THE NATIONAL PRISON PROJECT JOURNAL

A Project of the American Civil Liberties Union Foundation, Inc.
Vol. 14, No. 1 & 2, Spring/Summer 2000 • ISSN 1076-769X

No Lost Causes
Remaking Advocacy for a New Millennium

By Jackie Walker
AIDS Information Coordinator

Over the past five years a number of conferences have been organized to address issues of HIV/AIDS in prisons. Most have focused on service delivery issues involving medical care, education and prevention programs, and discharge planning. No Lost Causes: A National Action Meeting on HIV and Hepatitis in Prisons, held this past June at the National Prison Project, is among the first to focus on the much maligned A word. Advocacy. For the first time in years issues of advocacy and organizing are taking center-stage.

The impetus for the conference was the U.S. Supreme Court's January 2000 decision in *Davis v Hopper* which let stand the Alabama Department of Corrections policy of segregating prisoners living with HIV/AIDS. The policy excludes infected prisoners from education, vocation and recreation programs, as well as religious services. Their separation prevents them from participating in programs required for good time credit eligibility.

The meeting, hosted by the National Prison Project and organized in cooperation with the Southern Center for Human Rights, California Prison Focus, Lambda Legal Defense and Education Fund, the American Foundation for AIDS Research and the Brown University AIDS Program, focused on prisoner segregation policies in Alabama and Mississippi, HIV/AIDS treatment in jails, criminalization of HIV and the case of Gregory Dean Smith, Hepatitis C and HIV co-infection and the growing Hepatitis epidemic in prisons and jails. The day ended with a discussion of the mechanics of organizing and ways to build new alliances.

In each session, panelists explored avenues of change or provided information crucial to organizing efforts. The segregation session not only updated participants on legal efforts in both states, but proposed a joint strategy to organize local meetings in Alabama and Mississippi. During the hepatitis C session, attorney Jack Beck of the Prisoners' Rights Project gave details on the obstacles New York state prisoners face receiving treatment despite a New York Department of Corrections medical protocol for hepatitis C. While Tamara Serwer, Southern Center for Human Rights, discussed the intricacies of developing successful litigation against the Fulton County Jail in Atlanta because of its failure to provide adequate HIV/AIDS treatments. Even the lunch session was booked as Asia Russel, ACT UP Philadelphia, Judy Greenspan, the HIV in Prison Committee of California Prison Focus, and Catherine Hanssens, Lambda Legal Defense and Education Fund, updated participants on activist strategies for responding to felony charges against HIV positive prisoners accused of "criminal HIV exposure." Prisoners have become increasingly vulnerable to charges of trying to infect correction staff through spitting and biting which generally cannot cause transmission.

Participants in these sessions expressed a range of views about the impact of the day's proceedings. Julie Falk, Southland Prison News, said, "The group of people assembled and the list

of resources was the most valuable thing for me." It was a sentiment often expressed and evident as participants huddled in groups exchanging business cards or organizational newsletters. Other participants like Gavin Cook, a staff attorney with Prisoners' Legal Services, took a long range view noting, "There's a need to network and come up with some common plan for all states. But we also need to get Mississippi and Alabama up to date on the status of medical care and treatment of prisoners living with HIV/AIDS."

Over 125 people attended the meeting. Former prisoners, AIDS activists, attorneys, physicians, prisoners' rights activists, as well as drug company representatives and federal agencies and public health officials joined to begin a national movement. A movement which has already begun to progress.

Next Steps

Since No Lost Causes, local meetings have occurred in both Alabama and Mississippi. On September 9, twenty-three people gathered in Jackson, Mississippi to develop a strategy regarding the segregation policy. At this meeting, attendees decided to form the Coalition for Prisoners with HIV (CPH) and to ask for a meeting with Mississippi Department of Corrections Commissioner Robert Johnson. CPH members have since met with Commissioner Johnson. Of the meeting, Carla Shaw, CPH member and parent of a prisoner in the HIV Unit, says, "He was very receptive and asked for a reasonable amount of time to study what we were asking for." During a second meeting Commissioner Johnson announced the creation of a task force.

On November 4, a similar meeting occurred in Montgomery, Alabama. Over 25 representatives of community and religious organizations met to develop a plan of action. Jeanne Locicerno, a law fellow at the Alabama ACLU, says, "I think the meeting was a huge success where advocates from across the state who were dedicated to changing the policy met. We are carefully considering the best way to deal with the issue and bringing more people to the table." A follow-up meeting is planned for January 2001.

If you would like to receive additional information about No Lost Causes: A National Action Meeting on HIV and Hepatitis in Prisons, a limited number of conference summary reports are available free of charge from the NPP.

Jubilee Justice Campaign 2000

The Coalition for Jubilee Clemency is organizing a Religious Leaders' petition drive asking President Clinton, before he leaves office, to release on supervised parole those Federal prisoners who have served at least five years for low-level, nonviolent drug offenses. If you would like to sign the petition or find out how to participate in the campaign, contact: The Coalition for Jubilee Clemency, c/o CJPF, 1225 Eye St., NW, #500, Washington, DC 20005-3914. You can also visit their website at cjpf.org/clemency.

The NPP *JOURNAL*

NPP Director: Elizabeth Alexander
Editor: Kara Gotsch
Subscriptions Manager: Thandor Miller

The National Prison Project is a special project of the ACLU Foundation. It seeks to strengthen and protect the rights of adult and juvenile offenders, improve overall conditions in correctional facilities, and 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 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 at: 1875 Connecticut Ave., NW, Ste. 410, Washington, DC 20009. Contact us by phone at (202) 234-4830, facsimile at (202) 234-4890 or email at gotschnpp@aol.com.

(NO COLLECT CALLS PLEASE)

Case Law Report: Highlights of Most Important Cases

By John Boston
Director
Prisoner Rights Project of the NY Legal Aid Society

U.S. Supreme Court Cases

PLRA: Attorneys' Fees

Martin v. Hadix, 119 S.Ct. 1998 (1999). In a dispute over retroactivity of 42 U.S.C. § 1997e(d)(3)'s restrictions on hourly rates, the Court looks generally at PLRA § 803(d) (42 U.S.C. § 1997e(d)) and concludes it is "better read as setting *substantive* limits" on fees than prescribing the temporal scope of its provisions. 119 S.Ct. at 2004. It therefore rejects prison officials' arguments that the statutory text itself prescribes application of PLRA rates to work done before the PLRA's enactment. The Court also rejects the plaintiffs' argument, based on legislative history, that the removal of the fees provision from § 802 of the statute, which has an explicit retroactivity provision, to § 803, which does not, raises a negative inference that the fees provisions were intended to apply only to cases filed after the PLRA's enactment. Since the two statutory sections address "wholly distinct subject matters," and since in any case the reason for moving the fees provision is not known, no such inference is justified. 199 S.Ct. at 2004-05.

In the absence of an express prescription of its temporal reach, a statute is presumed to apply prospectively only. 119 S.Ct. at 2006. The PLRA fees limitations would have a retroactive effect as to work done before PLRA's enactment. The attorneys had a reasonable expectation, based on reliance on the district court's determination of market rates, that they would be paid those rates. To apply the PLRA limitations after the fact "would 'attac[h] new legal consequences' to completed conduct." 119 S.Ct. at 2006, *quoting Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994). However, as to work done after the PLRA's enactment, "there is no retroactivity problem," since plaintiffs' attorneys were on notice of the PLRA rates. "If the attorney does not wish to perform services at this new, lower, pay rate, she can choose not to work." 119 S.Ct. at 2007. The Court rejects the plaintiffs' argument that attorneys face ethical constraints in withdrawing from litigation and that the PLRA therefore attached new legal consequences to the pre-PLRA decision to appear in the case, stating that "they do not seriously contend that the attorneys here were prohibited from withdrawing from the case during the post-judgment monitoring stage...." *Id.; see Martin v. Hadix*, 1999 WL 200681 at *42-43 (U.S., March 30, 1999) (transcript of oral argument). The dissenting opinion cites Michigan Rules of Professional Conduct, Rule 1.3 Comment 1999, which states that "a lawyer should carry through *to conclusion* all matters undertaken for a client." 119 S.Ct. at 2012 (emphasis supplied).

It is arguable that *Martin* is limited to its facts by (a) the fact that the court had prospectively set out fee rates and a mechanism for paying them, creating an enhanced expectation on the attorneys' part; (b) the fact that it involves post-judgment monitoring and the rejection of the argument about attorneys' ethical obligations is stated in relation to the post-judgment monitoring stage.

Non-Prison Cases

Procedural Due Process: Property

City of West Covina v. Perkins, 119 S.Ct. 678 (1999). At 681:

> A primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is

> meaningful.... If follows that when law enforcement agents seize property pursuant to warrant, due process requires them to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return.... Individualized notice that the officers have taken the property is necessary in a case such as the one before us because the property owner would have no other reasonable means of ascertaining who was responsible for his loss.

No similar rationale justifies requiring individualized notice of state-law remedies which, like those at issue here, are established by published, generally available state statutes and case law. *Memphis Light, Gas & Water Div. v. Craft* is distinguished on the ground that in that case, the procedures of which customers had to be notified were not publicly available.

Qualified Immunity/Assistance of Counsel/Standing

Conn v. Gabbert, 119 S.Ct. 1292 (1999). At 1295: " ...[A] court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation."

The use of a search warrant to detain an attorney to keep his client from being able to consult with him at the grand jury did not deny the plaintiff attorney a liberty interest in practicing law. Cases supporting such a right all deal with a complete prohibition and not a brief interruption of the pursuit of an occupation.

The attorney lacks standing to raise the rights of his client to have him outside the grand jury room for consultation.

Equal Protection

Saenz v. Roe, 119 S.Ct. 1518 (1999). The right to travel has been upheld in several Supreme Court decisions, but its source has not been identified. Non-residents' right to equal treatment is protected by the Privileges and Immunities Clause of Article IV absent a "substantial reason" to treat them differently. New arrivals' right to equal treatment is also protected by the Privileges and Immunities Clause of the Fourteenth Amendment, which entitles residents of a state citizenship of that state as well as of the United States. Strict scrutiny, not some form of intermediate scrutiny, is appropriate for discrimination against new citizens. A California measure prescribing lower welfare payments for recent immigrants from states with lower welfare benefits does not pass this scrutiny. Neither the duration of state residence nor the location of prior residence has any relevance to citizens' need for benefits or equitable allocation of funds; the state's fiscal justification therefore fails. Congress's approval of durational residency requirements makes no difference, since Congress cannot authorize states to violate the Fourteenth Amendment, and in any case the Citizenship Clause of the Fourteenth Amendment binds federal as well as state governments.

This opinion does not rely on the Equal Protection Clause, but its evaluation of the statute's classifications is in substance an equal protection analysis.

Communication and Expression

City of Chicago v. Morales, 119 S.Ct. 1849 (1999). A Chicago anti-loitering statute (held unconstitutional on vagueness grounds) was not overbroad because it applied only to remaining in one place "with no apparent purpose," excluding assemblies designed to support or oppose a point of view. At 1857: "Its impact on the social contact between gang members and others does not impair the First Amendment 'right of association' that our cases have recognized."

Disabled

Albertson's, Inc., 119 S.Ct. 2162 (1999). The plaintiff had severely impaired vision in one eye. Whether he could proceed under the Americans with Disabilities Act depended on

whether his monocular vision "substantially limited" his seeing. That means more than a mere "difference." The determination must take into account the person's ability to compensate for the impairment. The existence of the disability must be determined on a case-by-case basis.

The defendants were entitled to enforce Department of Transportation standards of visual acuity for truck drivers notwithstanding the existence of a waiver procedure.

Murphy v. United Parcel Service, Inc., 119 S.Ct. 2133 (1999). Under the Americans with Disabilities Act, whether an impairment "substantially limits" one or more major life activities is assessed with reference to mitigating measures (in this case, medication for high blood pressure). That means someone whose disability is substantially corrected can still be fired for it without having a remedy under the ADA. If the person is "regarded as" disabled, he or she may still sue under the ADA, but disqualification from a single job (here, truck driving) does not amount to being regarded as disabled; the plaintiff must be regarded as unable to perform a "class of jobs" to fall under that rubric.

