THE NATIONAL PRISON PROJECT

JOURNAL

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NPP Begins New Litigation Initiative to End Prisoner Rape

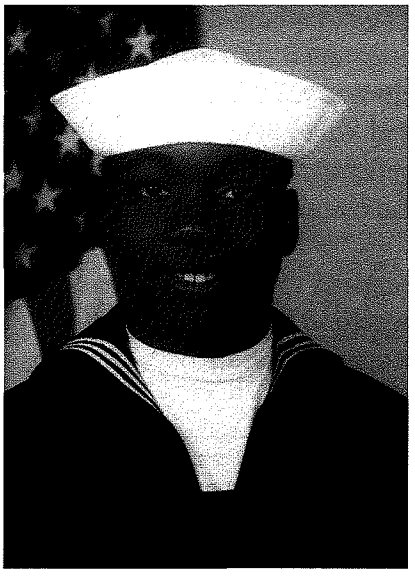
I am so scared of death and I feel that suicide is my only way out of this. I cannot sleep here at night with the horrors of knowing that I am constantly being sexually penetrated. . . . I can no longer handle the abuse and humiliation anymore. I have no one to turn to but you.

Roderick Johnson, a prisoner at Texas' Allred Unit and the victim of countless rapes and sexual assaults over an18-month period, wrote these anguished words in one of his first letters to attorneys at the ACLU's National Prison Project. His letter, a response to news that the NPP was seeking information about cases of rape and sexual assault in prisons or jails, made an immediate impression on the lawyer who read it. "Even after having read numerous disturbing accounts of sexual assault and abuse from prisoners across the country, the situation Roderick Johnson described in Texas shocked and horrified me," said attorney Amy Fettig.

Advertisements ran last fall in the NPP *Journal*, Prison Legal News, the Citizens United for Rehabilitation of Errants' Newsletter and several other publications read by prisoners. To date, the NPP has received responses from more than 300 current and former prisoners in nearly every state. In April, the Project filed its first two lawsuits in its new nationwide initiative to help stop rape and sexual assault in prisons. One lawsuit was filed on behalf of Mr. Johnson and the other on behalf of Robin Darbyshire, a female pretrial detainee sexually assaulted by a correctional officer.

Prisoner Rape in Texas

Roderick Johnson's case highlights the Texas Department of Criminal Justice's failure to protect vulnerable prisoners and the impact of racism and homophobia in determining who gets protected in prison. Mr. Johnson, a 33-year-old Navy veteran, is a gay African-American man who was repeatedly bought and sold by gangs as a sexual slave, raped, abused and degraded nearly every day.



Roderick Johnson, a Navy veteran serving time for a non-violent crime, has been bought and sold by gangs, raped, abused, and degraded nearly every day.

Margaret Winter, NPP's associate director and lead counsel for the case, asserts prison officials knew that gangs made Roderick Johnson their sex slave and did nothing to help him. "Our lawsuit shows that Texas prison officials think black men can't be victims and believe gay men always want sex -- so they threw our client to the wolves."

According to the complaint, Johnson appeared before the prison's all-white classification committee seven separate times asking to be placed in safe keeping from predatory prisoners. Instead of protecting Johnson, the committee members taunted him and called him a "dirty tramp," and one said, "There's no reason why Black punks can't fight if they don't want to

fuck."

Gangs and other prisoners often prey upon prisoners who are gay, as well as those who are young, small, mentally or physically disabled, first-time offenders, shy, perceived as weak, or possessing feminine characteristics. In Texas and elsewhere, individuals identified with one or more of these vulnerable characteristics typically qualify for a prison classification known as "safe keeping" or "protective custody."

Johnson informed the prison's staff of his sexual orientation during the intake process. But after leaving the intake unit, he was placed in general population. The result was devastating. The complaint describes how gang members negotiated fees of $5 to $10 for sex with Johnson. He was told that if he refused, he would be beaten and killed. As a sexual slave, he was repeatedly penetrated anally and forced to perform oral sex at the command of gang members.

"I know most people don't care what happens to prisoners, but no matter what Roderick has done he doesn't deserve the abuse he has received," said Roderick Johnson's cousin Sharon Bailey, whose calls to prison officials were ignored. "The entire family is horrified and devastated by what's happening to Roderick. We are afraid we will never see him alive again. We have faith that God will protect him, but the prison must also be held responsible for ignoring our pleas for help."

Texas was identified as the worst state in the nation for prison rape in Human Rights Watch's 2001 book-length report, *No Escape: Male Rape in U.S. Prisons.* Independent observers, including a federal judge, have said that some prisoners in Texas are vulnerable and need protection -- which they are not getting. "Evidence has shown that, in fact, prison officials deliberately resist providing reasonable safety to inmates. The result is that individual prisoners who seek protection from their attackers are either not believed, disregarded, or told that there is a lack of evidence to support action by the prison system," wrote U.S. District Judge William Wayne Justice, in a class-action case about Texas prison conditions that has spanned 30 years. He also said evidence "revealed a prison underworld in which rapes, beatings, and servitude are the currency of power."

After the NPP filed two requests with the executive director of Texas' prison system, Mr. Johnson was finally transferred to a different Texas prison and was placed in safekeeping. Since moving to the new unit, he has faced no additional sexual attacks.

Sexual Abuse by Correctional Staff

The NPP's sexual assault investigations also focus on the disturbing trend of sexual abuse and harassment of women prisoners by correctional staff. The first lawsuit filed as part of the NPP's new initiative concerns a female prisoner assaulted by an employee of a private prisoner transport company during a four-day trip to a jail in Colorado.

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AIDS Project Adds HCV to the Mix


Jackie Walker, AIDS and HCV in Prison Project Coordinator

When the AIDS in Prison Project was founded over a decade ago the major infectious disease raging through U.S. prisons and jails was HIV/AIDS. Although HIV/AIDS remains a problem across the nation, Hepatitis C (HCV) has now emerged as the new prison epidemic.

A study by the National Institute of Justice estimates that 17 percent of the U.S. prison population has HCV. California's corrections system reports the highest level of prisoner infection - 35 percent of its population is sick. HCV is also detrimentally impacting prisoners living with HIV/AIDS because many are now co-infected with the disease.

These developments encouraged the AIDS in Prison Project to expand and incorporate HCV infection concerns into its program mission. Correspondence on HCV issues now comprise almost half of the Project's incoming mail. The issues raised in these letters span the gamut. Men and women newly diagnosed with HCV have basic questions about the disease. Other prisoners write-in with more complex questions on dietary requirements, HIV co-infection concerns, and the effects of combination therapy.

Federal and state prisoners seeking treatment describe their struggles to navigate complex HCV treatment protocols. Some prisoners already debilitated and facing an upcoming release, write to the Project with questions about filing for disability. Some prisoners who have been stonewalled through the grievance process until they have less than a year remaining on their sentence, write seeking legal referrals. Even HIV/AIDS peer educators are writing to ask for materials on HCV to include in their workshops.

In response to these challenges, the Project has undertaken a number of activities. Treatment information packets on HCV are mailed to prisoners living with HCV and to a new generation of prisoner peer educators focusing their efforts on HCV. In addition, complaint letters to prison administrators, once drafted to request HIV/AIDS medications, now ask for prisoners to be evaluated for combination therapy of Peg-Intron and Ribavirin.

The role of the AIDS and HCV Project and the National Prison Project will continue to evolve as information about HCV develops. The accompanying article, *Hepatitis C Emerges as Major Health Threat in Prisons* by NPP Director Elizabeth Alexander, explores further the growing prevalence of HCV in prisons and highlights the National Prison Project's interest and dedication to ensuring treatment and care for infected prisoners who need it.

Hepatitis C Emerges as Major Health Threat in Prisons

By Elizabeth Alexander

It is a sad coincidence that, at the same time that effective treatments have turned HIV infection into a chronic disease rather than an automatic death sentence, another infectious disease is rampant in U.S. prisons and jails. Hepatitis C (also known as HCV) infection is even more disproportionately concentrated in prison populations than is infection with HIV and is ten times more common in prison than in the general population. Now that relatively effective but expensive treatments are available for HCV and the Centers for Disease Control are about to issue guidelines for treatment of HCV in correctional facilities, the question is whether Departments of Corrections will fulfill their duty to provide these treatments to eligible patients.

Infection with HCV is the most common

blood-borne chronic infection in the United States, affecting about four million people. About 60 percent of new cases result from intravenous drug use, about 20 percent from sexual transmission, and the remainder from a variety of causes. Eighty percent of intravenous drug users are HCV-positive.

Approximately 80 percent of persons with acute HCV infection will develop chronic infection and about 20 percent of those will develop cirrhosis of the liver and experience an increased risk of development of cancer of the liver. Present information suggests that 4 percent of those with HCV will develop life-threatening complications or die of the disease. Death rates are much higher among those who are also infected with HIV. In fact, end-stage liver disease is now emerging as a leading cause of death among persons with HIV.

Until recently, treatment of HCV was a difficult risk/benefit calculation. Only a minority of persons with HCV responded to the original standard treatment with interferon, which often produced substantial side effects. However, the newest treatment with pegylated interferon 2B and ribavarin, combined with optimum treatment of side-effects, has resulted in reported rates of response of 72 percent. Included are good response rates for types of HCV infection that were previously considered to be unlikely to benefit from treatment.[1]

The typical cost of a course of treatment for patients for the older form of combination interferon-ribavarin treatment has been roughly $12,000-$25,000. For many corrections systems, if all prisoners with HCV were treated, the cost would total more than the Department's current budget for all health care.[2] As a result, most prison systems across the country either do not routinely test for HCV infection, or use restrictive criteria to bar from treatment prisoners who would be treated in the community.

The Centers for Disease Control are expected to release guidelines for HCV treatment in correctional facilities in August. These

guidelines will likely advise more treatment for more patients than most Departments of Corrections currently provide and, consequently, should rapidly change the legal landscape. Up to now, most of the cases challenging a failure to provide treatment for HCV have been lost because the courts held that it was not a violation of constitutional rights to deny treatment. These cases are unlikely to remain good law because the facts have changed: treatment is much more likely to be successful now and the side effects are more controllable.

There is already one excellent, but unpublished, decision[3] granting a preliminary injunction to a Kentucky prisoner who had advanced liver disease and a 50 percent chance of dying before the end of his five-year sentence if denied treatment. At the time, Kentucky had 22 criteria that a prisoner had to meet to have HCV treatment provided, but not a single prisoner had been treated under those criteria. Indeed, the Magistrate Judge found that treatment was denied, not because of a medical judgment, but because of an unwritten policy that no prisoner would be treated for HCV. The judge also found that the criteria represented such a departure from accepted medical judgment as to suggest that no such judgment was exercised.

Because the National Prison Project is concerned that prison systems will continue to deny care for HCV after the CDC guidelines are released, we intend to monitor the policies and practices of departments around the country. If necessary, the NPP will file litigation to challenge continued failures to deny treatment when those failures openly or covertly result from financial concerns rather than medical judgment.

1. Anne S. De Groot, MD, HCV: The Correctional Conundrum, *HEPP NEWS* April 2001, 1. HEPP NEWS, a publication of the Brown Medical School Office of Continuing Medical Education and the Brown University AIDS Program, is an excellent source of information about HCV in prison.

2. In fact, even under appropriate treatment guidelines, not all patients with HCV infection would be eligible for treatment. Until Departments of Corrections survey infected patients applying correct criteria, it is impossible to estimate the actual cost of treatment.

3. *Michael K. Pauley v. Commonwealth of Kentucky*, No. 3:99-CV-00549-H (W.D. Ky.).

Prisoner Rape

Continued from page 2

Extraditions International took custody of Robin Darbyshire in Carson City, Nevada on May 13, 2001. During the van trip with two male officers and other, mostly male, prisoners, an Extraditions International guard sexually harassed and threatened to kill Ms. Darbyshire and another female prisoner. On one of the few van stops where prisoners were permitted to use the restroom, the driver, Richard Almendarez, brought Ms. Darbyshire to the bathroom and told her to lie down on the floor facing him. The 325-pound officer, who was armed, ordered her to expose her breasts and lift up her skirt. While restraining her, he then masturbated standing above her and ejaculated onto her breasts. Mr. Almendarez told Ms. Darbyshire that if she screamed he would shoot her and claim that she tried to escape. Ms. Darbyshire still experiences physical symptoms, nightmares and severe emotional distress because of the van ride that occurred almost one year ago.

"The private extradition business operates in the shadows, out of the public view, and with almost no government regulation," said NPP attorney Craig Cowie. "We're bringing this suit to shine a light on this shady industry, where some of the worst abuses of prisoners occur."

