatment, and the impact of HIV infection on TB. Single copies free; call for bulk order pricing.

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