Sutton v. United Airlines, Inc., 119 S.Ct. 2139 (1999). A person is disabled under the Americans with Disabilities Act if he or she possesses a physical impairment that substantially limits one or more major life activities. This assessment is to be made with respect to corrective or mitigating measures. A person with a visual impairment whose vision is corrected with eyeglasses to 20/20 is not disabled under the statute.

These plaintiffs were also not "regarded" as disabled for purposes of the ADA, since there was no evidence that they are regarded as unable to work in a "broad class of jobs," which is the meaning of the statutory term "substantially limits." These plaintiffs were viewed as unable to work only as global airline pilots.

Court of Appeals Cases

PLRA: Intervention/Standing

Ruiz v. Estelle, 161 F.3d 814 (5th Cir. 1998). The amended PLRA intervention provision authorizes individual legislators to intervene to challenge prisoner release orders regardless of whether they have authority to bind the legislature fiscally. (819-21) A consent decree limiting prison population density is a prisoner release order notwithstanding the authorities' ability to avoid releases by building more prisons. (825-27)

The statutory grant of intervention is constitutional; although it is doubtful that the legislators would have standing sufficient to satisfy Article III, they need not do so as long as another party seeking the same relief does have standing. (828-33) There is substantial contrary authority on this point. See *id.* at 831 (citing cases).

Pre-Trial Detainees/Protection from Inmate Assault

Perkins v. Grimes, 161 F.3d 1127 (8th Cir. 1998). The plaintiff was raped by his cellmate in a county jail holding cell after being arrested for public intoxication. Defendants knew the cellmate was a disruptive individual but the district court found that they did not know he posed a risk of serious injury to the plaintiff because the plaintiff did not tell them. The two had been celled together on previous stays in jail.

Rights of Staff/Disabled

Kees v. Wallenstein, 161 F.3d 1196 (9th Cir. 1998). The plaintiff correction officers were permanently disabled and could not occupy positions requiring inmate contact. They were not qualified individuals with a disability, for purposes of the Americans with Disabilities Act, since no accommodation would allow them to have direct inmate contact, an essential function of their position. Incidental inmate contact is common even to control room positions and the ability to restrain inmates during an emergency is critical to jail security.

Suicide Prevention/State Law Immunities

Payne for Hicks v. Churchich, 161 F.3d

1030 (7th Cir. 1998). The decedent was arrested while drunk and promptly hanged himself in a police holding cell. The plaintiffs settled with the city defendants for $110,000, leaving the state defendants in the case.

Federal claims should not be dismissed based on state law immunities.

The claim against one deputy was properly dismissed because he was not on notice that the decedent posed a danger to himself; the facts that the decedent was intoxicated and "his tattoo questioned life and ... he cursed angrily" do not create an obvious, substantial risk of suicide. There were no allegation of suicidal tendencies, no claim or evidence of past suicide attempts or warnings from family members of a mental disturbance and suicidal condition; his behavior was not alleged to be increasingly bizarre, erratic or wild. (The court goes through the usual litany about detainees having at least the protection provided by the Eighth Amendment.)

The claim against the municipality fails because there is no evidence that county policymakers knew that being at the overcrowded facility where the decedent died exposed him to a substantial risk of injury.

The state law claims against the municipality and Sheriff for failing to maintain an adequate jail are barred by state immunity law which absolutely bars such claims. However, that immunity does not extend to wilful and wanton acts, and the allegation that the sheriff did know of the risk of self-harm and directed the prisoner's placement in the jail anyway does state such a claim.

PLRA: Exhaustion of Administrative Remedies

Greig v. Goord, 169 F.3d 165 (2d Cir. 1999). An ex-prisoner who files suit after release is no longer a prisoner for purposes of the PLRA exhaustion requirement. The statute refers to prisoners "confined" in prison, and the definition of prisoner refers to persons "incarcerated" or "detained," and the plaintiff was none of these at the time he filed suit. This distinction is consistent with statutory intent as well as language because the legislative history indicated that Congress was concerned that people who were actually in prison had nothing to lose and could get a sabbatical from prison to federal court by filing litigation.

Wendell v. Asher, 162 F.3d 887 (5th Cir. 1998). The PLRA exhaustion requirement is not jurisdictional, which means it "may be subject to certain defenses such as waiver, estoppel, or equitable tolling." (890) It eliminates the discretionary interest-balancing approach of former 42 U.S.C. § 1997e set out in *McCarthy v. Madigan*. Exhaustion must be completed before filing suit; otherwise the case must be dismissed even if exhaustion has been completed after filing. Conclusory allegations that administrative procedures are inadequate do not excuse failure to exhaust. Also, dismissal without prejudice will not cause injustice or render judicial relief unavailable, since the plaintiff's now-exhausted claim is not time-barred, and he can still exhaust the other claim that he did not grieve. (How? As noted below, there is a 15-day deadline for filing the grievance.)

At n. 2: The court refuses to entertain the plaintiff's argument that he is seeking money damages only and therefore the grievance procedure is not "available," since this is inconsistent with his pleadings in the district court. On remand, he can limit his request for relief as he desires.

The Texas grievance procedure takes about 90 days: prisoners get 15 days to file a step 1 grievance, the response is due within 40 days after receipt, the prisoner has 10 days to appeal, the response is due within 40 days after receipt.

Publications

United States v. Bee, 162 F.3d 1232 (9th Cir. 1998). The criminal defendant, convicted of sexually abusing a child, was sentenced to prison and given a condition of subsequent supervised release that he "not possess any sexually stimulating of sexually oriented material deemed inappropriate by his probation officer and/or treatment staff, or patronize any place where such material or entertainment is available." The condition does not violate the First Amendment.

The relevant statute requires conditions to be "reasonably related" to and involve "no greater deprivation of liberty than is reasonably necessary" to deter criminal conduct, protect the public, and provide the defendant with "correctional treatment in the most effective manner." That standard is met. The court says nothing about First Amendment law.

Federal Officials and Prisons/Personal Property

Montano-Figueroa v. Crabtree, 162 F.3d 548 (9th Cir. 1998). The federal prisons' Inmate Financial Responsibility Program, which provides for development of a plan for inmates to pay obligations such as court-ordered assessments, restitution, and fines, with deprivation of privileges and preferred housing as a sanction for noncompliance, does not improperly intrude on the court's sentencing authority or constitute an illegal delegation of authority. The court tap-dances around contrary authority and says the plaintiff "has not presented a meritorious constitutional claim that prisons may not maintain work programs that require inmates to pay court-imposed fines or restitution." (550)

Federal Officials and Prisons/Pre-Trial Detainees

Magluta v. Samples, 162 F.3d 662 (11th Cir. 1998). The plaintiff sued over the conditions of his confinement. He was acquitted and later failed to show up for trial on other charges. His suit was dismissed under the fugitive disentitlement doctrine. The dismissal is reversed because there is no "nexus" between his fugitive status and the civil action that was dismissed.

Law Libraries and Law Books/Standing/Class Actions: Certification of Classes

Walters v. Edgar, 163 F.3d 430 (7th Cir. 1998). After *Lewis v. Casey*, the district court dismissed a class action about law library services on the ground that none of the named plaintiffs had had standing. Naming other members of the class as representatives would have been proper if the existing named plaintiffs had ever had standing. However, since the named plaintiffs had never had standing, federal jurisdiction never attached, and there was no case for new plaintiffs to join, and there had been no case when class certification was sought. Mootness may be cured by joinder of new plaintiffs, but not initial lack of standing.

The named plaintiffs' claims must have at least "colorable merit" to confer standing; if they lose on the merits later, new plaintiffs may be joined. Frivolous claims, however, do not "engage the jurisdiction" of the federal courts. This jurisdictional inquiry may be conducted at any time until the judgment becomes final.

The court rejects what it calls dictum in *East Texas Motor Freight System, Inc. v. Rodriguez* that states that if any class member had standing at the time of certification, Article III is satisfied even if the named plaintiffs prove not to have been members of the class.

The actual injury requirement of *Lewis v. Casey* in court access cases is different from the approach taken in due process cases, where the improper denial of the hearing is actionable at least for nominal damages even if a proper hearing would have had the same result, and is injury enough to support federal jurisdiction.

The injury requirement does not mean a plaintiff must prove he would have won, only that he was prevented from litigating a nonfrivolous case. In an injunctive case (434-35):

> It is enough if [plaintiffs] can show that they are highly likely to have a meritorious suit in the future that they will not be able to litigate effectively because of the defendants' infringement of the constitutional right of access. A probabilistic harm, if non-trivial, can support standing.
> ...In the usual case, the possibility of some day having a non-meritorious suit will be too speculative to support a present request for an injunction. But we can imagine a case in which the plaintiff's claim has accrued but he

> has not sued as yet (perhaps blocked by the prison's unconstitutional behavior) and the statute of limitations hasn't run.

The plaintiffs in this action were not denied access to courts by the restrictions on segregated prisoners. One of them had managed to file 13 suits using form complaints and other pleading forms with occasional assistance from inmate law clerks. The ability to litigate a denial of access claim may be evidence that the plaintiff has no denial of access claim.

Since this suit was dismissed for lack of standing, all previous rulings and findings of unconstitutionality in it should be vacated.

At 433: "The danger that a class action will have to be dismissed for lack of standing of the named plaintiffs, even though unnamed members of the class might have standing, is another reason... for scrupulous adherence to the requirement that the determination whether to certify a suit as a class action be made 'as soon as practicable after the commencement of the action.' Fed.R.Civ.P. 23(c)(1)." Here it took three years.

PLRA: Filing Fees

Celske v. Edwards, 164 F.3d 396 (7th Cir. 1999). The district court certified that the plaintiff, IFP in that court, was not appealing in good faith because he didn't provide a reason for wanting to appeal. It relied on *Newlin v. Helman's* statement that "A plaintiff who has been told that the claim is foreclosed and then files a notice of appeal without offering any argument to undermine the district court's conclusion is acting in bad faith." That case was barred by absolute immunity and the statute of limitations. Here the plaintiff failed to respond to a motion to dismiss, the court found that the allegations of the complaint were insufficient, and summary judgment was granted on his medical care claim because "all the evidence" showed his care was adequate. But decisions like this are sometimes wrong and are reversed, and nothing the court said suggests the claim is frivolous. As to the failure to give reasons, nothing in Rule 24, Fed.R.App.P. says that a notice of appeal is supposed to contain reasons. At 398:

> In cases such as this, where the appellant was authorized to proceed in forma pauperis in the district court, a district judge who after receiving the notice of appeal doubts that it is in good faith should, before yanking the appellant's IFP status, notify the appellant of the impending change of status and give him an opportunity to submit a statement of his grounds for appealing. On the basis of the appellant's response to the notice, the judge can make a responsible assessment of the issue of good faith. This procedure will reduce the number of cases in which we are compelled to remand for a fuller statement of the judge's reasons for believing that the appeal is not taken in good faith.

Pate v. Stevens, 163 F.3d 437 (7th Cir. 1998). The plaintiff lost at trial on his police misconduct claim. The district court certified that he took his appeal in bad faith.

The certification was in error. *Newlin v. Helman* said that a litigant who moves under Fed.R.App.P. 24(a) for IFP in the district court, but doesn't articulate any grounds for appeal, can be found not to be appealing in good faith, and IFP denied. That rule was applied erroneously here. *Newlin* involved a § 1915A dismissal. This case went to a jury and the plaintiff articulated grounds in motions for judgment as a matter of law and for a new trial, which put the court on sufficient notice of the issues for appeal. This is not strictly a PLRA holding because the relevant provision was only renumbered and not amended.

Review of bad faith determinations remains *de novo*; the PLRA did not change anything substantive on that subject.

Appeal/Mootness/Standing/Non-English Languages/Privacy/Procedural Due Process: Disciplinary Proceedings/Medical

Care/Remedial Principles

Franklin v. District of Columbia, 163 F.3d 625 (D.C.Cir. 1998). A judgment on liability that does not order relief is not a final judgment and therefore not appealable.

An injunction concerning interpreters at parole hearings is vacated as moot with respect to felons, since their parole matters have been transferred to the U.S. Parole Commission, and for lack of standing with respect to misdemeanors, since no "named member of the class" was shown to be a misdemeanant who did not understand parole proceedings because of lack of English proficiency.