Despite her complaint during a stop at the Extraditions International office in Commerce City, Colorado, the company placed Ms. Darbyshire back in the van with the driver whom they knew had sexually harassed and threatened to kill her. The final two hours of the trip with Officer Almendarez were terrifying. Ms. Darbyshire overheard Mr. Almendarez say that he should have "blown her head off" because she would not "give him any." She only escaped from the abusive treatment when the van she was traveling in broke down and she was placed in a van with different drivers for the rest of her trip.

According to the ACLU complaint, Officer Almendarez also repeatedly asked the women prisoners to sit on his lap and tell him "X-rated" bedtime stories. He called Ms. Darbyshire a "slut" and asked her, "You like sucking big dick, don't you?" While near the Mexican border, Mr. Almendarez suggested that he would take the women prisoners to a Mexican hotel and "fuck" them and then shoot them.

Another private extradition company, Transcor, recently settled a lawsuit with the ACLU of Colorado over similar allegations of sexual assault against a woman it transported. However, most incidents of sexual assault and abuse of women prisoners go unreported because of fear of retaliation by correctional staff and the vulnerability felt by prisoners.

Although comprehensive national statistics on the number of prisoners sexually victimized by correctional staff are not available, separate investigations conducted by Amnesty International, Human Rights Watch, the U.S. General Accounting Office and the United Nation's Commission on Human Rights all conclude that incidents of sexual abuse and assault

in U.S. prisons and jails are widespread.

The GAO report, *Women in Prison: Sexual Misconduct by Correctional Staff,* found that from 1990 to 1995 class actions or individual damage suits relating to sexual misconduct had been filed against at least 23 departments of correction. Amnesty International's 2001 survey, Abuse of *Women in Custody: Sexual Misconduct and Shackling of Pregnant Women,* reported allegations of sexual abuse of female prisoners by correctional staff in almost every correctional system in the country.

"With this lawsuit and others like it, the ACLU is putting corrections systems on notice that they will be held legally and financially accountable for the sexual abuse and assault of prisoners," said Cowie. The National Prison Project is investigating other incidents and expects to file additional lawsuits in the coming weeks and months.

The two lawsuits, *Roderick Keith Johnson v. Gary Johnson* and *Robin Darbyshire v. Extraditions International, Inc.* were filed in U.S. District Court for the Northern District of Texas and U.S. District Court for the District of Colorado respectively.

New Michigan Prisoner Legal-Mail Policy on the Right Track

By Elizabeth Alexander

A new policy, instituted by the Michigan Department of Corrections in May, bans prison staff from reading or skimming prisoners' privileged legal mail. Earlier this year, U.S. District Court Judge Richard Alan Enslen ordered the Michigan Department of Corrections to institute a new policy after the agency was found to be in violation of two court orders.

Shortly after the anthrax scares that followed the terrorist attacks of September 11th, the corrections department altered its mail protocol and allowed prison staff to open and read prisoners' privileged legal correspondence outside of the prison facility and outside of the presence of the prisoner. This move violated two long-standing federal court orders established in *Hadix v. Johnson* and *Knop v. Johnson* which prohibit the reading of prisoners' legal mail. The National Prison Project represents Michigan prisoners in the *Hadix* and *Knop* litigation and late last year filed objections to Michigan's revised legal mail policy. Judge Enslen granted the NPP's objections.

As Judge Enslen said in his order, "Neither the Anthrax threats nor the other evidence offered by Defendants is sufficient to justify reading of legal correspondence since contraband such as Anthrax could be discovered by inspection not involving reading.... Furthermore, the Court reiterates that the First Amendment right to access to the courts guarantees confidential relations between attorney and client against decisions by prison administrators to read such correspondence when those intrusions are unsupported by probable cause."

The new corrections department policy also requires prison staff to log all legal mail opened outside of the presence of the addressee. Log entries indicate the date the mail was received, when it was inspected and processed, the name of the prisoner to whom the mail was sent and the name of the sender. The log also notes whether any physical contraband was confiscated and, if so, what was confiscated.

The Michigan Department of Corrections is entitled to take reasonable security precautions in light of the recent terrorist attacks and anthrax threats through the mail, but a wholesale disregard for what one court called "the oldest of the privileges for confidential communication known to the common law" is unacceptable. Michigan's new policy protecting the attorney-client privilege is an important victory for its prisoners and sets a meaningful precedent for prisoners' rights nationwide.

After Eight Deaths in Colorado Jail, ACLU Files Lawsuit Over Treatment of Mentally Ill Prisoners

Saying that the El Paso County Jail in Colorado Springs has failed to protect and provide adequate resources for prisoners with serious mental health needs, the National Prison Project and the American Civil Liberties Union of Colorado filed in April a federal class action lawsuit against prison officials.

All over the country, more and more prisoners are arriving at overcrowded and understaffed county jails with serious mental illness or symptoms of psychosis that are the result of withdrawal or overdose from substance abuse. The El Paso County Jail has been unable to fulfill its constitutional duty to protect prisoners from the risk of self-harm or suicide and to provide for their serious mental health needs. "At best, our clients endure unconscionable neglect. At worst, they endure conditions that are inhumane, degrading, humiliating, dangerous, and sometimes fatal,"said Mark Silverstein, Legal Director of the ACLU of Colorado.

The jail has faced scrutiny from the ACLU since May 1998, when pre-trial detainee Michael Lewis died while strapped face-down to a restraint board. For days prior to his death, he had been hallucinating and suffering from psychosis probably caused by a change in his usual medications. He had been on a waiting list to see the facility's psychiatrist, who visited only every other week.

Eight additional prisoners have died in the jail since then, four of them in 2001. In almost every case the deceased prisoner was suicidal, seriously mentally ill, or displaying symptoms of psychosis from overdose or withdrawal. The jail provides medical, psychiatric, and mental health services by contracting with a private company, but allots only two hours per week of psychiatric services, which translates to 36 seconds per mentally ill prisoner per week "Providing only two full-time mental health employees who are unlicensed and lack sufficient background and training is grossly inadequate and negligent," said David C. Fathi of the NPP and co-counsel on the case.

According to the ACLU lawsuit, many individuals with mental illness enter the jail already taking medications prescribed by outside mental health care providers. Upon entry to the jail, prisoners have faced long delays before their medication is resumed, if it is resumed at all. Because the medical contractor has a restricted list of medications that it will provide, prisoners who had adjusted well to their previous prescription suddenly find their medications switched. Moreover, there is insufficient medical and mental health staff to monitor the effects of the changed medications, a combination that threatens the health and safety of prisoners.

The lawsuit also alleges that mentally ill prisoners suffer because the corrections staff is stretched too thin and not adequately trained to recognize when prisoners' behavior may be the result of mental illness or psychosis rather than willful defiance of jail rules or deputies' orders. The result is excessive force and unnecessary use of dangerous restraint devices. The lack of sufficient mental health staff also results in deputies making decisions that should only be made by qualified mental health professionals.

The lawsuit recounts the 1999 case of a young woman who arrived at the jail on an alcohol violation, already visibly upset. She told guards that she had recently been raped twice. Corrections staff put her in an isolation cell for making suicidal statements. When she attempted to harm herself, deputies stripped her naked, laid her face-down on the concrete floor, handcuffed her behind her back and shackled her legs. Fifteen minutes later, corrections officers returned to strap her into a restraint chair, still naked. For the next five hours she remained strapped in the chair, naked, screaming in terror, and in full view of the male officers. The on-call mental health worker was

paged four separate times but did not arrive until three hours after the young women had been strapped down.

The El Paso County Jail consists of two facilities holding recent arrestees, persons awaiting trial and persons convicted and sentenced to terms of two years or less. Prisoners, including the mentally ill, are forced to sleep in open "day-rooms" and in "sled beds," coffin-like plastic forms placed directly on the floor. Because of overcrowding, some seriously mentally ill prisoners are left in general population with no special protection or services. No mentally ill women have access to separate specialized units.

Prisoners who are suicidal or mentally ill often wind up in the jail's "special detention cells," which have no windows, no bed, and no toilet or sink. Four years ago, the American Correctional Association strongly urged the El Paso County Jail to stop using these tiny cells, but their use continues. Further, despite nationally recognized correctional standards that require checkups every 15 minutes, prisoners are often left alone in these cells without observation for extended periods of time.

At the end of 2001, deputies housed a suicidal prisoner in a special detention cell while they awaited instructions from the jail's mental health staff. After neglecting the fifteen-minute checks for an hour, a deputy reported that the prisoner had smeared feces on the cell door and had written "I need the toilet" in feces. Deputies left the prisoner in the tiny stench-ridden cell for another hour, intervening only when they discovered that he was cutting his arm with a sharpened metal cover from an electrical outlet. The prisoner was taken to the hospital. The jail's mental health staff never arrived.

"The El Paso County Jail continues to deny the prompt and proper provision of mental health treatment, protection from inhumane and punitive actions and appropriate housing for its mentally ill prisoners," said Fathi. "This oppressive environment causes further harm to the county's most vulnerable population."

The federal court lawsuit, *Shook v. Board of County Commissioners*, is the fifth in recent years to target conditions in the jail. An earlier ACLU class action resulted in a settlement that ended the use of the controversial restraint board. A separate wrongful death suit filed by Lewis's family was settled in 2001. Another ACLU suit filed last year seeks compensation for the family of Andrew Spillane, who died in the jail in 2000. Last week, the family of Steven Phelps, who died by suicide in the jail in 2001, filed a suit seeking compensation.

Kellogg Foundation Provides Grant to End HIV Segregation

In March, the W.K. Kellogg Foundation awarded the ACLU's National Prison Project $50,000 to continue its public policy efforts to promote the integration of prisoners infected with HIV/AIDS into educational, vocational, and rehabilitative programs, as well as community corrections programs, in the states that segregate them.

Last year the *Journal* reported on the Project's success in Mississippi which resulted in the dismantling of one of the nation's longest standing discriminatory HIV/AIDS policies. HIV positive prisoners there are now permitted to participate in important rehabilitative programs that qualify them for good-time credits that shave time off their sentences. Additional work remains to be done in Mississippi where sick prisoners are still excluded from out-of-prison programs, like work release.

New initiatives have also begun in Alabama where prisoners continue to be segregated in housing and denied programing. Margaret Winter, NPP Associate Director, thanked the Kellogg Foundation for its grant, "This vital assistance allows the NPP to conduct prison reform in new ways, without relying solely on litigation. Changing public policy with local grassroots efforts is likely to be an effective route in eliminating this discrimination."

District Court Orders Improvements at Wisconsin's Supermax

Remedying some of the country's most deplorable prison conditions, U.S. District Court Judge Barbara Crabb approved a settlement agreement in March between the Wisconsin Department of Corrections and prisoners incarcerated at the Supermax Correctional Institution in Boscobel, Wisconsin.

Prisoners at the facility in Boscobel are held in solitary confinement for 23 hours a day for up to a year or more. Prior to the agreement, prisoners lived in cells where lights burn 24 hours a day, mentally ill prisoners suffered from inadequate mental health care and abusive treatment by corrections staff, visits from family members were limited to viewing faces on fuzzy television screens, and calls to loved ones were restricted to a few minutes a month.

David C. Fathi, National Prison Project staff attorney, said, "case after case proves that supermax confinement is the most inhumane type of confinement in the United States. This agreement limits the amount of damage this prison can do to those warehoused within its walls, but the real victory will not occur until supermax facilities are abandoned altogether."

An independent monitor will oversee the improvements in conditions at the supermax facility for two years and ensure that the state stands by the agreement. In addition, the state has agreed to ban the confinement of seriously mentally ill prisoners at the prison. Evidence has shown that isolated conditions, like those found at the supermax, exacerbate the mental health problems of prisoners. In October of 2001, Judge Crabb ordered seven mentally ill prisoners removed from the supermax after plaintiffs' psychiatric expert, Dr. Terry Kupers, evaluated the prisoners' mental health and advised their immediate removal.

Prisoners continuing to be held at the supermax will receive additional out-of-cell activity, including additional time for exercise with improved recreational facilities and more educational and vocational programming. Cell temperatures will be regulated. Nocturnal lighting will be reduced by 60 percent and the Department of Corrections will install clocks in all cells. Face-to-face non-contact visits will be permitted for certain prisoner classifications and phone calls to family members will increase up to five 15-minute calls per month.

Among the most important changes at the supermax are improved dental and medical care and a significant reduction in the use of restraints and electronic control devices. Furthermore, the supermax facility will no longer be called a "Supermax" and prisoners may not be referred to as the "worst of the worst."

"The torturous conditions that existed at this prison and exist at supermax facilities around the nation treat prisoners worse than caged animals," Fathi added. "Their prevalence should alarm all Americans because these facilities violate the Constitution and are cruel and inhumane."

The lawsuit, *Jones' El v. Litscher*, was filed as a class action in June 2001 in U.S. District Court for the Western District of Wisconsin. The prisoners are represented by a team of lawyers led by Attorney Ed Garvey of Garvey & Stoddard in Madison, Wisconsin. Other team members include Fathi and Micabil Diaz, legal director of the Wisconsin ACLU; Howard Eisenberg, Dean of Marquette University Law School, Milwaukee; Glenn Stoddard and Pamela McGillivray, also of Garvey & Stoddard, and Attorney Robin Shellow of the Shellow Group in Milwaukee.

Correction:

The article, *What's Wrong with the ACA?*, which appeared in the Summer/Fall 2001 edition of the NPP Journal incorrectly indicated that Harold Clarke, Director of Nebraska's Department of Correctional Services, oversaw an ACA team that recommended accreditation of the Suffolk County Jail. Mr. Clarke was chosen to lead a second review of the facility but did not conduct it.

CASE LAW REPORT: HIGHLIGHTS OF MOST IMPORTANT PRISON CASES

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

U.S. Court of Appeals Cases

Federal Officials and Prisons/Transfers

U.S. v. Serafini, 233 F.3d 758 (3d Cir. 2000). At 778 n. 23: ". . . [A] district court has *no* power to *dictate* or *impose* any place of confinement for the imprisonment portion of the sentence. Rather, the power to determine the location of imprisonment rests with the Bureau of Prisons."

Federal Officials and Prisons/Medical Care

Clark v. Hedrick, 233 F.3d 1093 (8th Cir. 2000). The plaintiff complained that the Federal Bureau of Prisons refused him an autologous bone marrow transplant. The court affirms the district court's dismissal because during the pendency of the appeal the plaintiff was permitted to take the first steps toward a transplant, permitting it to be done quickly when his condition becomes acute. The court notes concerns that the defendants will not perform the transplant at public expense, but it has to decide on present facts, which show no Eighth Amendment violation.

Grievances and Complaints about Prison/Pro Se Litigation

Johnson v. Stovall, 233 F.3d 486 (7th Cir. 2000). The plaintiff complained that a nurse filed false disciplinary reports and injury reports against him in retaliation for his filing a grievance against her and complaining about other members of the medical staff.

The district court abused its discretion in dismissing as frivolous based on its view that the disciplinary reports portrayed the plaintiff as "a major troublemaker" capable of threats and dangerous actions. It erroneously resolved genuine issues of fact.

AIDS/Class Actions--Conduct of Litigation/Intervention/Appeal

Gates v. Cook, 234 F.3d 221 (5th Cir. 2000). At the direction of the Fifth Circuit, the district court appointed counsel in a class action challenge by HIV positive prisoners. Counsel did nothing for two years, then entered a consent decree that required no substantial change in any of the *pro se* plaintiffs' concerns. The court required no formal notice to the class. Class members complained thereafter that class counsel did not act on their complaints. The ACLU National Prison Project then moved to intervene, seeking a preliminary injunction alleging deficient medical care. The preliminary injunction was granted.

Proposed intervenors moved for substitution of counsel, supported by a petition signed by 100% of the HIV-positive prisoners at Parchman. The district court denied the motion and forbade the National Prison Project from contacting class members. No-contact orders in class actions infringe on rights of speech, association, and access to counsel of choice. They must be based on a clear record and specific findings and the order should be narrowly drawn. The order here meets none of these standards. Denial of the motion for substitute counsel was an abuse of discretion.

Use of Force--Restraints

DeLeon v. Strack, 234 F.3d 84 (2d Cir. 2000). Handcuffing a prisoner during trial did not deny due process because the trial judge did not improperly delegate the decision to restrain to corrections officials.

PLRA--Screening and Dismissal

Plunk v. Givens, 234 F.3d 1128 (10th Cir. 2000). The PLRA screening provision of 28 U.S.C. § 1915A applies to all prisoner complaints, including fee paid ones. There is no right to a hearing before dismissal.

Procedural Due Process--Property/Ripeness

Washlefske v. Winston, 234 F.3d 179 (4th Cir. 2000). The plaintiff complained that prison officials applied the interest from his prison account for the general benefit of prisoners. The relevant statutes create only a limited property right, and prisoners do not have a property interest in it.

Disabled/Summary Judgment

Beckford v. Portuondo, 234 F.3d 128 (2d Cir. 2000). The disabled plaintiff alleged subjection to inhumane prison conditions, excessive force, denial of adequate medical care, denial of drinking water for more than a week, failing to respond to an incident in which an inmate/porter poured bleach into his cell and sealed it, removing his bedding and clothing, denying him outdoor recreation for six months, and denial of mental health programs. The district court said that the claims "are legally deficient" and granted summary judgment to defendants. The appeals court says it isn't obvious why the allegations don't support a triable issue of material fact.

Deference/Administrative Segregation--High Security/Class Actions--Effect of Judgments

Goff v. Harper, 235 F.3d 410 (8th Cir. 2000). In a challenge to conditions in "long-term lockup," the district court found a constitutional violation and required a remedial plan. The district court "applied the appropriate standards for determining if the conditions at ISP were unconstitutional, but failed to take the analysis one step further and balance the liberty interests of the inmates at ISP with the State's penological interests." (414) The court therefore remands for a determination under the *Turner* standards and expresses hope that the parties will negotiate a settlement.

Searches--Person--Arrestees/Intake

Skurstenis v. Jones, 236 F.3d 678 (11th Cir. 2000). The female plaintiff was arrested for drunk driving and was subjected to a strip search requiring her to squat and cough. Later, *shortly before she was released*, she was told by a male employee of the medical provider to drop her pants so he could check her for pubic lice, which he did by running his fingers through her pubic hair. The district court termed this "the inspection to prevent lice from escaping from the jail" and held it clearly unreasonable.

Defendants' policy required that each inmate be strip searched before being placed in a cell or detention room. This policy, which does not require any reasonable suspicion, does not comport with the requirements of the Fourth Amendment. However, since the plaintiff had a handgun in her possession on arrest, there was reasonable suspicion to support the strip search. The search was conducted in a reasonable manner: in a bathroom by a same sex deputy with no body cavity search. The later search for lice did not violate the Fourth Amendment, since the male employee who performed it was a member of the medical staff, it was done privately in the infirmary, and it was done at the earliest opportunity (even though, coincidentally, that was just before release).

False Imprisonment

Scull v. New Mexico, 236 F.3d 588 (10th Cir. 2000). The plaintiff obtained an order stating that he should be released from the Taos County Adult Detention Center; however, by then he was at the Bernalillo County Detention Center. Officials at the latter were entitled to qualified immunity for not releasing him. The defendants were not obligated by Constitution or statute to investigate to find out if that order required his release from the second facility.

Medical Care--Standards of Liability--

Deliberate Indifference; Serious Medical Needs/Medication/State, Local and Professional Standards/Unsentenced Prisoners and Convicts Held in Jails

Garvin v. Armstrong, 236 F.3d 896 (7th Cir. 2001). The plaintiff was deprived of his asthma inhaler when he was jailed, supposedly pursuant to state standards stating that "all medications must be secured and accessible only to designated staff." Inhalers are to be provided within 4 minutes of their requesting them. However, the plaintiff complained that even after he was transferred to the infirmary it took up to 45 minutes to get it.

The medical director cannot be held liable for delays of subordinate personnel. Nor can he be found deliberately indifferent, since he moved the plaintiff to the infirmary when he complained and prescribed additional medication use. The policy of keeping inhalers, like other medications, in secure locations did not constitute deliberate indifference under the facts. The plaintiff, a state prisoner held in a county jail for proceedings on a new charge, was not entitled to the legal standards applicable to pre-trial detainees.

False Imprisonment/State Officials and Agencies/Parties Defendant

Streit v. County of Los Angeles, 236 F.3d 352 (9th Cir. 2001). The plaintiffs challenged "overdetention" resulting from a policy of detaining prisoners entitled to release for an additional day or two for purposes of checking records for holds. The Los Angeles County Sheriff's Department, in implementing its policy is not an arm of the state for Eleventh Amendment purposes. Federal law provides the rule of decision, and state law is relevant only insofar as it delineates responsibility for the governmental function at issue in a particular case. The Los Angeles County Sheriff's Department is also a separately suable entity under state law.

Punitive Segregation/Exercise and Recreation/Procedural Due Process--Disciplinary Proceedings/Qualified Immunity/Damages--Punitive/Cruel and Unusual Punishment

Pearson v. Ramos, 237 F.3d 881 (7th Cir. 2001). The plaintiff, a punitive segregation prisoner, received four consecutive 90-day denials of yard privileges.

This court has previously upheld a finding that the Eighth Amendment requires prisoners segregated for 90 days or more to receive five hours of out-of-cell exercise a week. But these offenses (assault on officer, setting a fire, spitting in a guard's face, throwing a broom and "bodily fluids" on a staff member) are serious. Even cumulatively, the four 90-day sentences are not cruel and unusual, since the offenses "marked the plaintiff as violent and incorrigible." Denying recreation is a reasonable way to protect staff and other prisoners from his violent propensities. The defendant, though entitled to appeal on qualified immunity grounds before trial, did not waive the issue by waiting until after trial.

Searches--Person--Arrestees/Qualified Immunity

Amaechi v. West, 237 F.3d 356 (4th Cir. 2001). The plaintiff was arrested on misdemeanor noise charges and subjected to a search that amounted to a pat frisk inside her dress, under which she was wearing nothing, in which the officer allegedly swiped his hand across her groin area, at which time the tip of his finger slightly penetrated her genitals, on the street outside the police car in view of her family and the neighbors.

The court applies the *Bell v. Wolfish* balancing test. This search was highly intrusive for no particular justification and violated the plaintiff's clearly established rights.

Procedural Due Process--Administrative Segregation/Group Activities/Summary Judgment

Taylor v. Rodriguez, 238 F.3d 188 (2d

Cir. 2001). The plaintiff was placed indefinitely in "close custody" after being found to be a member of a "security risk group" and a safety threat. To move from Phase I to Phase II, it is necessary to sign a "Letter of Intention" to sever ties with all security risk groups. The plaintiff refused to do this.

Hewitt v. Helms requires "some notice" of the basis for segregation. Under this standard, a notice that referred to "past admission to outside law enforcement about involvement with [the] Latin Kings," "recent tension in B-Unit involving gang activity," and "statements by independent confidential informants" was too vague. Specific facts about current involvement are especially important here because the hearing officer acknowledged Taylor's insistence that he had renounced his membership. None of this means that prison officials should have divulged the identify of confidential informants or that they should have testified as witnesses.

The district court also erred in concluding that the decision was supported by "some evidence," since the decision was based on confidential information not detailed in the finding and not disclosed to the district court.

Publications/Deference

Prison Legal News v. Cook, 238 F.3d 1145 (9th Cir. 2001). The defendants prohibited the receipt of "standard rate" ("bulk") mail, one category of which is mail from non-profit organizations. At 1149-50: "We hold that tying the receipt of subscription non-profit newsletters to postal service rate classifications is not rationally related to any legitimate penological interest put forth by the Department." If plaintiffs don't refute a common sense connection between policy and challenged practice, prison officials need only show that they reasonably could have thought it would advance legitimate penological interests. If plaintiffs do refute it, prison officials must "demonstrate that the relationship is not to 'remote as to render the policy arbitrary or irrational." The defendants are entitled to qualified immunity.

Crowding/PLRA--Termination of Judgments and Prisoner Release Orders/Standing

Castillo v. Cameron County, Tex., 238 F.3d 339 (5th Cir. 2001). The district court denied termination of a class action judgment involving a county jail and including the state as third-party defendants. Though it dismissed the state as a defendant, the state remained concerned that the County was enjoined not to accept certain state prisoners. The district court made conclusory factual findings that without the relief the jail would be overcrowded and conditions would be unconstitutional.

The State has standing to pursue this appeal. An order requiring removal of state-ready felons from the jail if necessary to control the jail population is a prisoner release order. The court (at 354) adopts the *Cason v. Seckinger* holding requiring particularized findings, on a provision-by-provision basis, showing that the provisions meet PLRA standards.

Hazardous Conditions and Substances/Mootness/PLRA--Mental or Emotional Injury

Herman v. Holiday, 238 F.3d 660 (5th Cir. 2001). Plaintiff alleged that the jail he was held in was contaminated with asbestos to which inmates were routinely exposed. His allegations present genuine issues of fact. Allegations of an increased risk of developing an asbestos related injury in the future are not sufficiently separate from a mental or emotional injury to be actionable under PLRA.