Plaintiffs have no right to interpreters in classification and housing determinations and in disciplinary proceedings in the absence of liberty interests under *Sandin*. The district court's reasoning that if defendants have hearings, they must comport with due process, is simply wrong. At 635:

> It is worth repeating that broad decrees rendered in the name of the Due Process Clause, decrees mandating what must occur no matter what the circumstances, represent the sort of judicial legislating we have rejected in the past.... If the district court detected a due process violation in a particular hearing or hearings, the court should have identified the proceeding and provided the District with an opportunity to rectify the deficiency....

The failure to provide interpreters at medical encounters did not violate the Eighth Amendment absent evidence of deliberate indifference. The District had a paper policy and this court thinks imperfect enforcement of it does not satisfy the deliberate indifference requirement. There was no senior policymaker shown to be deliberately indifferent. There were lots of resources devoted to monolingual prisoners.

The district court held that the lack of interpreters for medical encounters violated a right of medical privacy. The appeals court finds no such right. The Fourth and Eighth Amendments don't support it. Due process does not support it. Plaintiffs have to disclose their medical condition to government employees to get treatment, and they are claiming that they have a right to disclose their condition only to certain government employees. The right of privacy, when recognized, has been recognized as against the State. To recognize it in this form would require that interpreters be supplied for every language spoken by prisoners.

Use of Force

Gomez v. Chandler, 163 F.3d 921 (5th Cir. 1999). To support an Eighth Amendment use of force claim, an injury must be more than *de minimis* but need not be significant. This plaintiff meets the standard. He alleged cuts, scrapes, contusions to the face, head and body as a result of being knocked down so his head hit the floor and his face scraped the floor, being repeatedly punched and then kicked in the face and head. (His medical records said a 1 cm. abrasion; the court notes that photographs showed a mark considerably larger than that.)

Suicide Prevention/Negligence, Deliberate Indifference and Intent/Theories: Due Process

Collignon v. Milwaukee County, 163 F.3d 982 (7th Cir. 1998). The schizophrenic decedent was arrested, released, and arrested again, and released again to his parents. He committed suicide.

Both the deliberate indifference standard and the *Youngberg* professional judgment standard require a showing of criminal recklessness because only that standard "provides adequate notice of what conduct is or is not permitted." (988) The professional judgment standard "requires essentially the same analysis as the Eighth Amendment standard." At 989: "A plaintiff can show that the professional disregarded the need only if the professional's subjective response was so inadequate that it demonstrated an absence of professional judgment, that is, that no minimally competent professional would have so responded under those circumstances." (989)

The jail psychiatrist knew that the decedent had a serious mental illness and posed some risk for suicide, and that he had not been taking his medication because of the side effects. Her prescription of a sub-therapeutic dose of Thorazine to form a "therapeutic alliance" with the decedent and gradually increase the dosage was not a response that no competent professional would have made. The fact that the plaintiff's expert thought there was a better course did not make the defendant liable. The fact that he was on the highest level of suicide watch did not support liability. At 990: "Placing a pre-trial detainee on some level of suicide watch, even the highest level, does not demonstrate a subjective awareness of a substantial risk of imminent suicide." It is a safety measure that is not incompatible with a treatment plan that does not presuppose an imminent risk of suicide.

Police defendants who had the decedent in custody but released him rather than retaining custody and getting treatment for him did not violate his rights. There is no constitutional right to be taken into custody for the purpose of receiving treatment. The incremental stress claimed to have been created by their detention of the decedent was not a basis for liability; the police would not have been liable if they did nothing and it makes no sense to hold them liable for doing something. Government is liable when it restrains an individual from getting help and doesn't provide help itself, but here they did not restrain him.

Personal Involvement and Supervisory Liability/Homosexuals and Transsexuals/Qualified Immunity/Federal Officials and Prisons

Farmer v. Moritsugu, 163 F.3d 610 (D.C.Cir. 1998) (per curiam). The transsexual plaintiff complained that she received no treatment. The Bureau of Prisons medical director was entitled to qualified immunity. The Bureau's policy regarding transsexualism is concededly constitutional. Under that policy, there were three treatment options potentially available: hormone therapy, castration, and psychotherapy. The first two are concededly not realistically at issue (why is not explained). As for psychotherapy, there was no showing of a need for it. In any case the medical director does not diagnose or prescribe for particular patients. That is done by local medical personnel, with grievance and appeal procedures which are not contended to be inadequate.

Pre-Trial Detainees/Crowding/Sanitation/Cell Confinement/Recreation and Exercise/PLRA: Mental or Emotional Injury/Length of Stay

Craig v. Eberly, 164 F.3d 490 (10th Cir. 1998). The plaintiff claimed that while he was in jail he was confined with five or six other prisoners in an 11x15 foot cell, he received no clean bed linens, he was permitted only two showers a week in an unsanitary shower stall, the sink in his cell was frequently clogged, ventilation was inadequate, and he was only allowed out-of-cell recreation once.

The PLRA mental or emotional injury provision does not apply to claims that accrued before its enactment. At 494: "The language 'may be brought' clearly indicates that § 1997e(e) applies only to cases commenced after its enactment, not to those pending at the time."

At 495: "Although the Due Process Clause governs a pretrial detainee's claim of unconstitutional conditions of confinement,... the Eighth Amendment standard provides the benchmark for such claims." The defendants are not entitled to summary judgment on the plaintiff's allegations because the facts are disputed. E.g., the plaintiff alleges he received only two recreation periods, and the defendants said it was once a week; defendants disputed the claim concerning the sink. The parties also disputed the length of the plaintiff's confinement. At 496: "The difference between enduring certain harsh conditions for seven weeks versus six months may be constitutionally significant." The duration of each condition is also not clear.

Habeas Corpus

Moody v. Rodriguez, 164 F.3d 893 (5th Cir. 1999). Federal courts lack jurisdiction under § 1983 to stay executions; litigants must proceed

via habeas corpus.

PLRA: Screening and Dismissal

Humphries v. Various Federal USINS Employees, 164 F.3d 936 (5th Cir. 1999). Dismissals under 28 U.S.C. § 1915(e)(2)(B)(1) are governed by abuse of discretion standard. At 940: "In determining whether a district court abused its discretion, we consider factors such as 'whether (1) the plaintiff is proceeding pro se, (2) the court inappropriately resolved genuine issues of disputed fact, (3) the court applied erroneous legal conclusions, (4) the court has provided a statement of reasons which facilitates 'intelligent appellate review,' and (5) any factual frivolousness could have been remedied through a more specific pleading.'" (1992 citation omitted) This is not a new holding or an interpretation of the PLRA, but it is a useful indication that prior law survives the PLRA.

Drug Dependency Treatment/Federal Officials and Prisons

Martinez v. Flowers, 164 F.3d 1257 (10th Cir. 1998). The petitioner was denied a sentence reduction after he had successfully completed a substance abuse program. The Federal Bureau of Prisons did not exceed its statutory authority in excluding prisoners who had prior, rather than current, convictions for violent offenses from the sentence reduction program.

PLRA: Screening and Dismissal/PLRA: Mental or Emotional Injury/AIDS/Procedural Due Process/Medication/Restraints/Recreation and Exercise

Perkins v. Kansas Dept. of Corrections, 165 F.3d 803 (10th Cir. 1999). The HIV-positive plaintiff was made to wear a face mask which covered his entire head whenever he left his cell, and also was denied all outdoor exercise, after spitting at guards during recreation.

Dismissals under § 1915(e)(2)(B)(ii) for failure to state a claim are reviewed *de novo*, as they were before the PLRA.,

The primary harm the plaintiff alleges is mental or emotional, but he says his mental anguish has caused his physical condition to deteriorate. The court does not address whether this states a claim but leaves it for the district court. The district court must also determine whether the mental/emotional injury provision bars compensatory, punitive, or nominal damages. At 808 n. 6: the provision would clearly bar a claim for compensatory damages absent physical injury, but would not so clearly bar other kinds of damages; e.g., for a due process claim, which involves an "absolute" right. (The court ignores the statutory language, which refers to "actions" not "claims.") Even if damages are barred, an injunction is not (citing *Davis* and *Zehner*).

The district court should have examined evidence before holding that the plaintiff's treatment (23 and a half hours a day lock-in, out only for a shower, and required to wear the face mask during the shower) is not atypical and significant under *Sandin*. Defendants' statement that it is ordinary for prisoners to be segregated for various offenses and to be isolated because of extreme behavior "does not fully address both the duration and degree of plaintiff's restrictions as compared with other inmates." (809)

The plaintiff's exercise restriction stated an Eighth Amendment claim in light of precedent concerning long-term deprivations of out-of-cell exercise and the fact that defendants knew about it through grievances and their regular review of his status.

The face mask requirement, which the plaintiff said did not keep him from spitting at guards because he could do it when he took a shower, and which therefore was only a punishment for his HIV status, stated an Eighth Amendment claim.

The failure to provide protease inhibitors in addition to AZT and 3TC does not state an Eighth Amendment claim; "prison officials have recognized his serious medical condition and are treating it. Plaintiff simply disagrees with medical staff about the course of his treatment." (811)

Refusal of Treatment/Transfer and Commitment to Mental Health Facilities/Federal Prisons and

Officials/Magistrates/Religion

United States v. Muhammad, 165 F.3d 327 (5th Cir. 1999). The government sought to commit the defendant to a psychiatric hospital following her conviction. Her attorney's consent to proceeding before a magistrate judge permitted the judge finally to dispose of the matter; her personal consent is not required. Commitment is a civil proceeding within a magistrate judge's jurisdiction.

Use of a preponderance of evidence standard for civil commitment of prisoners is not clearly unconstitutional because it is less of a liberty deprivation than commitment of a free citizen. The court does not definitively decide this constitutional question because it was not raised below and it reviews the district court's action only for plain error.

The government showed that the defendant is a present danger to self or others because (among other things) she insisted on remaining in a special housing unit, did not interact with staff or other inmates when she needed something, and refused medical evaluation despite indications of severe anemia. She did all this on religious grounds; mental health personnel said she had "persecutory and religious delusions."

The defendant raised First Amendment claims only on appeal, and the court declines to consider them even under a plain error standard. It notes that the Religious Freedom Restoration Act's constitutionality as applied to federal government action remains disputed.

Medical Care: Standards of Liability and Deliberate Indifference

Dunigan ex rel. Nyman v. Winnebago County, 165 F.3d 587 (7th Cir. 1999). The decedent complained of headaches, double vision, muscle fatigue, and reduced strength; he had been in an automobile accident before admission to jail. Neurological tests were normal. After he fell a week later, he was tentatively diagnosed with myasthenia gravis. His condition fluctuated and about six weeks later he was found dead.

There is no evidence of deliberate indifference to a serious medical need. Plaintiff's criticisms of defendants' actions during the last days of the decedent's life are not persuasive in light of the three-month record of treating his medical condition. At 591: "Mistreatment for a short time might in some circumstances be evidence of a culpable state of mind, but the facts here do not justify such a conclusion."

There is no evidence of knowledge of a serious medical need. The decedent's deterioration in the last few days of his life was not clearly different from his condition earlier in his incarceration ("wildly sporadic"). There is no evidence that incontinence is indicative of a serious health threat.

There is no evidence of disregard of medical needs. Defendants were "continually solicitous" of the decedent's needs; they placed him in a cell where he could readily be observed; he was repeatedly examined by medical personnel, including a neurologist.

Personal Property/Federal Officials and Prisons

McGhee v. Clark, 166 F.3d 884 (7th Cir. 1999). The Bureau of Prisons did not usurp a judicial function by imposing a schedule governing the plaintiff's payment of the criminal fine imposed as part of his sentence. The court did not delegate its function to the Bureau; it made the fine payable immediately and the Bureau merely attempted to implement that direction.

The Inmate Financial Responsibility Program has been uniformly upheld against constitutional attack. Bureau personnel's decision to count as available funds those he received from outside sources was authorized by IFRP regulations.

Pre-Trial Detainees/Accidents/Medical Care/Color of Law

Davis v. Dorsey, 167 F.3d 411 (8th Cir. 1999). The plaintiff fell in the shower. His claim about the faulty shower amounted to no more than negligence, despite his allegation that defendants ignored prior complaints about standing water in the shower.