Medical Care--Standards of Liability

Napier v. Madison County, Kentucky, 238 F.3d 739 (6th Cir. 2001). The plaintiff suffered from complete kidney failure and was supposed to receive dialysis three times a week, but told jail intake personnel that missing appointments was "no big deal" and he had "missed them before." The claim failed. A prisoner who complains of

delayed medical care must "place verifying medical evidence in the record to establish the detrimental effect of the delay in medical treatment to succeed."

PLRA--Termination of Judgments

Laaman v. Warden, New Hampshire State Prison, 238 F.3d 14 (1st Cir. 2001). Plaintiffs moved for contempt. The motion was never formally decided. In 1999, a new judge ordered plaintiffs to show cause why the decree should not be terminated and the contempt motion declared moot, and then terminated the judgment. In certain circumstances it would be an abuse of that discretion to deny plaintiffs an evidentiary hearing once requested. The district court must exercise that discretion based on its familiarity with the record and with any "current and ongoing" violations that might not appear on the record, while considering the PLRA's bias toward the termination of the consent decree. In this case the failure to hold a hearing was an abuse of discretion. The court may terminate if the evidentiary hearing shows few or limited violations that could more appropriately be rendered by terminating the present case and allowing an individual to press a new suit in which a fresh decree could be addressed directly to these issues. But the district court needs to hear the facts first and the burden remains on the plaintiffs to show that such violations persist.

Medical Care/Pre-Trial Detainees/State Law Immunities/Municipalities

Young v. City of Mount Ranier, 238 F.3d 567 (4th Cir. 2001). The plaintiff was detained by police for emergency psychiatric evaluation, used pepper spray and placed him restrained and face down in the police car; he was discovered in the emergency room, dead. He had PCP in his system.

Under the due process clause, conduct must "shock the conscience" to be actionable. Failure to protect from a known risk falls into the "middle range" of culpability, governed by the deliberate indifference standard. It amounts to an *Estelle v. Gamble* deliberate indifference claim.

Based on the allegation that the combination of pepper spray and PCP is especially dangerous, no one can be found deliberately indifferent in this case, since they didn't know he was on PCP until later.

Grievances and Complaints about Prison/PLRA--Mental or Emotional Injury

Dawes v. Walker, 239 F.3d 489 (2d Cir. 2001). The plaintiff complained that an officer tried to get another inmate to attack him after he beat a disciplinary ticket, and when he complained about that a prison investigator accused him of being a "rat" in front of other prisoners. One of the plaintiff's claims is dismissed for failure to set forth a time frame showing that the protected activity preceded the alleged retaliation and failure to set out the nature of the disciplinary order. The rest are dismissed because labeling a prisoner a rat is not an adverse action supporting a retaliation claim.

Pre-Trial Detainees/Searches--Person--Arrestees

Roberts v. Rhode Island, 239 F.3d 107 (1st Cir. 2001). In Rhode Island, pre-trial detainees and convicts are held in the same institutions. The plaintiff was arrested for not showing up in court and was subjected to a strip and visual body cavity search upon admission. The state claimed that strip searching minor offenders was necessary because they get thrown in with the felons. The court doesn't buy it.

Religion--Practices/Equal Protection/Classification--Race/Deference

Morrison v. Garraghty, 239 F.3d 648 (4th Cir. 2001). The defendants refused to let the plaintiff have Native American religious items because he is not of Native American heritage. Prison equal protection claims are governed by the *Turner* reasonableness standard even in cases like racial discrimination claims where a higher

standard of scrutiny would obtain outside of prison.

The court rejects the notion that sincerity of adherence to Native American religion can be determined from race or heritage. Courts must consider whether the religious "occupies a place in the lives of its members 'parallel to that filled by the orthodox belief in God'" in other religions.

Defendants' claim, that the items sought by the plaintiff are dangerous, fails since they allow some inmates to have them. Defendants failed to substantiate the claim that the policy promotes security by appeasing Native Americans who are offended by whites practicing their faith.

Suicide Prevention/Mental Health Care

Domino v. Texas Dept. of Criminal Justice, 239 F.3d 752 (5th Cir. 2001). The decedent had a long history of psychological problems including hospitalization and suicide attempts. He had been found in his cell with a homemade noose 17 months earlier and had a diagnosis of recurrent major depression and then of bipolar disorder. He had been released from the mental health caseload because he was noncompliant with medication and refused blood work. He later asked to see mental health staff and expressed apprehension to the defendant psychiatrist apprehension saying "I can be suicidal." The defendant thought that this was "an attempt to achieve 'secondary gain'." The decedent began banging his head on the table and the psychiatrist had him returned to his cell. Two and a half hours later he hanged himself. The record does not show deliberate indifference.

Mental Health Care/Release of Prisoners

Government of the Virgin Islands v. Martinez, 239 F.3d 293 (3d Cir. 2001). In revoking the defendant's probation, the court said that he should receive psychiatric counseling, and also said it realized that local facilities for that purpose were nonexistent. The defendant now argues that his probation should therefore have been continued. If his needs were not met his remedies would be in a civil action seeking the treatment."

PLRA--Three Strikes Provision

Abdul-Akbar v. McKelvie, 239 F.3d 307 (3d Cir. 2001). The court overrules the holding of *Gibbs v. Roman* that the "imminent danger of serious physical injury" exception to the three strikes provision is assessed as of the time of the alleged incident, not the time the complaint is filed. The statute doesn't deny equal protection.

Use of Force/Personal Involvement and Supervisory Liability/Emergency/Qualified Immunity

Jeffers v. Gomez, 240 F.3d 845 (9th Cir. 2001). The plaintiff was shot in the neck during a disturbance in the yard, apparently accidentally, while he was being attacked by another prisoner. The defendant officers are entitled to qualified immunity for the shooting in the absence of evidence that they acted maliciously or sadistically. A defendant who let prisoners out into the yard even after hearing that Hispanic inmates were going to attack "one of their own" could not be found deliberately indifferent. The Director was entitled to qualified immunity from a claim based on the use of force policy, which said that firearms shall only be used when reasonably necessary to prevent or stop escapes, the taking of hostages, or other immediate danger. The district court erred in holding that the excessive number of shootings supported his liability. The warden was entitled to qualified immunity with respect to the claim that he created an unsafe and potentially volatile situation by housing inmates of various races and gang affiliation together. Those policies antedated the warden.

Suicide Prevention/Pendent and Supplemental Claims; State Law in Federal Courts

Brown v. Harris, 240 F.3d 383 (4th Cir. 2001). The decedent committed suicide in jail and brought state tort and federal constitutional

claims. Even if a jail supervisor knew about the decedent's suicidal tendencies, he could not be found deliberately indifferent where he put the decedent on "medical watch" with constant video surveillance of his cell. Even if the probation officer who issued a warrant for the decedent's arrest failed to inform jail personnel about his suicidal tendencies, she could not be held deliberately indifferent because she took steps to reduce the risk.

Use of Force--Restraints/Negligence, Deliberate Indifference and Intent

Hope v. Pelzer, 240 F.3d 975 (11th Cir. 2001). The plaintiff was handcuffed to the Alabama "hitching post" twice, once for seven hours after an altercation with a guard, without regular water or bathroom breaks. The court holds this treatment unconstitutional.

At 980-81:

> . . . [W]e find that the policy and practice of cuffing an inmate to a hitching post or similar stationary object for a period of time that surpasses that necessary to quell a threat or restore order is a violation of the Eighth Amendment. It is our intention that this holding serve as a bright-line rule.

The defendant officers are entitled to qualified immunity because prior law was not clear enough. (The Supreme Court is reviewing the qualified immunity holding.)

Medical Care–Standards of Liability--Deliberate Indifference and Serious Medical Needs/Sanitation/PLRA--Screening and Dismissal and Mental or Emotional Injury

McBride v. Deer, 240 F.3d 1287 (10th Cir. 2001). The plaintiff alleged that he complained of pain in his leg and received treatment, but the doctor refused to see him again for almost two months, and the plaintiff no longer has full function of his leg. Contrary to the district court, the plaintiff alleged "substantial harm" in the form of "a lifelong handicap or a permanent loss."

Allegations that the plaintiff was required to live in a feces-covered cell for three days stated a claim. If cleaning materials had been available to him, he would not have a claim.

PLRA--Attorneys' Fees and Costs

Singleton v. Smith, 241 F.3d 534 (6th Cir. 2001). Plaintiff went to trial and lost; defendants sought costs. The assessment of costs is not unconstitutional. There is a presumption for taxation of full costs, but partial remittance of costs is a matter of discretion.

At 541: Before the PLRA, an unsuccessful indigent litigant could subsequently challenge an award of costs based on proof of inability to pay. Costs in the case "made necessary and incurred" after the PLRA are governed by the PLRA (543-44).

PLRA--In Forma Pauperis Provisions--Filing Fees/PLRA--Attorneys' Fees and Costs

Whitfield v. Scully, 241 F.3d 264 (2d Cir. 2001). The plaintiff was assessed costs. The district court did not abuse its discretion in refusing to reduce or eliminate the award based on his limited means. The provisions for collection of filing fees and costs call for sequential, not simultaneous, collection--i.e., 20% of monthly income at a time, not 20% times the number of fees owed. However, the fees and costs sections are separate and can be collected separately, permitting a total assessment of 40%.

PLRA--In Forma Pauperis Provisions--Filing Fees

Goins v. Decaro, 241 F.3d 260 (2d Cir. 2001). A prisoner who withdraws his appeal may not get a refund of partial fee payments or a cancellation of the obligation to continue paying.

Religion/Grievances and Complaints about Prison/Deference

Rauser v. Horn, 241 F.3d 330 (3d Cir. 2001).

The plaintiff alleged that he was required to participate in Alcoholics Anonymous and Narcotics Anonymous in violation of his religious rights as a condition of recommending him for parole, and did not offer him a non-religious alternative. He alleged that he was retaliated against for asserting his rights.

A prisoner litigating a retaliation claim need not prove that he had an independent liberty interest in the privileges he was denied. As a threshold matter, a prisoner-plaintiff in a retaliation case must prove that the conduct which led to the alleged retaliation was constitutionally protected. Next, a prisoner litigating a retaliation claim must show that he suffered some "adverse action" at the hands of the prison officials that "was sufficient to deter a person of ordinary firmness from exercising his [constitutional] rights."

Once a prisoner demonstrates that his exercise of a constitutional right was a substantial or motivating factor in the challenged decision, the prison officials may still prevail by proving that they would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest. In this case, the defendants did not dispute that the conduct at issue was protected. The court holds that denial of parole, transfer to a distant location, and a financial penalty amount to "sufficient evidence of adversity." The district court should not have granted summary judgment.

Religion--Practices--Hair, Beards, Dress/Qualified Immunity/Deference

Flagner v. Wilkinson, 241 F.3d 475 (6th Cir. 2001). The Hasidic Jewish plaintiff challenged a policy requiring him to cut his beard and sidelocks. The defendants are entitled to qualified immunity from damages. The plaintiffs' claim is governed by *Turner*. Qualified immunity does not protect defendants from declaratory or injunctive relief. This plaintiff presented evidence challenging the validity of the defendants' asserted penological interests, and the case is remanded for consideration of the as-applied declaratory and injunctive claim. There is no evidence that any of the problems defendants asserted as justifying the policy were ever associated with *this plaintiff*.

Medical Care--Access to Outside Services/Medical Care--Standards of Liability--Serious Medical Needs and Deliberate Indifference/Medical Care--Staffing--Qualifications of Personnel

Oxendine v. Kaplan, 241 F.3d 1272 (10th Cir. 2001). The plaintiff's finger was accidentally severed. The prison physician and his assistant reattached it but it rotted. They declined to send him to a specialist either before the surgery or afterward.

Denial of access to "medical personnel capable of evaluating the need for treatment" can constitute deliberate indifference. The allegation that the doctor performed an operation he was not qualified for without seeking specialized assistance stated a deliberate indifference claim.

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

Benefield v. McDowall, 241 F.3d 1267 (10th Cir. 2001). The plaintiff alleged that an officer labeled him as a snitch to other prisoners in order to get him attacked, and filed a false report resulting in his being disciplined. It is clearly established in the Tenth Circuit that labeling an inmate a snitch constitutes deliberate indifference to the prisoner's safety. The fact that the plaintiff had not yet been assaulted did not defeat his claim. The government does not rely on the PLRA mental/emotional injury provision. Psychological harm is actionable under the Eighth Amendment.

Medical Care/Use of Force

Chapman v. Keltner, 241 F.3d 842 (7th Cir. 2001). The plaintiff, who had had bowel

resection surgery five days previously, was arrested in the hospital and taken to jail. When she climbed into the van her incision reopened and she sustained a hernia. The defendants were not deliberately indifferent because there is no evidence that the doctor totally prohibited her from climbing stairs. Even if he had, there is no evidence that the officers knew of such a direction.

PLRA--Exhaustion of Administrative Remedies/Federal Officials and Prisoners/Religion--Outside Organizations/Visiting/Deference/Qualified Immunity/Injunctive Relief--Preliminary

Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001). The plaintiff, who practices a mixture of Buddhism and Christianity, was denied pastoral visits with a Christian minister because he was registered as a Buddhist.

Defendants argued that plaintiff had failed to exhaust because he failed to adequately explain during his administrative appeals his belief in both the Christian and Buddhist religions. The appeals adequately revealed his claim.

The district court correctly denied a preliminary injunction under the *Turner* standard. The plaintiff's Religious Freedom Restoration Act claim was not barred by *City of Boerne v. Flores* because that decision did not address the statute's applicability to the federal government. Congress amended RFRA in the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), redefining "exercise of religion" to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." On remand, the court will have to apply the "compelling interest" analysis of RFRA as amended rather than the reasonable relationship test of *Turner*. A violation of RFRA, like a constitutional violation, constitutes irreparable harm for purposes of injunctive jurisprudence.

PLRA--Termination of Judgments/Appeal

Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001). The termination provisions don't violate separation of powers. There's no due process violation. A decision to terminate or continue prospective relief is to be reviewed for abuse of discretion, except where it involves the interpretation of § 3626(b), which is reviewed *de novo*. The court adopts the "particularized findings, on a provision-by-provision basis" requirement of *Cason v. Seckinger*. Here, the court "in a conclusory fashion and tracking the pertinent statutory language, merely stated that the relief contained in that judgment meets the standards outlined in § 3626(b)(2)." (951) However, outright reversal is not warranted. The constitutional findings made by the district court were based on the evidence in the record concerning the current state of TCDJ-ID and are sufficient to permit the court to analyze the continued necessity of each provision of the 1992 judgment. Therefore it should do so "in light of its findings of the unconstitutionality of various conditions in TDCJ-ID."

Medical Care/Staffing--Training/Qualified Immunity

Tlamka v. Serrell, 244 F.3d 628 (8th Cir. 2001). The decedent died of a heart attack in the prison yard. Other prisoners began CPR and seemed to be getting results, but officers then made them stop, and he got worse. CPR was not started until he arrived at an ambulance. Absent an explanation for this conduct, defendants are not entitled to summary judgment based on qualified immunity.

Telephones/Standing/PLRA--Exhaustion of Administrative Remedies

Arsberry v. Illinois, 244 F.3d 558 (7th Cir. 2001). The plaintiffs challenged a sole-source contract for prisoner telephone service on the ground of excessive rates. The plaintiff public interest law firm lacks standing to challenge the high rates, since it is reimbursed for the expenses of the calls by state or federal government. The plaintiff prisoners are barred from suing by the

PLRA exhaustion provision.

The filed rate doctrine prevents a court from invalidating or modifying a tariff, but the remaining plaintiffs (the prisoners' friends and relatives) are not barred by it because they say they are challenging the exclusive contracts rather than the tariffs. The doctrine of primary jurisdiction is not applicable either. The telephone rates do not violate the First Amendment. The plaintiffs have no equal protection claim because a claim of discriminatory rates is within the primary jurisdiction of the telephone regulators. The plaintiffs have no due process claim. The plaintiffs have no antitrust claim.

Pre-Trial Detainees/Protection from Inmate Assault/Deference/Classification/Prisoners as Staff

Mayoral v. Sheahan, 245 F.3d 934 (7th Cir. 2000). The plaintiff, a former Latin King who was accused of murdering a member of the Latin Disciples, informed jail staff on intake and said he needed protection. A little later, the plaintiff was stabbed and beaten.

Defendants were under no legal duty to separate inmates by gangs. Evidence that a tier officer brushed off the plaintiff's request for protective custody and that she knew that inmates on the tier were rowdy and intoxicated, and her testimony that she didn't know anything about gangs were sufficient to withstand summary judgment.

Evidence that the sergeant knew that some inmates were drunk, that he thought the situation serious enough to lock down the inmates, that some of them refused to be locked down and that he told an inmate to "control his guys" could support a claim of deliberate indifference against him (940). The shift commander is conclusorily let off the hook.

PLRA--Termination of Judgments

Harvey v. Schoen, 245 F.3d 718 (8th Cir. 2001). Defendants moved to terminate a 1973 decree governing disciplinary proceedings. The district court did not abuse its discretion in denying plaintiffs discovery.

Medical Care--Standards of Liability--Deliberate Indifference/Medical Care--Access to Medical Personnel/Drug Dependency Treatment/Refusal of Treatment/Qualified Immunity
Pre-Trial Detainees/Personal Involvement and Supervisory Liability

Thompson v. Upshur County, Texas, 245 F.3d 447 (5th Cir. 2001). The decedent was arrested for DWI and later he began suffering from delirium tremens. Jail personnel called for an ambulance but the decedent signed a refusal of treatment form. A jailer then arranged to transfer him to a jail with a detoxification cell. His condition worsened and he was placed in a strait jacket after falling and striking his head. He had a seizure and died. Returning the decedent, who refused hospitalization, to a jail better equipped to handle his problem was objectively reasonable.

A sergeant at the second jail was not entitled to qualified immunity, and was sufficiently alleged to have been deliberate indifference, based on allegations that she knew of the decedent's condition and that he was injuring himself in his cell, but did not arrange for medical care.

Correspondence/Protection from Inmate Assault/PLRA--Screening and Dismissal

Curley v. Perry, 246 F.3d 1278 (10th Cir. 2001). The complaint is dismissed because the plaintiff failed to allege facts showing a substantial risk of harm or that the defendants were deliberately indifferent.

The court considers *sua sponte* dismissal under § 1915(e)(2)(B)(ii) and Rule 12(b)(6), since the standards are the same. The court is not, however, dealing with § 1915A, which deals only with prisoners. Dismissal of a meritless complaint that cannot be salvaged by amendment comports with due process and does not infringe the right

of access to the courts.

PLRA--In Forma Pauperis Provisions/Access to Courts/Sanctions

Kolocotronis v. Morgan, 247 F.3d 726 (8th Cir. 2001). A mental hospital inmate committed pursuant to a finding of not guilty by reason of insanity is not a prisoner for PLRA purposes. The district court erred in directing the plaintiff to file no more cases except through his court-appointed guardian.

PLRA--Exhaustion of Administrative Remedies/Statutes of Limitations

Miller v. Norris, 247 F.3d 736 (8th Cir. 2001). Plaintiff's complaint was dismissed for non-exhaustion, then plaintiff (by then transferred from state to federal custody) filed a motion to compel the defendants to provide him with grievance forms, then filed a "motion to reinstate cause" saying that the failure to provide forms prevented him from exhausting administrative remedies. The court construes the motion liberally as initiating a new civil action on the date it was filed. The action is timely because Arkansas has a saving statute providing that a litigant who files timely and is dismissed has a year to commence a new action.

Plaintiff's argument that he is not a "prisoner" for PLRA exhaustion purposes (having been transferred from the system where the claim arose to another prison system) is not considered because it was not raised below, and the district court's decision that § 1997e(a) applied precludes him. However, he may have complied with the exhaustion requirement. Mr. Miller's allegations raise an inference that he was prevented from utilizing the prison's administrative remedies.

PLRA--Exhaustion of Administrative Remedies

Curry v. Scott, 249 F.3d 493 (6th Cir. 2001). The plaintiffs have satisfied the exhaustion requirement. It does not decide what her exhaustion is an affirmative defense. The *Brown v. Toombs* holding requiring *sua sponte* dismissal "appears to remain viable" (501 n.2).

While the preferred practice is for inmates to complete the grievance process prior to the filing of an action and to attach to their complaint documentation of that fact, because the exhaustion requirement is not jurisdictional, district courts have some discretion in determining compliance with the statute. Here, the district court could find that exhaustion prior to filing an *amended* complaint sufficed.

Procedural Due Process--Disciplinary Proceedings/Heating and Ventilation/Pest Control

Gaston v. Coughlin, 249 F.3d 156 (2d Cir. 2001). The "some evidence" standard for disciplinary hearings may be met even where the only evidence was supplied by a confidential informant. An independent assessment of the informant's credibility, would not entail more than some examination of indicia relevant to credibility rather than wholesale reliance upon a third party's evaluation of that credibility.

The plaintiff alleged that mice were constantly entering his cell, that for several days the area in front of his cell was filled with feces, urine, and sewage water, and that windows remained broken and unrepaired for the entire winter, when the average outside temperature varied from 22 to 40 degrees. Defendants conceded that the allegations of cold stated a claim.

Defendants argued that the unsanitary conditions did not violate the Eighth Amendment because they were "temporary." The court was unwilling to adopt as a matter of law the principle that it is not cruel and unusual punishment for prison officials knowingly to allow an area to remain filled with sewage and excrement for days on end. The rodent infestation claim should be reinstated as well.

Classification--Race/Protection from Inmate Assault

Robinson v. Prunty, 249 F.3d 862 (9th Cir.

2001). An administrative segregation prisoner alleged that he was attacked by other prisoners as a result of a policy of racial integration in prison yards, in the context of intense race-based gang rivalries (allegedly defendants did segregate the cells).

The defendants were not entitled to qualified immunity. The law was clearly established after *Farmer v. Brennan*, and accepting plaintiff's allegations as true, there was a "gladiator-like scenario, in which prison guards are aware that placing inmates of different races in the yard at the same time presents a serious risk of violent outbreaks."

False Imprisonment/Municipalities/Mental Health Care/Theories--Due Process/Evidentiary Questions/Procedural, Jurisdictional and Litigation Questions/Disabled

Lee v. City of Los Angeles, 250 F.3d 668 (9th Cir. 2001). This is the case of the mentally disabled plaintiff who was arrested in California, mixed up with someone else, and sent to New York, where he served two years in prison before anyone listened to him.

Allegations that the City knew that arrestees were often misidentified but did not properly train and supervise their employees and implement and maintain proper procedures which would check the identities of people being extradited, that the need for such training is obvious, and that the City ignored it, sufficiently stated a claim of municipal liability.

Mistaken incarceration denies due process "after the lapse of a certain amount of time" or after "it was or should have been known that the detainee was entitled to release." The fact that he got an extradition hearing after one day in custody did not defeat his claim by breaking the causal chain in light of his allegations that defendants acted with reckless indifference.

Use of Force/Standing/Class Actions--Certification of Classes/Injunctive Relief--Preliminary

Hawkins v. Comparet-Cassani, 251 F.3d 1230 (9th Cir. 2001). The plaintiff was shocked with a stun belt in court at his sentencing because he wouldn't shut up, by order of the judge. The district court certified a class and enjoined the use of the stun belt in court entirely.

The plaintiff had standing to seek injunctive relief because there was a likelihood of recurrence. Unlike the chokehold in *Lyons*, use of the belt stems from official written policy. Also, though plaintiff must establish his own standing, "it is not irrelevant that he sought to represent broader interests than his own." The court erred in certifying the plaintiff, a convicted prisoner, to represent a class including non-convicted persons.

The injunction was supported by the Sixth Amendment. The Eighth Amendment claim would offer no greater support for it. The district court credibly found that the belt had a chilling effect, deterring defendants from participating in their own defense. The district court should have restricted its injunction to prohibiting the stun belt's use to prevent disruption, leaving undisturbed its use to maintain security.

Discovery/Telephones/Federal Officials and Prisons

Smith v. U.S. Dept. of Justice, 251 F.3d 1047 (D.C.Cir. 2001). The plaintiff alleged that he received inadequate assistance of counsel and his attorney admitted it in conversations recorded by the Bureau of Prisons. The government alleged they didn't have to produce the conversations because they were exempted from FOIA. However, the recordings were not the product of an "interception" governed by Title III, which contains an exception for devices used "by an investigative or law enforcement officer in the ordinary conduct of his duties;" so disclosure under FOIA was appropriate.

Searches--Person--Arrestees

Wilson v. Jones, 251 F.3d 1340 (11th Cir.

2001). The plaintiff was strip searched after being arrested for DWI. The search, pursuant to a policy requiring strip searches on intake without reasonable suspicion, violated the Fourth Amendment. However, the Sheriff was entitled to qualified immunity.

Procedural, Jurisdictional and Litigation Questions

Porchia v. Norris, 251 F.3d 1196 (8th Cir. 2001). A prisoner who did not establish that there was a prison mailbox or that he used it, and did not provide an affidavit or notarized statement recounting the precise date he left his notice of appeal with prison authorities, is not entitled to the benefit of the prison mailbox rule.