The plaintiff was injured on Friday, was

given three Tylenol, but was not permitted to see medical personnel for bleeding, a lump on his head, and bodily pain until the following Wednesday, where he was treated in a perfunctory and abusive way. Then he was sent to the Regional Medical Center, where he was examined and told to come back if he experienced loss of consciousness. The next day he fainted but again received perfunctory and disparaging treatment at the prison.

The plaintiff "failed to rebut Regional's evidence that it was a private entity and did not act under color of state law in treating him." (412) No details are given. The plaintiff is *pro se.*

The evidence could support a jury finding that the facility defendants intended to punish the plaintiff; summary judgment for defendants is reversed.

Procedural Due Process: Disciplinary Proceedings/Sanctions/Habeas Corpus

Carr v. O'Leary, 167 F.3d 1124 (7th Cir. 1999). The plaintiff did not appear for the morning count because there was a riot going on and he was threatened with bodily harm. He and every other inmate who had failed to appear were disciplined with six months' loss of good time credits. The defendants did not move for summary judgment under *Heck v. Humphrey* (1994) until the Seventh Circuit held it applicable to prison disciplinary proceedings in 1996, after the plaintiff had been granted summary judgment on liability. Since the application of *Heck* was foreseeable, defendants waived the issue. In addition, five Justices in *Spencer v. Kemna* have stated that a person whose habeas petition has been mooted by release can proceed via § 1983 even if the claim would otherwise be barred by *Heck.* Hence the defendants should not be relieved from their waiver.

The court directs the Illinois attorney general's office to show cause why the authors of the state's brief should not be sanctioned for unethical advocacy for statements in it; the court cites its repeated prior condemnations of the office's work.

Medication/Medical Care: Standards of Liability and Serious Medical Needs

Ralston v. McGovern, 167 F.3d 1160 (7th Cir. 1999). The plaintiff, who has Hodgkin's Disease and is undergoing radiation treatment with painful sequelae, was prescribed pain medication. An officer refused him his medication even though he complained that he couldn't swallow and was spitting blood.

The district judge erred in holding that the plaintiff's mouth and throat pain was not a serious medical need. Determining what medical needs are serious is a question of judgment not susceptible to mechanical resolution. At 1162:

> ...[T]he civilized minimum is a function both of objective need and of cost. The lower the cost, the less need has to be shown, but the need must still be shown to be substantial. It seems to us that to refuse to treat, at trivial cost, the pain caused by cancer and cancer treatments borders on the barbarous. Realism requires recognition that the terror which cancer inspires magnifies the pain and discomfort of the frequent side effects of cancer treatments. It is not as if Ralston were demanding esoteric, experimental, or expensive interventions. Such a demand would raise very serious questions, especially since the side effects of which he complains were not life-threatening.... Ralston was not seeking an expensive or unconventional treatment; he just wanted the pain medicine that the prison doctor had prescribed for him. The prison guard's deliberate refusal of it was a gratuitous cruelty, and not a trivial one, even if the context of cancer is ignored. A blistering that prevents a person from swallowing and causes him to spit blood is a source of discomfort acute enough to constitute a serious

> medical need, at least when it can be readily and inexpensively alleviated.

The defendant is not entitled to qualified immunity; the standard applicable to pain medication was "reasonably clear and definite as applied to a case as extreme as this" (1162).

Rights of Staff

Hafford v. Seidner, 167 F.3d 1074 (6th Cir. 1999). The plaintiff correction officer complained of a pretty appalling course of racial and religious harassment (he is a Muslim), consisting of physical threats as well as racial slurs and a failure by management to do anything about it. These allegations were sufficient to withstand summary judgment as to his claim of a racially hostile working environment but not a religiously hostile working environment; accusations that he was preparing for a holy war and that his religion taught hatred of white people do not meet the Supreme Court's standard prescribing that "'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'" and that "conduct must be extreme to amount to change in the terms and conditions of employment." However, the court should allow at trial for the possibility that the racial animus of co-workers was augmented by their religious bias.

Searches: Person and Prisoners/Religion/Staffing: Sex

Moore v. Carwell, 168 F.3d 234 (5th Cir. 1999). The plaintiff alleged that multiple strip and body cavity searches performed by a female officer violated the Eighth and Fourth Amendments and violated his religious rights. (He stated that the Baptist faith requires modesty and forbids him from being viewed naked by a female other than his wife.)

The district court dismissed the First Amendment claim as frivolous under RFRA case law; it is directed to reconsider the claim under *Employment Division v. Smith*. (The reason this could make a difference is that the district court relied on the "substantial burden" language of RFRA, which many courts applied in a way narrower than the usual First Amendment standard.)

The allegation of strip and body cavity searches performed by an opposite sex officer absent an emergency, at a time when same sex officers were available to conduct the search, was not frivolous, and the legality of such searches was not clearly established so as to entitle the defendants to qualified immunity. At 237: "We must balance the need for the particular search against the invasion of the prisoner's personal rights caused by the search."

The Eighth Amendment claim was properly dismissed, since the Fifth Circuit has held that the Fourth Amendment provides the proper analysis. This would appear to be contrary to *Hudson v. Palmer*, which holds that searches conducted for harassment can violate the Eighth Amendment.

Correspondence: Legal and Official/Attorneys' Fees and Costs/PLRA: Filing Fees

Talley-Bey v. Knebl, 168 F.3d 884 (6th Cir. 1999). A claim of refusal by a staff member to accept legal mail for mailing was properly rejected because it could not possibly be causally related to the dismissal of the plaintiff's lawsuits. Nor did such refusal violate the Eighth Amendment by depriving the plaintiff of the minimal necessities of life.

The district court properly divided an assessment of $41.00 in costs between the two plaintiffs, since both chose to prosecute the case. At 887:

> We wish to make clear, however, that in cases involving class actions, district courts are not to assess fees and costs to each member of the class. As a class action certification is normally made long after the complaint is filed, the responsibility of paying the required fees and costs rests with the prisoner or prisoners who signed the complaint. In class

> actions on appeal, the prisoner or prisoners signing the notice of appeal are obligated to pay all appellate fees and costs.

Correspondence: Non-Legal/Searches

United States v. Gordon, 168 F.3d 1222 (10th Cir. 1999). Letters are generally protected by an expectation of privacy, but the sender's expectation ordinarily terminates upon delivery. At 1228: "Because Defendant sent the letters to an inmate at a correctional facility, fully aware that prison officials could lawfully and, would likely, [commas sic] inspect the letters, he had no reasonable expectation of privacy in them." (The letters contained photographs of the defendant with large amounts of currency.)

Correspondence: Legal and Official/Access to Courts/Pendent and Supplemental Claims; State Law in Federal Courts

Boswell v. Mayer, 169 F.3d 384 (6th Cir. 1999). The plaintiff alleged that defendants opened a piece of mail from the state Attorney General's office in his absence. He has no standing to raise a court access claim absent a showing of prejudice. However, the court construes his complaint as raising a First Amendment claim based on the right to receive mail, as to which he has standing. The plaintiff loses on the merits. The defendants' policy of treating Attorney General mail as privileged mail if the envelope contains the return address of a licensed attorney and has markings that warn of its privileged contents, *and* if the prisoner has requested its treatment as legal mail, is constitutional. After all, mail from the Attorney General or a prosecutor's office will generally consist of documents in the public record; seldom will such mail be sensitive or confidential. The policy passes muster under the *Turner* standard given prison officials' need to inspect for contraband. The plaintiff did not allege that the contents of the envelope were privileged or that it bore the necessary markings.

Noncompliance with state laws and administrative procedures in promulgating the policy does not state a claim under § 1983.

Publications/Religion/Access to Courts/Personal Property

Chriceol v. Phillips, 169 F.3d 313 (5th Cir. 1999). The plaintiff complained that he was denied materials from Aryan Nations/Church of Jesus Christ Christian. The relevant rule forbade material that presents "an immediate and tangible threat to the security and order of the facility or to inmate rehabilitation," and specifically material that "advocates racial, religious, or national hatred in such a way so as to create a serious danger of violence in the facility." It also provided for notice and the opportunity to file a grievance.

The withholding of mail did not violate the plaintiff's First Amendment free exercise rights. Defendants' policy "restricting access to potential violence producing materials is valid" (316) under the *Turner* test. The plaintiff had alternatives, since he received and possessed many other religious and political materials. The magistrate judge found that the materials were "incendiary to the point of being almost certain to cause interracial violence, and nearly all of them openly advocate violence or other illegal activities." There are no ready alternatives to censorship; allowing him to read them in the presence of security would impose more than *de minimis* cost.

The defendants refused to approve a disbursement from the plaintiff's account to file this suit, but the plaintiff could not show actual injury and denial of court access because his parents paid the fee. At 317:

> Arguably, withholding access to a prison account to pay for legal fees could, at a minimum, cause a delay in access to the courts. Withholding money from a prison account could also effectively deny access to obtaining an attorney, filing a complaint, or mailing other legal documentation.

PLRA: Judgment Termination

Imprisoned Citizens Union v. Ridge, 169 F.3d 178 (3d Cir. 1999). The PLRA termination

provisions are constitutional. The final judgment rule has an exception for prospective relief where the underlying law is changed. The underlying law is the law of prospective relief in federal courts. (184-86) Since relief can be retained on the showing of a constitutional violation, the PLRA does not curtail Eighth Amendment rights. (The court seems to think this is responsive to the contention that the "underlying law" is the Eighth Amendment.) *Wheeling Bridge* turned on the prospective/retrospective distinction, not public vs. private rights. (186-87) Even if the public/private rights distinction governed, it would not matter; private rights are unaffected by the PLRA; PLRA operates on the public right to have non-federal claims vindicated in a federal forum. (The court doesn't quite say this but that seems to be what it means.)

No rule of decision is prescribed. PLRA provides a standard and does not pre-empt the decision process. (184-86) The relevant underlying law, once again, is the federal courts' injunctive power.

Courts retain authority to enforce effective remedies under the PLRA, since they can hear constitutional claims and grant equitable relief to remedy violations. (188)

Equal protection strict scrutiny does not apply to the PLRA. Court access is not burdened; remedies are merely limited. The rational basis test is met by the "unquestionably legitimate purposes" of minimizing prison micro-management by federal courts and preserving judicial resources. (188-89)

The court did not err in refusing to stay its decision pending agreement to enforce the decree by state courts; the statute says "immediate termination." Speculation that there might be contractual obligations the defendants might not carry out provides no basis for the federal court to stay in the act. Any valid contract claims must be pursued in state courts.

Past non-compliance with orders does not prevent termination of the judgment; that result is contrary to the statutory language. (188-89) It would also be an inappropriate remedy for civil contempt because it would have no coercive effect. (189)

PLRA: Three Strikes Provision

Rodriguez v. Cook, 169 F.3d 1176 (9th Cir. 1999), *withdrawing* 163 F.3d 584 (9th Cir. 1998). The PLRA three strikes provision does not deny due process, equal protection, or access to courts, and does not violate the Ex Post Facto Clause or the principle of separation of powers. Strict scrutiny does not apply because there is no "fundamental interest" at stake. (The plaintiff challenged the defendants' limits on free postage. The court says access to courts is not implicated because the defendants' rule does not implicate that right. The court here addresses the merits of the underlying claim in resolving an issue which is logically prior to and independent of the merits of the underlying claim.) Since there is no fundamental interest at stake, the statute does not infringe upon court access. At 1180: "Inmates are still able to file claims--they are only required to pay for filing those claims." Prisoners may have to save their money, and filing may therefore be delayed. The court ignores situations (appeal deadlines, statutes of limitations) where delay may be fatal. At 1181: The interest in saving money by curbing defense costs in prison litigation meets the rational basis requirement.

Mental Health Care/Use of Force/Restraints

Campbell v. Sikes, 169 F.3d 1353 (11th Cir. 1999). The plaintiff was admitted to prison and had her previously prescribed medication, which was appropriate for bipolar disorder, discontinued, albeit by a psychiatrist who saw her frequently. She was also placed in restraints repeatedly during the same period for seemingly deranged behavior. Sometimes she was in "L-shaped restraints," a euphemism for hog-tying, for up to 27 hours. She was never diagnosed by prison staff with a psychiatric disorder, just as having a history of polysubstance abuse.