Dental Care/Medication/Procedural Due Process--Property/Medical Care--Standards of Liability--Serious Medical Needs; Deliberate Indifference/Pleading

Wynn v. Southward, 251 F.3d 588 (7th Cir. 2001). The plaintiff alleged that he was denied his dentures and his heart medication when he was placed in the Isolation Detention Unit. He claimed pain, injury, inability to chew, and other consequences from deprivation of the dentures. Dental care is "one of the most important medical needs of inmates." The plaintiff's allegations that without his dentures he could not chew and suffered resulting problems suffice at the pleading stage.

Federal Officials and Prisons/Transfers/Habeas Corpus

Boyce v. Ashcroft, 251 F.3d 911 (10th Cir. 2001). 28 U.S.C. § 2241 is not the right procedure to challenge the constitutionality of plaintiff's transfer. Prisoners seeking to challenge placement within a given jurisdictional entity must use § 1983 or *Bivens*.

PLRA--Mental or Emotional Injury/Religion--Practices--Diet/Damages--Intangible Injuries, Punitive/Evidentiary Questions

Searles v. van Bebber, 251 F.3d 869 (10th Cir. 2001). The plaintiff was awarded compensatory damages and punitive damages after being denied a kosher diet. The court holds that the PLRA mental/emotional injury provision applies to first amendment claims. The PLRA does not restrict punitive damages. The evidence was sufficient to support punitive damages under the reckless disregard standard.

Procedural Due Process--Disciplinary Proceedings

Broussard v. Johnson, 253 F.3d 874 (5th Cir. 2001). The petitioner was convicted of possessing contraband, bolt cutters, intended for use in an escape, based on information from a confidential informant. The investigating officer who testified had not interviewed the informant personally, just relied on what the warden had said about him. The hearing officer did not allow the inmates to question the hearing officer about the informant's reliability, nor did the hearing officer receive evidence *in camera* on the subject.

The disciplinary board failed to independently assess the reliability of the informant's tip based on some underlying factual information before it can consider the evidence, although that requirement could have been met by additional documentation submitted outside the hearing.

The staff's finding of the bolt cutters does not support the decision because, when one ignores the informant's tip, the only evidence is the bolt cutters' presence in an area to which about 100 inmates had access.

Medical Care--Denial of Ordered Care/Medical Care--Standards of Liability--Deliberate Indifference/Waiver of Rights/Summary Judgment

Beck v. Skon, 253 F.3d 330 (8th Cir. 2001). The plaintiff's neurological condition led to a medical recommendation that he be placed closer to the cafeteria and infirmary. Because he didn't meet the security criteria for the unit closest to the cafeteria and did not have an acute or terminal

illness necessitating placement in a medical unit, prison officials offered to allow him to use a wheelchair to get to meals or have meals delivered to him. The plaintiff also had a hernia. Surgery was recommended but he refused to sign the forms. He also refused the recommendation of a truss.

Defendants were not deliberately indifferent. The plaintiff argued that the consent forms he was required to sign conditioned the procedure on all release of future liability. The consent forms weren't in the record, and the defendants denied the allegation only in a motion to supplement the record. At 334: ". . . [I]f prison officials indeed conditioned a necessary medical procedure on Beck's release of liability, their action could establish a deliberate indifference to Beck's Eighth Amendment rights to basic medical care."

Disabled/Mootness/State Officials and Agencies

Randolph v. Rodgers, 253 F.3d 342 (8th Cir. 2001). The deaf plaintiff alleged that defendants failed to provide a sign language interpreter during disciplinary proceedings, medical encounters, and on unspecified other occasions. Injunctive claims against officials at one prison, but not against the Commissioner were mooted when the plaintiff was transferred. The plaintiff may seek injunctive relief against the Commissioner in her individual capacity. If the state waived its Eleventh Amendment immunity to receive federal funds and if the waiver is valid under the Spending Clause, the plaintiff may seek damages under the Rehabilitation Act.

Statutes of Limitations/Denial of Ordered Care

Heard v. Sheahan, 253 F.3d 316 (7th Cir. 2001). The plaintiff developed a ruptured hernia and a doctor recommended surgery, which jail officials refused to act on. The district court dismissed on limitations grounds, holding that the limitations period ran from the time the prisoner knew he had a problem. That would be correct if the suit were for medical malpractice, but it is not; it is about medical neglect.

> This refusal continued for so long as the defendants had the power to do something about his condition, which is to say until he left the jail.
>
> . . . [A]ll the pain after the date of onset, as it were, of deliberate indifference was fair game for the plaintiff's suit, by virtue of the doctrine of "continuing violation" . . . .

The court then distinguishes the situation it describes from cases in which repeated events give rise to discrete injuries, as in suits for lost wages.

PLRA--Exhaustion of Administrative Remedies/Religion--Practices--Beards, Hair, Dress

Jackson v. District of Columbia, 254 F.3d 262 (D.C.Cir. 2001). Rastafarians and Sunni Muslims challenged a ban on beards and long hair under the First Amendment and RFRA.

The PLRA exhaustion requirement applies to RFRA. The defendants did not waive the exhaustion issue. There is no irreparable injury exception to the exhaustion requirement because it is unnecessary. The Supreme Court has long recognized that federal courts possess a "traditional power to issue injunctions to preserve the status quo while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction." Remedies must be exhausted before suit is filed; exhaustion before trial is not good enough.

What these seemingly contradictory holdings probably mean is that a plaintiff can bring an action to maintain the status quo pending exhaustion that is completely separate from the suit about the merits of the claim, which must be filed after exhaustion. Plaintiff Jackson said that he exhausted his remedies because he filed an informal complaint but never received a response, and you have to have a response to file a formal grievance. However, prison officials have 15 days to respond to an informal complaint, and he

didn't wait that long before filing suit.

Each individual plaintiff in a class-action suit need not have pursued the available administrative remedies 'if at least one member of the plaintiff class has met the filing prerequisite.' The complaint should have been dismissed without prejudice pending completion of grievance procedures.

Federal Officials and Agencies/PLRA--Exhaustion of Administrative Remedies/Administrative Segregation--High Security

Yousef v. Reno, 254 F.3d 1214 (10th Cir. 2001). The plaintiff, convicted of participation in the 1993 World Trade Center bombing, challenged his placement in administrative segregation in an isolated soundproof cell, supplemented by "Special Administrative Measures" ("SAMs") restricting his mail, telephone access, media access, visitors, religious materials, and recreation and exercise time. The plaintiff's claims are subject to the exhaustion requirement. The plaintiff's argument that the Bureau of Prisons administrative remedy procedure can't deal with SAMs because they are ordered by the Attorney General is rejected.

The BOP is authorized to rule on challenges to specific SAMs. Thus, despite the BOP's inability to address challenges to the SAM's overall validity, Mr. Yousef was required to exhaust all of his administrative remedies before seeking judicial consideration of his claims.

Federal Officials and Prisons/Medical Care -- Denial of Ordered Care/Discovery/Qualified Immunity

Garrett v. Stratman, 254 F.3d 946 (10th Cir. 2001). The plaintiff's shoulder was injured; he said his condition was ignored for two months, then an orthopedic consultant recommended reconstructive surgery. No surgical consult was ordered for another nine months, by which time the surgery could not be performed successfully. The clinical director said he "began the process" to transfer plaintiff for surgery, but he could only recommend a transfer and could not order it or have the surgery performed locally.

The questions whether the clinical director could be held liable and whether the plaintiff submitted sufficient evidence of actual harm for the delay are the kinds of evidence sufficiency questions not reviewable on a qualified immunity appeal.

Homosexuals and Transsexuals/Protection from Inmate Assault/Personal Involvement and Supervisory Liability

Doe v. Bowles, 254 F.3d 617 (6th Cir. 2001). The plaintiff, biologically male, diagnosed with a gender identity disorder and with feminine characteristics, dressed as a woman but was placed in a male prison, was attacked in the protective custody unit by a prisoner was in PC but had a violent record. Plaintiff reported the attack. Nothing was done and she was attacked twice more.

Defendants did not dispute knowledge of the risk. A captain to whom the first assault was reported could not be held deliberately indifferent because he took steps to address the danger: he asked the reporting officer if the prisoners should be formally segregated and the officer said that wasn't necessary. As to the officer who said segregation was not necessary, and whom the plaintiff said she gave all the details about the physical attack and threats, there was a sufficient issue of material fact that the court could not review the qualified immunity claim.

U.S. District Court Cases

PLRA--Exhaustion of Administrative Remedies/Class Actions--Certification of Classes/Protective Custody/Pleading

Graham v. Perez, 121 F.Supp.2d 317 (S.D.N.Y. 2000). The plaintiffs complained of conditions in protective custody. The case is dismissed for non-exhaustion. Even if one

plaintiff's letters of complaint were adequate to exhaust (which they probably are not), he would be barred because he sent the last complaint letter the same day he filed suit. At 322: "In seeking to file an untimely grievance, plaintiff must offer an explanation for his failure to file a timely grievance." If he doesn't get the exception, he may refile his suit explaining his failure to file a timely grievance, his efforts to file a later grievance, and the alleged mitigating circumstances justifying his failure.

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

Williams v. Wilkinson, 122 F.Supp.2d 894 (S.D.Ohio 2000). The plaintiff was disciplined based on a drug test; he said that the finding was based on someone else's urine sample (which the other prisoner confirms). He was not allowed to call the other prisoner as a witness, apparently because the hearing board decided he would not be credible.

Plaintiff's claim that he was improperly denied a witness is not a claim that he is innocent of the charge, and he is not seeking invalidation of the charge, so *Heck v. Humphrey* is not relevant. In the Sixth Circuit, the state of mind requirement for a procedural due process violation is intentional or deliberately indifferent conduct, and the standard is an objective one. The "objective intent" requirement is satisfied by the fact that defendants intentionally disallowed plaintiff's witnesses.

PLRA--Termination of Judgments

Martin v. Ellandson, 122 F.Supp.2d 1017 (S.D.Iowa 2000). Defendants moved to terminate a law library injunction from the 1970s. They stopped updating the law library except for statutes and regulations and contracted with the state public defender to provide legal services. The relief is terminable because the requisite findings were not made back in 1974. The plaintiffs are not entitled to a hearing because plaintiffs had not alleged "specific facts which, if true, would amount to a current and ongoing constitutional violation. Judgment terminated.

Medication

Flowers v. Bennett, 123 F.Supp.2d 595 (N.D.Ala. 2000). The plaintiff was arrested and told jail personnel she would need insulin that night; however, the jail had the wrong kind of insulin. The plaintiff was placed on "medical watch." A certified nursing assistant was present in the jail. Early that morning, the plaintiff was hospitalized with diabetic ketoacidosis. The plaintiff's allegations raise a material question of fact.

Recreation and Exercise/Emergency/Cruel and Unusual Punishment

Delaney v. DeTella, 123 F.Supp.2d 429 (N.D.Ill. 2000). The plaintiff was in segregation during a lockdown which resulted in a six-month deprivation of yard time. His only alternative was exercises within his cell. Ordinarily, segregation prisoners got one hour a week during their first 90 days and five hours a week thereafter. The six-month denial of exercise was long enough to state an Eighth Amendment claim regardless of its proffered justification.

Contempt/Crowding/Intake

Morales Feliciano v. Rosello Gonzales, 124 F.Supp.2d 774 (D.P.R. 2000). After findings of unconstitutional overcrowding, the court adopted a stipulation that detention cells, holding pens or admission areas would be used only for temporary detention and transfer purposes, and no one could be held in them for more than 24 hours, and they must be under constant supervision to ensure that their safety and hygienic needs are met.

The court observes that admission cells, holding cells, and detention cells lack features that make housing units habitable, e.g. toilets, beds, bathing or washing facilities, etc. They also house inmates at a "particularly susceptible period of their correctional tenure," since they come

directly from the street.

Holding prisoners for up to 14 days in overcrowded admission cells, sleeping on the floor without mattresses or bedding, without adequate toilet facilities, under grossly unsanitary conditions, without adequate personal hygiene supplies, with no sick call or limited access to sick call, no drug withdrawal treatment, inadequate security surveillance, etc., constituted contempt of the court's prior orders. The court rejects the defense of substantial compliance.

Searches--Person--Arrestees

Mason v. Village of Babylon, 124 F.Supp.2d 807 (E.D.N.Y. 2000). Strip searches incident to arrest must be justified by facts pertaining to the particular arrest, such as the nature of the charge or other circumstances, but cannot be justified by factors relating to the correctional facility. Therefore the commingling of misdemeanor arrestees with the general jail population does not justify a blanket strip search policy. Even less than a full strip search, absent justification for the intrusion, is unreasonable. The unconstitutionality of blanket strip search policies is clearly established.