There was no deliberate indifference. The defendant psychiatrist was not shown to have known that the plaintiff had bipolar disorder, that he had misdiagnosed her, or that his treatment was grossly inadequate. The failure to review her prior

medical records was not deliberately indifferent where a summary of her records was reviewed. Expert affidavits stating that her care was substandard are not sufficient to withstand summary judgment because they do not address the defendants' subjective intent. Prior authority is distinguished on the ground that in it, the plaintiff's condition was so obvious that knowledge can be inferred.

The use of restraints did not violate the Eighth Amendment, since the plaintiff was undisputedly a danger to herself and others and had shown great ingenuity in escaping from less severe restraints. She was also monitored every 15 minutes. She got meals, bathroom breaks, and sometimes a mattress to lie on. Defendants complied with all their own procedures, including documentation, and in some cases refused requests to restrain her.

PLRA: Filing Fees/Contempt

Hall v. Stone, 170 F.3d 706 (7th Cir. 1999). The plaintiff was denied IFP status because the district court thought he was not indigent. He didn't pay or apply for IFP in the appeals court and his case was dismissed. The district court ordered the Warden of Allenwood to remit $105 from the plaintiff's account, and the warden refused to do so on the ground that the plaintiff had not authorized it. The appeals court ordered the warden to show cause why he should not be held in contempt, and his response was that the prisoner had been transferred and the warden at the receiving prison had authorized payment. That isn't good enough. It doesn't say why he disregarded the order and what procedures have been put in place to ensure that similar orders will be followed. He is held in contempt with sanctions withheld to give him the opportunity to purge the contempt by showing he has put into place an administrative system that will prevent this from happening again, transfers notwithstanding.

At 708: The warden's initial response "is unfortunately not unique. Other prisons likewise have occasionally failed to comply; the problem seems to be especially severe when prisoners are transferred, for the transferee institution may not receive instructions concerning required payments."

At 708: "Ignoring a judicial order, as Warden Fanello did, because a prisoner contradicts it, is out of the question. We reiterate the point of *Newlin*: Custodians must remit as ordered under § 1915 without regard to the prisoner's wishes. A prisoner's complaint or notice of appeal is all the authorization needed to debit his trust account; wardens must follow the statute (and judicial orders) rather than contrary directions from their charges."

Federal Officials and Prisons/Drug Dependency Treatment

Pelissero v. Thompson, 170 F.3d 442 (4th Cir. 1999). The Bureau of Prisons' regulation stating that convictions involving the use or possession of firearms were not "nonviolent offenses" entitling prisoners to early release if they successfully completed drug treatment programs was not unreasonable, and the program statement in which it was contained was not subject to the rule-making procedures of the Administrative Procedures Act.

Publications/Deference

Crofton v. Roe, 170 F.3d 957 (9th Cir. 1999). A state regulation barred receipt of publications not ordered from the publisher and paid for out of the prisoner's account.

The regulation is unconstitutional under the *Turner* standard. The district court held that it is not reasonably related to concerns about fire hazards and storage space, since other regulations limit the number of books a prisoner may possess. It is not reasonably related to prevention of contraband, since there is no rational distinction between the prisoner's ordering from the publisher and a friend or family member ordering from the publisher. The gift prohibition is not necessary to ensure efficiency of prison operations, since the prison can regulate the number of gift publications prisoners can receive. (The prison had in fact not limited the number of publications prisoners could possess.) The prohibition is also not reasonably

related to preventing strong-arming (extortion of prisoners' family and friends), since the prison permitted family and friends to send money, which raises the same concerns. Permitting them to send money and gift packages but not constitutionally protected publications also troubled the district court.

On appeal, defendants raised only the contraband and strong-arming arguments, emphasizing that the prison must monitor the source of all items coming to the prisoner; but in light of the publisher only rule, that concern was not furthered by the no-gift rule. The fact that other gift items are also prohibited does not justify prohibiting items protected by the First Amendment. Thus the state has "offered no justification for a blanket ban on the receipt of all gift publications, nor has it described any particular risk created by prisoners receiving such publications." (961)

A federal statute, 18 U.S.C. § 1702, which criminalizes the obstruction of correspondence, does not apply in the prison context.

A temporary delay in delivery of publications resulting from prison officials' inspection does not deny First Amendment rights.

The district court properly denied a continuance so the plaintiff could take discovery on the publisher only rule, since he did not show that application of that rule ever hindered his receipt of publications.

Non-Prison Cases

Attorneys' Fees and Costs

Fletcher v. City of Fort Wayne, Ind., 162 F.3d 975 (7th Cir. 1998). Plaintiffs in two excessive force cases accepted offers of judgment of $5,000 and $2,500 although their complaints sought $150,000 and $30,000. The district court properly concluded that these were nuisance settlements and the plaintiffs were not prevailing parties. However, the court rejects the proposition that a disclaimer of liability in the offer of judgment automatically precludes attorneys' fees. The court discusses the strategy of offers of judgment at some length.

Municipalities/Negligence, Deliberate Indifference and Intent

Sharp v. City of Houston, 164 F.3d 923 (5th Cir. 1999). In a Title VII case, a muncipality can be held liable for sexual harassment based on jury findings including that there was no effective supervision over the workplace in question and that the police department "tolerated and even fostered an attitude of fierce loyalty and protectiveness within its ranks" resulting in a code of silence about misconduct. However, this is characterized as a finding under a "should have known" standard--constructive rather than actual knowledge.

Use of Force/Municipalities/Res Judicata and Collateral Estoppel/Summary Judgment

Thomas v. Roach, 165 F.3d 137 (2d Cir. 1999). A plea of *nolo contendere* to a criminal charge cannot bar a subsequent § 1983 action arising from the same set of facts.

While a litigant cannot defeat a summary judgment motion by submitting an affidavit that contradicts his earlier sworn statements, the rule applies only where the plaintiff had been "examined at length" on the subject, and not where his prior statements were "vague and inconclusive." (144)

At 145: "A municipality may be liable under § 1983 in cases of police brutality where the City's failure to supervise or discipline its officers amounts to a policy of deliberate indifference." However, a series of civilian complaints that were investigated and found to be unfounded cannot establish a policy of deliberate indifference.

Municipalities/Use of Force

Mettler v. Whitledge, 165 F.3d 1197 (8th Cir. 1999). At 1205:

> This Court has held municipalities liable under *Monell* when the plaintiffs have produced evidence of prior complaints sufficient to demonstrate that the municipalities and their officials

> ignored police misconduct....
> ...Evidence that a police department has failed to investigate previous incidents similar to the incident in question may support a finding that a municipal custom exists, and that such a custom encourages or allows officers to use excessive force without concern for punishment.

However, a single incident usually doesn't suffice to prove a municipal custom, and inadequate investigation of the current incident could not have caused the current incident.

Use of Force/Summary Judgment/Personal Involvement and Supervisory Liability Procedural Due Process

Bass v. Robinson, 167 F.3d 1041 (6th Cir. 1999). The plaintiff alleged that a police officer put him in a headlock and slammed his head against a tree several times even though he was not resisting. The district court granted summary judgment to the defendant, terming his claims "unfounded." This was error; the court credited the defendants' version of events rather than the plaintiff's.

The court also erred in granting summary judgment against the supervisor who failed to intervene. At 1048: "Supervisory liability under § 1983 cannot attach where the allegation of liability is based upon a mere failure to act.... Instead, the liability must be based on active unconstitutional behavior." (Wrong, according to most courts.) The allegation that the supervisor attempted to cover up the misconduct after the fact gives rise to a question of fact whether the supervisor encouraged or condoned the use of excessive force.

No due process claim was stated by the excessive force allegations, since the plaintiff did not plead inadequacy of post-deprivation remedies.

Use of Force/Damages: Assault and Injury/Trial/Municipalities

Amato v. City of Saratoga Springs, 170 F.3d 311 (2d Cir. 1999). A jury found two police officers liable for excessive force and awarded nominal damages, plus punitive damages against one officer.

Excessive force does not automatically entitle a claimant to compensatory damages, e.g., where claims of injury lack credibility or the injuries lack monetary value, or where some force was justified and that accounted for the injuries. The court distinguishes a prior case in which uncontested evidence of pain and suffering entitled the plaintiff to more than nominal damages, since here there was a videotape of the plaintiff before and after, and evidence that cast doubt on the claims of injury.

The district court's order to bifurcate the claims against the individual defendants from those against the municipality, with the municipal claims to commence immediately upon a finding of liability against the officers, is reviewed for abuse of discretion. It is upheld both because a trial against the municipality might have proven unnecessary had the officers been absolved, and because evidence that would be used against the municipality would have been inadmissible against the individual defendants (e.g., the officers' personnel records and prior claims of excessive force against the Police Dept.) Other cases have come out differently, but "[b]y its very nature, discretion yields differing outcomes." (316)

The district court erred in dismissing the claim against the municipality. Although the plaintiff could not have recovered any more damages (the compensatory verdict against the officers being preclusive, and municipalities being immune from punitive damages), he was entitled to an award of nominal damages against the municipality. There is a long discussion of why "a finding against officers in their individual capacities does not serve all the purposes of, and is not the equivalent of, a judgment against the municipality." (318) The decision to bifurcate should not extinguish the right to obtain such a judgment. The court points out that the defendants can simply default and pay their dollar, and Judge Jacobs, concurring, adds that a default judgment lacks preclusive effect and may be grounds for reducing or denying attorneys' fees.

Privacy

Paul P. v. Verniero, 170 F.3d 396 (3d Cir. 1999). The registration and community notification provisions of Megan's Law are upheld. The constitutional right to privacy is discussed at some length.

District Court Cases

False Imprisonment

Brady v. Dill, 24 F.Supp.2d 129 (D.Mass. 1998). If law enforcement officers held the plaintiff even though they knew that he was not the person named in a warrant, they could be held liable under the Fourth Amendment.

Use of Force/Evidentiary Questions/Pre-Trial Detainees

Wilson v. Williams, 161 F.3d 1078 (7th Cir. 1998). The plaintiff waived his objection to references at trial to his having murdered a police officer by not renewing it at the appropriate time at trial after his *in limine* motion had been denied. (This is the majority view in federal court.) Counsel may ask the court for leave to enter a continuing objection. Also, the plaintiff's own references to the facts in the opening statement and afterward waived any objection. Admission of the evidence was not plain error. It was also harmless error; the court thinks the plaintiff's case was weak and contradictory. The court also notes that the trial court conducted extensive voir dire to avoid prejudice on this point.

Protection from Inmate Assault/Personal Involvement and Supervisory Liability/Eye Care/Municipalities

Boyce v. Fairman, 24 F.Supp.2d 880 (N.D.Ill. 1998). The plaintiff was attacked by other inmates and threatened with further attack if he complained. He complained, jail officials refused to place him in protective custody, and he was attacked again in the yard. He was not permitted a return visit for his eye injury and lost vision in one eye.

The plaintiff's claims are deemed to be individual capacity claims based on the fact that he is suing the defendants for damages for their individual conduct, except for the Executive Director, against whom the allegations were of official policies. This states a claim against the Director in his official capacity.

Allegations against two jail lieutenants that they knowingly exposed the plaintiff to the risk of further assault and knowingly prevented him from receiving medical care for his serious medical needs were sufficient at the pleading stage.

Rehabilitation/Searches: Persons/Privacy/Standing

Lile v. McKune, 24 F.Supp.2d 1152 (D.Kan. 1998). The plaintiff was required to complete a sex offender treatment program or suffer impaired ability to earn good time, transfer to maximum custody, and loss of privileges for the review period, which "mirror the consequences imposed for serious disciplinary infractions." The plaintiff refused to sign an "Admission of Guilt" form, objected to the requirement that participants provide a written sexual history (verified by polygraph) which includes all prior activities including uncharged criminal offenses, and objected to penile plethysmograph testing. Staff are required to report any uncharged sex offenses that are disclosed, and program files are subject to subpoena.