Use of Force/Trial/Evidentiary Questions

Ruffin v. Fuller, 125 F.Supp.2d 105 (S.D.N.Y. 2000). The plaintiff said he was kicked in the face several times by staff while lying on the floor in the SHU, breaking his teeth and filling his mouth with blood. The officers said the plaintiff attacked them without provocation and he must have hurt his mouth when he hit the floor, or maybe his bed. The incident was videotaped; however, only an edited version of the tape was preserved. A maxillofacial surgeon testified that the plaintiff's injuries could not have occurred as a result of a single blow or impact such as a fall. A jury found for the defendants. The court grants a new trial because the jury's verdict is against the weight of the evidence.

PLRA--Exhaustion of Administrative Remedies/Use of Force/Procedural Due Process--Disciplinary Proceedings/Habeas Corpus/Negligence, Deliberate Indifference and Intent/Personal Involvement

Concepcion v. Morton, 125 F.Supp.2d 111 (D.N.J. 2000). A remedy system set up at the individual prison level is not a remedy that must be exhausted under the PLRA; the statute only addresses department-wide remedies. The court relies on the fact that regulations do not authorize the promulgation of an administrative remedy system.

The court concludes that the evidence of force used against the plaintiffs initially, after they had assaulted staff members, does not raise a material factual issue under the Eighth Amendment. However, after they were restrained, the urgency to restore order had abated. One plaintiff's testimony that he was kicked in the face, lifted off his feet by his handcuffs, and hit in the face with a stick while restrained does present a factual issue for a jury. The same is true of the second plaintiff's testimony that he was dropped on his face from a height of several feet and then kicked.

Federal Officials and Prisons/Exhaustion of Remedies/Protection from Inmate Assault/Classification--Pre-Trial vs. Convicted/Service of Process

Palay v. United States, 125 F.Supp.2d 855 (N.D.Ill. 2000). The plaintiff sued under the Federal Tort Claims Act alleging that prison staff negligently permitted him to be injured as a result of a gang fight in which he was not involved, and that he did not receive proper medical treatment.

His complaint alleged that he was negligently reassigned from a pretrial unit to a holdover unit which contained members of rival gangs. The government said he hadn't exhausted his negligent reassignment claim. At 859: "Nevertheless, a plaintiff is not required to plead legal theories in the administrative claim, or set forth facts that were at least as well known to MCC officials as to Palay. All that is required is

'sufficient notice to enable the agency to investigate the claim.'" However, the administrative claim did not sufficiently allege medical malpractice or deficient medical care.

The plaintiff's assertion that he was negligently reassigned to holdover status and unnecessarily exposed to harm stated a claim. However, the claim appears to be barred by the discretionary function exemption, which applies even to lower-level operational personnel if their conduct involves an element of judgment or choice. The plaintiff was a detainee and Bureau of Prisons regulations call for detainees' separation from convicts "to the extent practicable" from sentenced persons. But it allows discretion to defendants. Also, it may not support a tort claim under state law.

The court declines to dismiss based on the plaintiff's failure to serve process on the United States within 120 days; such dismissal is discretionary even without good cause, and the plaintiff was an incarcerated layman who didn't know whom he had to serve.

PLRA--Exhaustion of Administrative Remedies

Johnson v. True, 125 F.Supp.2d 186 (W.D.Va. 2000). The PLRA exhaustion requirement is not jurisdictional. At 188: There is "[n]othing in the language or legislative history of the PLRA's amendments to section 1997e(a) [that] supports a 'total' exhaustion requirement." The plaintiff alleges that "to the extent some of his claims were not fully prosecuted through the various levels of the grievance procedure, his efforts to so exhaust his administrative remedies were frustrated by prison officials. . . ." The plaintiff's allegations create a factual issue barring dismissal. Even if the plaintiff had adequate access to the grievance procedure, relegating him to that procedure now would be futile because his claims would be time-barred under defendants' 30-day time limit and exhaustion would be futile.

Pre-Trial Detainees/Use of Force

Watford v. Bruce, 126 F.Supp.2d 425 (E.D.Va. 2001). The plaintiff alleged that he sustained bruising, scarring and swelling from an unprovoked attack by an officer. Fourth Circuit law seems to support the argument that such injury is *de minimis* and not actionable. The court says that such a conclusion would be contrary to *Hudson v. McMillian*, which in its invocation of a *de minimis* standard "is referring to trivial use of force as distinct from categorizing injuries as severe, moderate or trivial." The court applies the Eighth Amendment to this detainee case without discussion.

Hazardous Conditions and Substances/Cruel and Unusual Punishment/Disabled

McIntyre v. Robinson, 126 F.Supp.2d 394 (D.Md. 2000). Defendants had issued a directive to designate smoking areas and then banned all indoor smoking in state prisons. The plaintiffs alleged and submitted evidence showing that smoking was still prevalent in the prisons and was affecting their health.

The plaintiffs have alleged the violation of a clearly established right in light of *Helling*. However, there is a question whether a reasonable person would have had knowledge that conditions in the prisons actually violated that right; each damage claimant must show that he or she has a serious medical condition, that defendants knew of them and of their seriousness, and that the defendants were personally responsible for the conditions.

Defendants are entitled to qualified immunity from damages. The plaintiffs are not entitled to summary judgment under the disability statutes. Under those statutes, the plaintiffs need to establish the elements of an Eighth Amendment violation such as violation of contemporary standards of decency.

PLRA--Prospective Relief Restrictions--Settlements/Procedural Due Process--Disciplinary Proceedings/Class Actions--Settlement, Conduct of Actions

Heit v. van Ochten, 126 F.Supp.2d 487 (W.D.Mich. 2001). The court approves settlement of a challenge to disciplinary procedures. Prison officials kept statistical records of the decisions of Administrative Law Judges and allegedly used disciplinary threats against ALJ's to keep the conviction rates high. The settlement forbids prison officials from keeping statistics on dispositions for individual hearing officers, from threatening hearing officers with personnel action because of the percentages of decisions favorable to the plaintiffs, and from communicating with them about hearing results outside of the rehearing process, and requires the hearing officers to log any such communications. It also directs hearing officers to refrain from automatically crediting testimony of staff over prisoners and to set forth the basis for their credibility determinations. The settlement does not provide injunctive relief but allows reinstatement of the case within one year if the settlement isn't followed.

Searches--Person--Arrestees/Suicide Prevention/Pre-Trial Detainees/Deference

Wilson v. City of Kalamazoo, 127 F.Supp.2d 855 (W.D.Mich. 2000). The plaintiffs are arrestees who refused to answer suicide screening questions. They were treated as posing a suicide risk and were placed in a cell completely naked for periods from 6 to 18 hours, subjected to video surveillance and in most cases viewed by opposite sex officers. They were supposed to be given "suicide gowns" but none were available.

Under *Wolfish*, the facts alleged state a Fourth Amendment claim. Under *Turner v. Safley*, this appears to be a readily available alternative to stripping them entirely. There is also a Fourteenth Amendment privacy claim, even though the allegations "only arguably make out a denial of the 'minimal civilized measure of life's necessities.'"

Medical Records/Standing/Mootness/Mental Health Care/Assistance of Counsel/Injunctive Relief

The Advocacy Center v. Stalder, 128 F.Supp.2d 358 (M.D.La. 1999). The plaintiff, a Protection and Advocacy organization formed under the PAMII legislation, sought medical records of a complaining prisoner, and were refused based on a state statute that required them to obtain a court order first.

The release of the prisoner does not moot the case. The plaintiff organization has standing to bring suit for the records and has suffered a direct injury to its statutory interest.
Compliance with the court's temporary restraining order does not moot the issue. The plaintiff's allegations of PAMII violation state a claim under § 1983. The plaintiff is entitled to the records. To the extent that state statutes and policies promulgated under them are inconsistent with PAMII, they are pre-empted. The court grants a permanent injunction requiring the defendants to comply with PAMII.

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

Castellano v. Chicago P.D., 129 F.Supp.2d 1184 (N.D.Ill. 2001). The plaintiff, who had had a serious leg injury, was forced to stand, walk, and/or hop for several hours after he was arrested and the police refused to retrieve his crutches. Upon entering jail, he had to do the same for several hours until he was given crutches.

Allegations that the plaintiff told the defendants about the serious pain in his leg and repeatedly asked for treatment, but he was kept in the segregation unit for several days without treatment, and segregation officers ignored or mocked him, support a claim of deliberate indifference. Allegations that health care unit staff twice transferred him out of that unit without medical attention sufficiently allege intentional denial of medical care.

Homosexuals and Transsexuals/Medical Care--Standards of Liability--Deliberate

Indifference and Serious Medical Needs/Statutes of Limitations/Res Judicata and Collateral Estoppel/PLRA--Mental or Physical Injury/Pendent and Supplemental Claims; State Law in Federal Courts

Wolfe v. Horn, 130 F.Supp.2d 648 (E.D.Pa. 2001). The plaintiff, a pre-operative male-to-female transsexual, was undergoing a course of hormone therapy at the time she was incarcerated. A prison doctor discontinued her hormones abruptly.

Transsexualism is a serious medical need. At 653: "Moreover, abrupt termination of prescribed hormonal treatments by a prison official with no understanding of Wolfe's condition, and failure to treat her severe withdrawal symptoms or after-effects, could constitute 'deliberate indifference.'" There is a rational basis for letting prisoners wear long hair for religious reasons in a male prison while denying that right to a transsexual.

The plaintiff's allegations that after her hormones were terminated she suffered headaches, nausea, vomiting, cramps, hot flashes, hair loss, reduced breast size, increased body hair, and lowered voice, resulting in her becoming depressed and suicidal, constitute direct physical injuries, for purposes of PLRA.

The existence of a deliberate indifference claim means that there is a state law malpractice claim. Such a claim must be supported by expert testimony that the disputed treatment fell below the applicable standard of care, to a reasonable degree of medical certainty. The plaintiff's expert reports created factual questions on those points even though they didn't use those "magic words."

Federal Officials and Prisons/Statutes of Limitations/Habeas Corpus/PLRA--Mental or Emotional Injury/Criminal Prosecution

Turner v. Schultz, 130 F.Supp.2d 1216 (D.Colo. 2001). The plaintiff alleged that he was assaulted and maliciously criminally prosecuted by a gang of guards in the federal prison who falsified evidence against prisoners to cover up their own misconduct (the defendants are among the "Cowboys" of Colorado). The statute of limitations for the claim was tolled while he was under indictment.

The malicious prosecution claim is barred by PLRA because the plaintiff did not allege physical injury in connection with the criminal prosecution. The court dismisses the claims. The defendants who didn't move under the PLRA are entitled to qualified immunity.

Medical Care/PLRA--In Forma Pauperis Procedures/Statutes of Limitations/Municipalities/Modification of Judgments/Pro Se Litigation/Color of Law/Service of Process

Gil v. Vogilano, 131 F.Supp.2d 486 (S.D.N.Y. 2001). The plaintiff fell in the shower and his back and heel injuries were not treated. After he was convicted and in state custody he was found to have bone deterioration caused by infection.

The plaintiff failed to complete the IFP procedures required by the PLRA and his first complaint was dismissed. Later, he filed a second, more or less identical complaint, and got the PLRA paperwork right. However, the limitations period had expired. The court construes his response to defendants' motion to dismiss as a request for relief under Rule 60(b)(6) from the initial judgment of dismissal and for the application of equitable tolling to avoid the statute of limitations. The court directs that the initial action be reopened, reassigned to this court, and consolidated with this action, so it doesn't need to reach the equitable tolling question.

The plaintiff did not explicitly allege the existence of a municipal custom or policy. The court rejects the argument that such a claim cannot be based on a single plaintiff's experience. The fact that the county contracted with a private corporation for medical care did not save it from liability. The plaintiff relied on the Marshals to serve his amended complaint, but it didn't happen because the court didn't receive it. The court

gives him more time to serve process.

Standing/Procedural Due Process--Disciplinary Proceedings/PLRA--Prospective Relief Restrictions--Entry of Relief/Personal Involvement and Supervisory Liability/Injunctive Relief

Williams v. Wilkinson, 132 F.Supp.2d 601 (S.D.Ohio 2001). The plaintiff was denied a witness at a disciplinary hearing because the Rules Infraction Board decided he would not be credible. A jury awarded damages. After a subsequent hearing on the injunctive claim, the court finds that, though written policy concerning witnesses conforms to *Wolff*, unwritten policy was to exclude witnesses based on a pre-judgment of credibility. The plaintiff has standing to seek an injunction. The court distinguishes *Lyons*.

Defendants said that the prospective relief provisions of the PLRA prevented the court from entering relief except as to him individually, and that because there was a new warden relief could not be entered without evidence that the new warden had violated the law. The court rejects those arguments.