The required sexual history is incriminating for Fifth Amendment purposes. (The court does not reach the question whether the written "admission of responsibility" for the current offense invokes Fifth Amendment protection.) The sex offender program operates to compel the disclosure of such incriminating testimony. The court distinguishes the clemency hearings at issue in *Ohio Adult Parole Authority v. Woodard* on the ground that the Court found them to be voluntary. This case would be similar to *Woodard* if the consequences of non-cooperation were limited to effects on the discretionary grant of parole. However, the adverse consequences to classification, housing and privileges are sufficient to constitute Fifth Amendment compulsion. (The

Kansas Supreme Court has reached the same conclusion with respect to restrictions on earning good time. *Bankes v. Simmons*, 963 P.2d 412 (1998).) The court rejects the defendants' argument that if no liberty interest is denied, there is no compulsion.

The state may require the disclosures at issue if it extends immunity against their use in subsequent criminal proceedings.

The use of penile plethysmography to measure response when prisoners are played audio recordings of sexual scenes does not violate the Fourth Amendment. Prisoners have no legitimate expectations of privacy in their cells. At 1161: "A search of a prisoner's body, however, is a qualitatively different matter.... A prisoner retains a privacy interest in the integrity of his own person." The collection of revealing private physiological data has been found to be an invasion of privacy interests. However, the reasonableness of this intrusion is measured by the Turner standard. The practice has a valid, rational connection to a rehabilitative program; its intrusiveness is mitigated by the fact that staff do not touch or observe the inmate during the procedure and do not videotape it. The fact that this procedure has garnered only limited acceptance by the courts, that its usefulness is diminished by the involuntariness of the program, and that staff's training and expertise is marginal, are outweighed by the deference owed defendants.

The consequences to the plaintiff of noncooperation with the procedure render it involuntary and give the plaintiff standing to challenge it.

Religion: Services Within/Practices Institution/Publications/Correspondence/Religion: Practices/Personal Property

Maberry v. McKune, 24 F.Supp.2d 1222 (D.Kan. 1998). The plaintiff complained of restrictions on his religious practice as a follower of the First Hermetic Order of Thelema, a religion founded in 1904 by Aleister Crowley. Prison officials recognized the religion and arranged for a visit from Thelemic clergy from the Khensu-Ra-Oasis in Bellevue, Nebraska, and sought volunteers from that site and from the Ra-Here-Behutet Camp in Kansas City to assist with Thelemic spiritual needs.

The restrictions are upheld under the *Turner* standard. The court first notes that defendants have expended much effort to accommodate the Thelemic religion. The denial of some allegedly religious items (sword, dagger, etc.) clearly serves interests in safety and security, and a Thelemic religious authority said they weren't necessary anyway. They would create a ripple effect because others would want them too.

Defendants' censorship of chapter 12 of Aleister Crowley's *Magick in Theory and Practice* is upheld because it discusses blood sacrifices, "a topic that could clearly pose a threat to prison safety and security." (1228) A letter between the plaintiff and another prisoner on the same subject was also properly censored.

The Thelemic group is only allowed to practice once a week and is required to have outside clergy present. Religious groups need not be treated identically as long as each has a reasonable opportunity to exercise its beliefs. The court does not refer to any official justification of the differences.

A limit of $30 a payroll period on outside items does not deny equal protection as applied to the plaintiff; it is an incentive program and the plaintiff has not achieved a level in the program permitting greater expenditures. The limit is not an *ex post facto* violation because it does not increase his punishment.

A limit on the number and value of books the plaintiff can possess does not deny due process or equal protection.

Federal Officials and Prisons/Emergency/Protection from Harm/Statutes of Limitations

Jackson v. United States, 24 F.Supp.2d 823 (W.D.Tenn. 1998). The plaintiff sustained carbon monoxide poisoning while locked down during a fire started during a riot. The Clinical Director ordered that he remain in the prison medical facility rather than be sent to a hospital. Six days later, when he finally got to a hospital, he was

ordered that he remain in the prison medical facility rather than be sent to a hospital. Six days later, when he finally got to a hospital, he was found to have a collapsed lung.

The plaintiff's *Bivens* claim is barred by the one-year Tennessee statute of limitations on personal injury actions. The period was not tolled while the Federal Tort Claims Act claim was under consideration, since constitutional claims may not be pursued under FTCA.

The court denies the government summary judgment under the discretionary exception to the FTCA because it failed to show how the decision to leave the plaintiff in his cell during the fire was made.

The court denies the government summary judgment on the merits. The doctor who refused to send the plaintiff to the hospital never x-rayed him or took a blood sample to determine if he had CO in his blood, and the government has provided no evidence that the doctor exercised the requisite degree of skill. The only evidence of the proper course of treatment was the paramedics' act of bringing the plaintiff to the front gate for evacuation to a hospital.

The plaintiff's incarceration gave rise to a duty of care to the plaintiff. Staff left their posts during the fire, showing that the government breached its duty to the plaintiff. The CO poisoning and the collapsed lung show proximate cause. (This is not explained.) The government presented no evidence that the housing units were cleared of smoke before the prisoners were locked in or that leaving them locked in while fires burned out of control was reasonable.

Habeas Corpus

Moreno v. State of California, 25 F.Supp.2d 1060 (N.D.Cal. 1998). Parole conditions are part of the criminal sentence and therefore subject to the *Heck* rule requiring them to be invalidated by a state forum or else challenged via habeas corpus after exhaustion rather than via § 1983.

Rights of Staff

Smylis v. City of New York, 25 F.Supp.2d 461 (S.D.N.Y. 1998). A Department of Correction captain pled guilty to administrative charges related to an incident of misuse of force and cover-up by correctional staff. He then alleged that he was denied due process of law in that he was threatened with criminal prosecution, bullied, treated disrespectfully, etc. The only legal question is whether he was coerced into waiving his due process right to a hearing. He was advised by competent counsel, there was no violence or threat of violence, and there was no withholding of exculpatory evidence or other prosecutorial misconduct, so his waiver was voluntary and intelligent.

In his deposition the plaintiff attested to the code of silence, stating that it would be difficult for him to remain at DOC if he testified against co-workers.

Pre-Trial Detainees

Zimmerman v. Tippecanoe Sheriff's Dept., 25 F.Supp.2d 915 (N.D.Ind. 1998).

Procedural Due Process--Disciplinary Proceedings (920): *Sandin* does not apply to detainees, who are entitled to procedural due process in disciplinary proceedings. Here there was some evidence because staff said the plaintiff had confessed.

Procedural Due Process--Administrative Segregation (921): Placement of an escape risk in segregation without a hearing, and requiring him to wear leg irons when out of his cell, was not unlawful punishment.

Procedural Due Process--Disciplinary Proceedings, Personal Property (921): The plaintiff alleged that his cell was stripped for 14 days. The Fourteenth Amendment requires no process when officials search a cell or remove property to ensure security.

Personal Property (922): Short-lived deprivation of

commissary buys does not violate the Constitution.

Attorney Consultation (922): The plaintiff complained of lack of attorney-client confidentiality; however, the defendants denied listening in on conversations and and there was no evidence to the contrary. The appearance of impropriety does not violate the Constitution.

Correspondence, Procedural Due Process--Property (924): Allegations that an officer hid the plaintiff's outgoing mail do not state a claim since another officer found it and mailed it a few hours later. Allegations that unspecified, non-written items were removed from correspondence do not state a claim if there are post-deprivation remedies available.

Dental Care, Serious Medical Needs (925-26): The plaintiff's dental complaint does not meet the serious medical needs standard in the absence of pain and discomfort, which he did not allege.

Use of Force--Restraints (926): The plaintiff alleged that after he had been subdued during an escape attempt he was handcuffed so tightly that he suffered permanent nerve damage. The defendant is denied summary judgment.

Communication with Media, Correspondence--Legal and Official (927): The refusal to mail letters to a newspaper reporter and an attorney pursuant to a policy against sending mail with anything on the envelope other than address and return address did not violate the Constitution, since he could resend the letters.

Protection from Inmate Assault

Mabine v. Vaughn, 25 F.Supp.2d 587 (E.D.Pa. 1998). The plaintiff had a separation order from another prisoner whose brother he had killed. He was assaulted by that prisoner, who was permitted to be in the same population only because of error. There was no showing that the defendants actually knew about the separation order before the attack. The plaintiff required no medical treatment after the attack; his injuries are "constitutionally *de minimis*" and do not meet the serious harm standard of *Farmer v. Brennan*.

Crowding/Equal Protection/Classification: Race

Simpson v. Horn, 25 F.Supp.2d 563 (E.D.Pa. 1998). Defendants are entitled to summary judgment on plaintiff's overcrowding claim. Although he presented evidence of a prison overtaxed by its population with breakdowns in services and maintenance, it does not show a deprivation of basic human needs. It shows, at most, discomfort, sometimes limited to isolated instances. There is no evidence of deliberate indifference, in that defendants either did not know of the plaintiff's problems, or their conduct (like delays in making repairs and providing supplies) was negligence at most.

A policy of cell assignment that takes into account inmates' history of racial violence or propensity for it meets the *Turner* standard. The plaintiff's evidence of the existence of a "chart board" listing black, Hispanic and white cells, along with a memo seeming to suggest a more categorical segregation policy and remarks made to him by staff, comprise sufficient evidence of intent to withstand summary judgment.

The prohibition of racial segregation in prison is a clearly established right which may be abridged in narrowly tailored and particularized circumstances.

PLRA: Prospective Relief Restrictions/Attorney Consultation/Standing/Deference

Williams v. Price, 25 F.Supp.2d 623 (W.D.Pa. 1998). The plaintiffs alleged that the

defendants failed to provide them with facilities for confidential conversations with counsel. The court entered an injunction directing them to do so. Defendants then moved to alter or amend under the PLRA, and the district court remanded to the magistrate for proceedings consistent with the PLRA. Plaintiffs did not pursue their request for injunctive relief but sought only declaratory relief.

The plaintiffs did not invoke the right of court access because they could not meet the *Lewis v. Casey* injury requirement. Rather, they argued that their First Amendment free speech rights and their Fourteenth Amendment privacy rights were infringed. The Sixth Amendment was not relevant because the plaintiffs are convicted prisoners. At 628:

> Now that the constitutional right of access to court is no longer available to prisoners to preserve the confidentiality of their communications with their counsel unless they can meet the difficult test of injury set forth in *Lewis*, or unless the Sixth Amendment is available, they will reasonably look to the right of privacy to assure their right to confidential communications with counsel. This seems to be an appropriate application of the right of privacy.

The court therefore grants plaintiffs' motion for declaratory relief.

The right to attorney-client confidentiality is also protected by the First Amendment. This claim is governed by the *Turner* standard. Defendants have raised no order, security, or other administrative need to deny privacy in these consultations. Although prisoners have an alternative--written communication--the only impact accommodation would have on others is soundproofing the rooms. Defendants' reliance on *Laird v. Tatum* is misplaced. In that case the government was collecting public information about people who may or may not have been chilled in their expressive activities. The present plaintiffs showed that the ability of others to overhear their conversations prevented them from being able to discuss private matters with their attorneys. This is sufficient injury.

AIDS/Special Diets

Polanco v. Dworzack, 25 F.Supp.2d 148 (W.D.N.Y. 1998). The failure of the defendants to provide the HIV-positive plaintiff with the brand name dietary supplement he wanted was not deliberately indifferent. He raised only a difference of opinion about medical treatment. Defendants provided him with appropriate medical attention, including dietary supplements in the form of night snacks. He did not lose weight during the period in question.

Religion/Damages: Intangible Injuries, Punitive/Use of Force

Arroyo Lopez v. Nuttall, 25 F.Supp.2d 407 (S.D.N.Y. 1998). The defendant officer shoved the plaintiff without justification while he was praying. His actions lacked any penological justification. He is not entitled to qualified immunity.

The court awards $2,000 for his emotional distress and $5,000 in punitive damages. The PLRA mental or emotional distress provision is not mentioned; the incident antedates the PLRA.

Sexual Abuse/Jurisdictional, Procedural and Litigation Questions/Protection from Harm/Food/Color of Law

Gwynn v. Transcor America, Inc., 26 F.Supp.2d 1256 (D.Colo. 1998). The plaintiff was transported from Oregon to Colorado by the defendant pursuant to a contract for extradition transportation. The trip took 145 hours and passed through seven states. The plaintiff alleged that she was endangered by the drivers' excessive speed and lack of sleep, provided inadequate food, and raped and sexually assaulted.

Venue was proper in Colorado, since the defendants, acting under contract with Colorado, essentially acted as prison guards for and agents of Colorado. The plaintiff, though not claiming rape in Colorado, said she was sexually assaulted and fondled in all of the states including Colorado, and

sexual assault short of rape is actionable under § 1983.

The Colorado court has personal jurisdiction over the individual Transcor employees, who lived in Tennessee, since they acted under color of Colorado law, transported the plaintiff to Colorado, and performed tortious acts in Colorado.

Sexual assaults by the defendants occurred under color of state law because they used state power as a coercive force to further their wrongful acts. The fact that sexual abuse was not part of their jobs is beside the point; abuse need not be "perpetrated in the performance of the actor's assigned tasks" to be under color of law.

Allegations of unsafe driving are not objectively serious enough to state an Eighth Amendment claim or a substantive due process claim.

The plaintiff's allegation that she was provided food only from McDonald's or Arby's, and not much of that, and that she was forced to sign for meals she was not actually given, fails because ten of the nineteen meals she received were in various jails along the way, and she did not allege any harm resulting from the deprivation of food.

Correspondence/Publications/Mootness

DiRose v. McClennan, 26 F.Supp.2d 550 (W.D.N.Y. 1998). The plaintiff was found with letters detailing an escape plan and convicted of disciplinary charges. Prison officials instituted a mail watch. This action was fully justified by security concerns. Failure to follow defendants' internal directive did not violate the Constitution. The refusal to permit catalogs was moot, since the plaintiff had prevailed in grievances challenging these denials. A Department of Motor Vehicles Driving Abstract record of a corrections officer was properly deemed contraband and intercepted because of the need to keep officers' addresses from prisoners.

Procedural Due Process: Disciplinary Proceedings/Qualified Immunity

Lee v. Coughlin, 26 F.Supp.2d 615 (S.D.N.Y. 1998). The plaintiff was sentenced to two years in disciplinary segregation and served 376 days before he got his conviction reversed in state court. The time he served was atypical and significant under *Sandin*. The court reviews data on the nature and length of disciplinary sanctions and notes, e.g., that the time the plaintiff served is longer than all but 2.2% of the confinement sentences imposed.

Sandin has brought due process analysis "full circle." At 630: "It now appears that the 'grievous loss' test of *Goldberg* has been resurrected and repackaged as the 'atypical and significant' hardship requirement in *Sandin*...." Under that analysis, the court first addresses atypical and significant hardship, and then determines whether the plaintiff had a liberty interest. Prior Second Circuit law holding that administrative and disciplinary segregation implicates liberty interests is still good.

The New York disciplinary system and prison system are different from that in *Sandin*. In Hawaii, there is only one maximum security prison, compared to many in New York. The New York system permits the possibility of unlimited solitary segregation. There is a bigger difference between general population and segregation in New York. In Hawaii, officials retain broad discretion to place prisoners in segregation for punitive and non-punitive reasons. In New York, there is a catchall provision for administrative segregation but it is only used in "emergency or unusual situations." (633) *Id.*: "The limited number, exigent circumstances, and frequent review of such segregations bespeak their atypicality." There are significant differences between the treatment of prisoners in punitive segregation and other forms of segregation.

Decisions holding that segregation can never be atypical and significant have not applied "the rigorous factual analysis commanded by *Sandin*." (634) The duration and degree of restriction must be considered. The relevant comparison here is between disciplinary segregation and general population, since protective custody conditions are closer to general population than to segregation, and administrative

segregation "is closely cabined by extensive state restrictions." (635) *Id.*: "In New York, unlike Hawaii, the full isolation of punitive confinement, compounded by the duration and the loss of all privileges of long-term punitive confinement, do impose a 'major disruption' on an inmate's environment." That is especially true where the sentence is longer than received by 99% of the inmate population.

The basis for comparison under *Sandin* is the sentence actually imposed, not the potential sentence. Having said that, the court examines the time actually served.

At 637: "The effect of prolonged isolation on inmates has been repeatedly confirmed in medical and scientific studies."

At the time of the incident complained of, the law was clearly established that disciplinary segregation without due process was unconstitutional. *Sandin* did not retroactively disestablish that law.

Telephones/Attorney Consultation

Arney v. Simmons, 26 F.Supp.2d 1288 (D.Kan. 1998). Under prison policy, prisoners can make telephone calls only collect and to persons previously placed on a list limited to 10; calls can be recorded and monitored; calls are automatically terminated when the outside party tries to transfer the call or make it a three-way call. The monitoring feature is disabled for persons identified and verified as attorneys. The telephone list can be changed every 120 days, or more frequently under some circumstances. Public officials may not be placed on the lists, but other arrangements are made to contact such "privileged persons" on a case by case basis. These calls are subject to monitoring.

Courts are divided over whether there is any First Amendment right to telephone access at all. The court does not resolve this question but upholds the restrictions under the *Turner* standard. They are content-neutral and unrelated to suppressing expression. They are logically connected to legitimate security interests in avoiding escape plots and the planning of assaults, other violent acts, and harassment of people outside prison. It is a "common sense assumption" that telephone restrictions serve legitimate penological purposes. Prison officials need not present evidence that the evils they wish to prevent have actually occurred.

Prisoners have alternative means of communication, i.e. visiting and correspondence. The plaintiffs' complaints of inability to call particular people under particular circumstances are dismissed because they did not try to resolve them administratively by seeking exceptions.

Expanded telephone privileges would have an effect on prison resources because of the time it takes to approve and to change telephone lists and to monitor calls. There are no obvious, easy alternatives, and other well-run prison systems use similar restrictions.

At 1296: "The legality of monitoring inmate calls to an attorney is not settled." Monitoring such calls does not deny access to courts in the absence of proof of injury as required by *Lewis v. Casey*. In any case the evidence did not support the existence of monitoring of legal calls, which contravened prison policy. The fact that "facility phones" are monitored is not unconstitutional given that attorney calls on the "inmate phones" are not.

Protection from Inmate Assault/Statutes of Limitations/Cruel and Unusual Punishment: Proof of Harm

Daily v. Monte, 26 F.Supp.2d 984 (E.D.Mich. 1998). Substituting a named defendant for a John Doe defendant is a change in parties, such that an amendment relates back to the time of filing of the original complaint if the requirements of Rule 15(c), Fed.R.Civ.P. are otherwise met. The court rejects Sixth Circuit authority indicating that such a substitution cannot meet the "mistake of identity" requirement of the rule, preferring earlier authority to the contrary. The court finds that the new defendants received sufficient notice under the rule because an investigation of the incident must have been conducted in response to the plaintiff's interrogatories and that the new defendants are named in the incident reports supplied by defense

counsel.

The plaintiff's assertions that he repeatedly complained to the defendants about threats of assault and actual assaults from other prisoners, and that they saw his bruises and saw him hit on one occasion and did nothing, sufficiently supported his Eighth Amendment claim. At 989: ".... [T]he fact that Plaintiff was fortunate enough to be rescued before serious harm was done does not preclude a finding that he was in fact at substantial risk of serious harm."

Criminal Proceedings/Use of Force/Pre-Trial Detainees

United States v. Walsh, 27 F.Supp.2d 186 (W.D.N.Y. 1998). The defendant, a correctional officer at the Orleans County Jail, was convicted of criminal civil rights violations for stepping on a prisoner's penis on several occasions. The prisoner was mentally ill; the officer weighed 400 pounds; the officer required the prisoner to submit to this treatment before he would give him a cigarette. The charges were corroborated by three other officers and another prisoner.

The court rejects defendant's argument that the force used was "merely the application of *de minimis* force ... and was at most a spontaneous act under *Johnson v. Glick*...." (192) Rather, it was force of the sort that is "repugnant to the conscience of mankind." *Id.*: "Stepping on one's penis is not 'routine discomfort' [that] is 'part of the penalty that criminal offenders pay for their offenses against society.'" (Citation omitted) The conduct was wanton and malicious because there was no need for it, there was no threat reasonably perceived by the defendant, and the defendant made no effort to temper the severity of his response.

The plaintiff was a detainee for part of the time in question and a sentenced prisoner at other times. The court charged the jury under the Eighth Amendment and neither party objected.

Drug Dependency Treatment/Federal Officials and Prisons

Martinez v. Flowers, 164 F.3d 1257 (10th Cir. 1998). The petitioner was denied a sentence reduction after he had successfully completed a substance abuse program. The Federal Bureau of Prisons did not exceed its statutory authority in excluding prisoners who had prior, as well as current, convictions for violent offenses from the sentence reduction program.

AIDS/Pre-Trial Detainees/Medical Care: Standards of Liability and Serious Medical Needs

McNally v. Prison Health Services, 28 F.Supp.2d 671 (D.Me. 1998). The HIV-positive plaintiff was incarcerated and told the medical staff he needed his medications immediately. His doctor confirmed his diagnosis, medication, and dosage. The plaintiff was also suffering from symptoms including fevers, night chills, and night sweats. He didn't get his meds. These facts sufficiently pled that defendants had actual notice that he needed medical care and that they refused to provide it.

The allegation that a physician confirmed that the plaintiff was on a medication protocol for HIV treatment, and that HIV is a serious medical condition, sufficiently alleged a serious medical need.

Assuming significant harm is an element of a medical care claim, the plaintiff showed it, alleging fevers, night sweats and chills, infections from cuts and bruises, and "psychological stress over being forced to endure a potentially fatal deprivation of prescribed medication." (674) These allegations and the time sequence sufficiently pled causation.

Class Actions: Settlement/PLRA: Settlements/Hygiene

Austin v. Hopper, 28 F.Supp.2d 1231 (M.D.Ala. 1998). In the Alabama chain gang litigation, the parties settled the claim concerning lack of adequate toilet facilities. Defendants agreed to promulgate a procedure providing for soap, water, and toilet paper; one portable toilet for every 40 inmates; and for medium security inmates who work on prison grounds for whom no toilet facilities are available, "reasonable efforts will be made to allow privacy for those who need

to relieve themselves," and a shovel will be provided for those who must defecate.

At 1234: "[T]he court was unable to evaluate the underlying fairness of the agreement without obtaining the views of the members of the class." At 1236: "As required by Rule 23(e) of the Federal Rules of Civil Procedure, the court ordered the parties to provide notice of the settlement of the toilet-facilities issue to the putative class of plaintiffs." It was posted on bulletin boards in all dormitories, in law libraries and in dining rooms, and sent to county jails to facilitate notice to state inmates there. "The notice informed inmates about the nature of the settlement, the advantages and disadvantages of the terms of the agreement, and the right to file an objection to the settlement, and the parties also provided inmates with forms for filing such objections."

At 1235: "Before approving the settlement agreement, the court must determine whether it complies with the PLRA." However, this is a private settlement agreement not subject to the PLRA. "The agreement does not require judicial enforcement of its terms, but rather contemplates enforcement through mechanisms permitted by the PLRA: reinstatement of the action and state-court relief."

At 1235: "Judicial policy favors voluntary settlement as the means of resolving class-action cases."

At 1236: "In determining whether a settlement agreement is fair, adequate, and reasonable, the obvious first place a court should look is to the views of the class itself." Most objectors misunderstood what was going on (e.g. complained about other issues). The 26 objections are a small percentage of the class; where a settlement provides for structural changes affecting everyone similarly, and there are no conflicts of interest within the class, majority sentiment should be given great weight. But silence may not mean consent. "The court is especially wary of such silence in the context of prison litigation where the members of the class are likely to have lower literacy levels, as well as limited access to materials to enable them to file an objection." (1238, quoting earlier opinion) The court approves the settlement.

Rights of Particular Groups/Theories: Due Process/Habeas Corpus

Martinez v. Greene, 28 F.Supp.2d 1275 (D.Colo. 1998). A statute requiring that criminal aliens detained for deportation hearings be held without bond denies due process on its face because, substantively, it is a deprivation of liberty and is not narrowly tailored to meet valid legislative goals, and procedurally, denies individualized consideration of whether each alien is a flight risk and a threat to the community's safety.

Federal courts retain jurisdiction under the federal habeas statute and the Suspension Clause to review aliens' claims of constitutional violation, notwithstanding the broad language of AEDPA suggesting otherwise.

Medical Care: Standards of Liability and Deliberate Indifference/Medical Care: Standards of Liability and Serious Medical Needs

Hudak v. Miller, 28 F.Supp.2d 827 (S.D.N.Y. 1998). The plaintiff complained of chronic headaches repeatedly for nine months at one prison; he continued to complain at other prisons; he was finally sent out for a CT scan, and proved to have a large aneurysm, which was surgically corrected.

A serious medical need must be "sufficiently serious, in the sense that a condition of urgency, one that may produce death, degeneration, or extreme pain exists." (830, citation omitted). It is not disputed that plaintiff's need was serious.

Obviousness of a risk may support an inference of actual knowledge. At 831: "It should be noted that the knowledge which Hudak must show Dr. Miller had is not that Hudak had a brain aneurysm ... but rather that Miller knew that Judak had some serious medical problem which bore further investigation." The doctor's self-serving statement that he believed, based on the evidence, that the headaches were from tension can't defeat

liability if the facts indicated that the risk of a serious problem was so obvious that he must have known about it. The fact that he treated the plaintiff every time he came in and gave him a neurological examination was also not dispositive. At 832: "[T]he mere fact that the plaintiff was treated in some manner, while it may 'substantially weaken[]' his claim ... does not foreclose a finding of deliberate indifference if Miller knew that his treatment was inadequate."

The fact that another doctor with access to the same facts also missed the aneurysm doesn't prove the defendant didn't have actual knowledge; officials at another prison, reviewing plaintiff's grievance, reached the conclusion that further investigation and testing were warranted.

The doctor's statement that "inmates are hostile" is not evidence of bias supporting a claim of deliberate indifference.

Medical Care: Quarantine/Medical Care: Standards of Liability and Deliberate Indifference/Medical Care: Standards of Liability and Serious Medical Needs/Dental Care/Personal Involvement and Supervisory Liability/Service of Process/Grievances and Complaints about Prison

Ramos v. O'Connell, 28 F.Supp.2d 796 (W.D.N.Y. 1998). The plaintiff was placed in medical quarantine after he refused to be tested for tuberculosis. He had a dental abscess and over a period of months staff refused to take him out of his cell for medical or dental appointments, despite a grievance decision in his favor.

Denial of a routine blood test is not a serious medical need. However, an abscessed wisdom tooth is. The court notes that the Second Circuit has just held that a toothache that causes "great pain" is a serious medical need.

The Superintendent who granted a grievance and directed that plaintiff go to a dentist could not be found deliberately indifferent.

An official who was responsible for enforcing a policy denying medically quarantined inmates medical and dental treatment, and who was alleged to have done so with respect to the plaintiff, could be found deliberately indifferent.

Correctional supervisors who allegedly directed security officers not to release plaintiff for medical appointments could be found deliberately indifferent.

Medical personnel who, respectively, repeatedly reported the plaintiff's complaints and symptoms and repeatedly scheduled appointments for him could not be found deliberately indifferent.

Defendants not served within 120 days would not be dismissed on that ground; "the 120-day period is not absolute and '[a]n indulgent attitude towards pro se plaintiffs suing in forma pauperis, especially when they are incarcerated, has been manifest in a number of cases.'" (804, citation omitted)

Classification: Race

Anthony v. Burkhart, 28 F.Supp.2d 1239 (M.D.Fla. 1998). The plaintiff alleged that a private nonprofit corporation that administers prisoner work discriminated against him in denying him an office position and then terminating him. The court grants summary judgment to defendants.

At 1245: "Clearly, prison officials cannot discriminate against Plaintiff on the basis of his age, race, or handicap in choosing what job to assign him.... Furthermore, prison officials cannot punish Plaintiff for exercising his First Amendment rights by denying him certain job assignments or transferring him from one job to another."

Class Actions: Certification of Classes/Medical Care: Standards of Liability: Serious Medical Needs/Medication

Maldonado v. Terhune, 28 F.Supp.2d 284 (D.N.J. 1998). The plaintiff tested positive for tuberculosis while incarcerated; he was given INH, which caused some liver problems.

The defendants were not deliberately indifferent in not doing TB testing every six months rather than yearly and in giving him INH. In both cases they were following standard medical practice.

A pro se prisoner is inadequate to represent

the interests of other prisoners in a class action.

At 290: "Active tuberculosis is surely a 'serious medical need,' ... and even the latent presence of the tuberculosis bacterium, as shown in a positive Mantoux test, is a condition which must be treated with the utmost care and caution. As a general rule, it is not required that latent health problems blossom into full fledged disease before being considered serious."

At 290: "Prescribing medication that may have side effects does not amount to 'deliberate indifference' to serious medical needs as is necessary to support a claim under *Estelle*.... What is required is that prison officials be mindful of side effects and take reasonable steps to avoid serious harm."

Access to Courts/Grievances and Complaints about Prison

Lewis v. Cook County Dept. of Corrections, 28 F.Supp.2d 1073 (N.D.Ill. 1998). The plaintiff, who worked in the law library, was observed to have what he said was a pimple and a doctor said was a hickey. They asked him whether he was homosexual or had been attacked, both of which he denied, then fired him. He had previously filed a grievance against the lieutenant who made the decision.

Plaintiff states a claim for retaliation "because he has properly alleged a chronology of events from which retaliation can be inferred." (1076) Retaliation does not have to be the only logical inference that can be drawn. To pursue a retaliation claim, plaintiff need not show that he was prejudiced in the litigation of a non-frivolous claim. The court does not explain this conclusion in *Lewis v. Casey* terms.

Absent injury, plaintiff does not state an access to courts claim.

The plaintiff does not state an equal protection claim on the ground of discrimination by sexual orientation unless he alleges that he is a homosexual; an equal protection plaintiff must allege he or she is a member of an identifiable minority and that membership caused differential treatment. This is probably overruled by *Village of Willowbrook v. Olech*, 120 S.Ct. 1073 (2000).

PLRA: Exhaustion of Administrative Remedies/State Officials and Agencies/Habeas Corpus/Procedural Due Process: Disciplinary Proceedings/Res Judicata and Collateral Estoppel

Beeson v. Fishkill Correctional Facility, 28 F.Supp.2d 884 (S.D.N.Y. 1998). The court should not assume that a plaintiff's failure to specify the capacity in which a defendant is sued means that it's an official capacity case dismissible under the Eleventh Amendment; the court should look to the course of proceedings.

A claim that defendants assaulted the plaintiff and destroyed his property in events leading up to a disciplinary hearing is not barred by *Edwards v. Balisok* because it is not a challenge to the finding of the disciplinary hearing, though the court does observe that some assertions may eventually be barred by collateral estoppel under principles of administrative *res judicata*. This is dictum; I have never seen administrative *res judicata* used in a prison discipline case (yet).

A use of force claim is subject to administrative exhaustion; the court rejects contrary authority. It rejects the statutory construction that the narrowing of language from former § 1997e(a) to the current PLRA language excludes use of force actions. It also rejects arguments based on the ordinary meaning of the "effect" of prison conditions (since the statutory definition of prison conditions pre-empts ordinary meaning), and the argument from *Farmer v. Brennan's* distinction between conditions cases and use of force cases. *McCarthy v. Bronson* supports the court's interpretation. Also, the argument that the purported legislative purpose--to avoid interference with prison management--is not affected by use of force disputes, is rejected because there is "mischief" inherent in reliance on legislative history, and in any case PLRA's purposes include reducing frivolous lawsuits as well. Anyway, it is a form of micromanagement for courts even to decide these cases if they could be resolved by prison officials.

Damage claims must be exhausted even if the administrative remedy doesn't provide for

damages. The opposite argument contravenes the statutory language, which no longer addresses the adequacy of remedies, but only their availability. The opposite argument also makes applicability of the exhaustion requirement depend on the vagaries of state law (i.e., whether a grievance system does or does not provide damages), and would frustrate the legislative purpose to reduce the volume of frivolous prison litigation. Also, this court's position is supported by the statement in *McCarthy v. Madigan* that where Congress mandates exhaustion, rather than leaving it to courts' discretion, exhaustion is required. Even without this authority, a balancing analysis would call for exhaustion because it serves agencies' interest in resolving their own internal problems, avoids the purposeful evasion of administrative processes, and promotes judicial efficiency by getting rid of more prisoner cases.

Non-Prison Cases

Use of Force

Pritzker v. City of Hudson, 26 F.Supp.2d 433 (N.D.N.Y. 1998). The plaintiff, arrested for perjury after voluntarily surrendering, stated a Fourth Amendment claim for excessive force by alleging that a police officer placed handcuffs tightly around his wrists and chained him to a bench, and that he had previously sustained an injury to both wrists. (444)

High Court Allows Congress' Limits on Prison Litigation

In a fresh blow to the independence of the federal courts, the Supreme Court in June reinstated a key provision of the 1996 Prison Litigation Reform Act.

The American Civil Liberties Union, which argued against the law's provision in *U.S. v French*, said that allowing Congress to second-guess the Courts violates the constitutional principle of separation of powers and further weakens a federal court system already hobbled by government-imposed limits. "Much to our disappointment, the Court put its stamp of approval on the direct legislative suspension of judicial decisions," said Ken Falk, Legal Director of the Indiana Civil Liberties Union, who argued the case before the High Court last April. "This ruling has grave repercussions not only for prison litigation cases, but for any case that Congress may choose to weigh in on."

At issue is the automatic stay provision of the PLRA, which provides only 90 days for courts to rule on often complex cases before previously entered judgments are stayed. In effect, Falk said, Congress is forcing its timetable on an already overworked federal court system. "At least the Justices didn't foreclose the possibility that district courts could suspend stays on court-ordered decrees on due process grounds," he added.

Writing in a dissent joined by Justice Stevens, Justice Stephen Breyer said that the majority ruling in this case ignores the "extreme circumstances that at least some prison litigation originally sought to correct, the complexity of the resulting judicial decrees, and the potential difficulties arising out of the subsequent need to review those decrees in order to make certain they follow Congress' PLRA directives."

Margaret Winter, NPP's Associate Director, said the ruling is yet another example of how the 1996 Prison Litigation Reform Act has restricted federal courts from exercising their judgment in the majority of prison litigation cases, many of them involving rape and sexual abuse, physical abuse, squalid conditions and lack of medical care.

The case is *U.S. v French et al.*, consolidated with *Miller v. French et al.*, Nos. 99-224 and 99-582, respectively.

Legislative Updates

BOP Medical Copayment Now Law

The Federal Prisoner Health Care Copayment Act of 2000, [see *Journal* Fall 1999/ Winter 2000 edition], was signed into law by the President in October. The law authorizes the director of the Federal Bureau of Prisons to collect

a fee not less than $1 from a prisoner for each health care visit made by that prisoner. Certain health care services are exempted from the fee including, preventative care services, emergency services, prenatal care, diagnosis or treatment of chronic infectious diseases, mental health care, or substance abuse treatment. Prisoners should not be discouraged from seeking necessary medical treatment. A last minute amendment to the law also requires comprehensive coverage for services relating to HIV/AIDS for each Federal prisoner when medically appropriate. The BOP may not assess or collect a fee for this coverage.

Grants for Mental Health Diversion Courts Pass Congress

According to a Department of Justice July 1999 report, nearly 16 percent of all prisoners in State prisons and local jails suffer from mental illness. The National Alliance for the Mentally Ill estimates that 25 to 40 percent of the nation's mentally ill will come into contact with the criminal justice system. Statistics like these as well as Representative Ted Strickland's first hand knowledge, from working as a psychologist treating prisoners in a maximum security prison, inspired him to introduce America's Law Enforcement and Mental Health Project in the U.S. House.

The new law provides $10 million in grant money to States to establish demonstration mental health courts. The project seeks to divert mentally ill persons accused of nonviolent offenses away from prison or jail and into treatment. This new amendment to the Omnibus Crime Control and Safe Streets Act of 1968 states that each program will provide "voluntary outpatient or inpatient mental health treatment, in the least restrictive manner appropriate, as determined by the court, that carries with it the possibility of dismissal of charges or reduced sentencing upon successful completion of treatment." Supervision of treatment compliance may not exceed the maximum sentence or probation for the charged offense.

NPP is Moving!

As of January 1, 2001 our new address will be 733 15th Street, NW, Suite 620, Washington, DC 20006. The new phone number will be 202-393-4930.

The National Prison Project
American Civil Liberties Union Foundation
1875 Connecticut Avenue, NW, Suite 410
Washington, DC 20009