False Imprisonment/Evidentiary Questions/Negligence, Deliberate Indifference and Intent

Johnson v. Herman, 132 F.Supp.2d 1130 (N.D.Ind. 2001). The plaintiff was kept in jail for an extra 17 days, despite 14 inquiries. Jail personnel called the court to determine whether he should be incarcerated, and an unknown member of the judicial staff supposedly said to keep him locked up until the court determined otherwise.

An affidavit by a jail staff member recounting the conversation with the unknown judicial employee is admissible, not to establish the truth of its assertion, but to negate deliberate indifference and show what jail staff did in response to plaintiff's complaints.

Under state law, the sheriff had no authority to hold the plaintiff for the 17 days. The failure of jail staff to investigate the plaintiff's complaints supports an inference of deliberate indifference against them individually. A jury could find that waiting 18 days to make the first inquiry and then relying on an unknown judicial staff person's statement established deliberate indifference. The jail staff were not entitled to qualified immunity, since it is clearly established that incarcerating someone without a judicial order is unconstitutional.

Color of Law/Medical Care--Standards of Liability--Serious Medical Needs and Deliberate Indifference/Disabled/Medical Care--Staffing--Qualifications of Personnel and Denial of Ordered Care

Palermo v. Correctional Medical Services, Inc., 133 F.Supp.2d 1348 (S.D.Fla. 2001). Several prisoners complained about the care received from a private medical provider. The court grants summary judgment against all but one of them.

Failure to refer a prisoner with a back problem to a spine specialist and refusal to authorize a wheelchair even though crutches hurt the plaintiff's armpits involve only medical judgement. A prisoner determined to be in urgent need of a bone graft had a serious medical need. Seven months passed before the surgery was approved, and then four months later a decision was made to cancel the surgery. The delay presents a genuine issue as to deliberate indifference, though the court does not suggest that the decision to cancel surgery is actionable. Orthopedic shoes for a prisoner experiencing foot pain are not a serious medical need.

A private medical care corporation cannot have a policy of deliberate indifference if government officials impose policy on it, though they may be able to have a custom of deliberate indifference. There is a jury question whether there is a custom of denying or delaying surgery.

Communication with Media/Federal Officials

and Prisons/Deference

Entertainment Network, Inc. v. Lappin, 134 F.Supp.2d 1002 (S.D.Ind. 2001). The plaintiff wanted to record and broadcast the execution of Timothy McVeigh. The restriction is not content-based. Anyway, *Turner v. Safley* applies; even though the plaintiff is not a prisoner.

Visiting--Conditions/Damages--Intangible Injuries, Punitive/Hygiene

Glaspy v. Malicoat, 134 F.Supp.2d 890 (W.D.Mich. 2001). The defendant correctional officer refused to permit a prison visitor to use the restroom despite repeated requests, with predictable results. The ostensible reason was that the count was going on, but there is no rule against visitors' using the bathroom during the count. The plaintiff's Fourteenth Amendment rights were violated. The deliberate indifference standard is applicable.

Survival of Actions and Wrongful Death Litigation/Pendent and Supplemental Claims; State Law in Federal Courts

Gonzalez Rodriguez v. Alvarado, 134 F.Supp.2d 451 (D.P.R. 2001). The decedent died in prison. His mother lacks standing to bring a § 1983 suit based on loss of the family relationship with her son.

Food/Federal Officials and Prisons/Refusal of Treatment/Deference

In re Soliman, 134 F.Supp.2d 1238 (N.D.Ala. 2001). The petitioner is subject to indefinite detention pursuant to a final order of removal. He went on a hunger strike and was force-fed. The *Turner* standard is applicable. There is a valid, rational connection between force-feeding and keeping him alive, and also with orderly operations.

PLRA--Three Strikes Provision/Standing

Lewis v. Sullivan, 135 F.Supp.2d 954 (W.D.Wis. 2001). The court holds that the three strikes provision unconstitutionally restricts court access unless read to affect only non-constitutional claims. The plaintiff has standing because he can't file his case without paying a fee that exceeds his monthly income.
The usual justification for deferring to prison regulations under *Turner* is not present when considering federal statutes.

PLRA--Prospective Relief Restrictions--Preliminary Injunctions/Religion--Services Within Institutions/Injunctive Relief--Preliminary

Mayweathers v. Terhune, 136 F.Supp.2d 1152 (E.D.Cal. 2001). The court grants its third successive preliminary injunction allowing Muslim prisoners to attend Jumu'ah services. The court rejects the defendants' argument that successive injunctions cannot be granted under the PLRA.

Sexual Abuse/Women/Color of Law/Municipalities/Grievances and Complaints about Prison/State Law Immunities

Paz v. Weir, 137 F.Supp.2d 782 (S.D.Tex. 2001). The plaintiff alleged that she was sexually abused by the jail chaplain, for whom she was working. The court notes that provision of ministerial services is required by state law and that the Sheriff's Department determined who was allowed access to the Jail. The chaplain, was acting under color of state law.

Even without state action by the chaplain, the County could be held liable for his conduct based on a constitutional failure to protect theory. The County argued that the sexual activity was consensual. These circumstances raise an issue of consent under those Texas criminal laws regarding clergy and public servants.

The jail administrator was the relevant policymaker for plaintiff's *Monell* claim, "as he was authorized by the Sheriff to make policy for the Jail, drafted the Standing Policies for Inmate Management, and approved the Ministries' operational procedures."

Procedural Due Process--Disciplinary Proceedings/Grievances and Complaints about Prison/Federal Officials and Prisons/Habeas Corpus/Exhaustion of Remedies

Hinebaugh v. Wiley, 137 F.Supp.2d 69 (N.D.N.Y. 2001). The petitioner challenged loss of good time allegedly caused by discipline done in retaliation. The court rejects the argument that habeas will not lie. Restoration of good time and expungement of the disciplinary record would accelerate the petitioner's release.

Failure to exhaust administrative remedies may be excused under the "cause and prejudice" standard. The plaintiff's claim that his legal files were confiscated and not returned for 14 months meets that standard. Challenges to disciplinary proceedings that resulted only in loss of privileges, not in the deprivation of liberty interests, can be pursued via habeas corpus if it appears that they were relied on in imposing a later sanction that directly affects the terms and duration of confinement.

PLRA--Mental or Emotional Injury; Waiver of Reply/Mootness

Shaheed-Muhammad v. DiPaolo, 138 F.Supp.2d 99 (D.Mass. 2001). The plaintiff alleged various denials of his religious rights and retaliation against him for asserting them. The PLRA mental/emotional injury provision does not cover the claims alleged by Muhammad because the harms proscribed by the First Amendment, Due Process, or Equal Protection are assaults on individual freedom and personal liberty, even on spiritual autonomy, and not on physical well-being.

Where the harm that is constitutionally actionable *is* physical or emotional injury occasioned by a violation of rights, § 1997e(e) applies. In contrast, where the harm that is constitutionally actionable is the violation of intangible rights--regardless of actual physical or emotional injury--section 1997e(e) does not govern.

Procedural Due Process--Disciplinary Proceedings/Evidentiary Questions/Use of Force--Restraints

Laws v. Cleaver, 140 F.Supp.2d 145 (D.Conn. 2001). The plaintiff was summoned to a disciplinary hearing, got there late, and discovered he had been found guilty. He asked to be heard and was maced and then beaten and stomped. He was placed in four-point restraints. A jury ruled in his favor on the due process clause and against him on the use of force claim.

The deprivation of good time credits did not deprive the plaintiff of a liberty interest under *Sandin*. Although state law created such an interest, the credits were restored on administrative appeal. Four hours in four-point restraints did not make the disciplinary determination atypical and significant, since it was not claimed to result from the disciplinary determination.

The court correctly excluded evidence that one of the defendants had previously been disciplined for failing to report an incident in which white guards had hung a noose from the ceiling in the presence of an African-American inmate. It was barred by Rule 404(b) (other crimes, wrongs, etc.)

Use of Force/Evidentiary Questions/PLRA--Mental or Emotional Injury/Damages--Assault and Injury

Romaine v. Rawson, 140 F.Supp.2d 204 (N.D.N.Y. 2001). The court finds for plaintiff after a bench trial on his use of force claim. The plaintiff was slapped or struck three times in the face by an officer; he claimed pain, and hearing loss, but the court found there wasn't any of the latter. The force was *de minimis*, but nonetheless "repugnant to the conscience of mankind" because Defendant struck Plaintiff in a situation where all parties admit that force was not necessary. "Minor" physical injuries are sufficient to support an award of damages for mental or emotional injury under the PLRA.

Use of Force/Medical Care/Municipalities/State Officials and Agencies/Pendent and Supplemental Claims; State Law in Federal Courts

Ramsey v. Schaube, 141 F.Supp.2d 584 (W.D.N.C. 2001). The plaintiff alleged that his fingertip was severed when a jail staff member forcefully slammed a cell window closed on it, that medical care was delayed, and that jail staff would not release his prescribed medication. These allegations state a claim against the Sheriff. Plaintiff's official capacity claim against the Sheriff is not barred by the Eleventh Amendment because a North Carolina sheriff is a local officer.

Searches--Person--Convicts/Sexual Abuse/Grievances and Complaints about Prison/Federal Officials and Prisons/Pleading/Deference/Cruel and Unusual Punishment--Proof of Harm/Negligence, Deliberate Indifference, and Intent/Staffing--Sex

Colman v. Vasquez, 142 F.Supp.2d 226 (D.Conn. 2001). The plaintiff alleged that she was harassed and sexually abused by a staff member and also challenged the use of cross-gender pat frisks in the "sexual trauma unit" to which she had been assigned.

The court rejects defendants' argument that there is no Fourth Amendment claim for cross-gender pat frisks. Defendants are also not entitled to qualified immunity on the ground that the right is not clearly established.

The plaintiff's allegations also implicate the Eighth Amendment to the extent that the searches are alleged to have caused extreme emotional distress due to the plaintiff's history of sexual trauma. Claims against supervisors for failure to protect from sexual assault (by staff as well as other inmates) are subject to the deliberate indifference standard. Plaintiffs' allegation that they did not conduct a meaningful investigation of her complaints sufficiently stated a claim given that she continued to be subjected to the officer's sexual harassment during that time. The law was sufficiently established to defeat a qualified immunity defense.

Recreation and Exercise/PLRA--Mental or Emotional Injury/Use of Force--Restraints/Qualified Immunity

Williams v. Goord, 142 F.Supp.2d 416 (S.D.N.Y. 2001). The plaintiff complained that while in SHU he was placed in mechanical restraints during recreation for 28 days.

Exercise is a basic need provided by the Eighth Amendment. However, "a plaintiff must show that he was denied all meaningful exercise for a substantial period of time. . . . Factors to consider in making this determination are: (1) the duration of the deprivation; (2) the extent of the deprivation; (3) the availability of other out-of-cell activities; (4) the opportunity for in-cell exercise; and (5) the justification for the deprivation." (425) Summary judgment has been granted to plaintiffs in cases of very long deprivation of exercise and to defendants in cases involving short deprivations. This claim is in between. In addition, there is a factual dispute whether the plaintiff could engage in meaningful exercise in restraints. Summary judgment is also inappropriate as to whether defendants were deliberately indifferent to a serious risk of harm.

The right to some out-of-cell exercise is clearly established, though there is a "safety exception" which is "limited to unusual circumstances or circumstances in which exercise is impossible because of disciplinary needs." But even an unusual security risk cannot be subjected to a blanket policy of denial of exercise. Since there is a factual dispute whether the plaintiff was denied all meaningful exercise, the supervisory defendants are not entitled to summary judgment on qualified immunity. Indeed, a finding of deliberate indifference would be incompatible with qualified immunity. The line staff are entitled to qualified immunity. The question whether plaintiff actually suffered a 'physical injury' under the Prison Litigation Reform Act ('PLRA'), § 42 U.S.C. § 1997e, is a question of

fact for the jury.

Color of Law/Medical Care/Personal Involvement and Supervisory Liability/Damages--Punitive

Segler v. Clark County, 142 F.Supp.2d 1264 (D.Nev. 2001). A private medical care provider (EMSA in this case) is not a municipality, and punitive damages may be assessed against it. The plaintiff needn't show that he was injured as a result of a corporate policy.

Non-Prison Cases

U.S. Court of Appeals Cases

Communication and Expression

United States v. Loy, 237 F.3d 251 (3d Cir. 2001). The defendant, convicted of possessing child pornography, was forbidden as a condition of post-incarceration supervised release to possess any pornography, child or otherwise. The court rejects the government's position that the condition isn't ripe for judicial review until it is enforced. The court also rejects the view that the plaintiff lacks standing.

To comport with First Amendment standards, the release condition concerning pornography must be narrowly tailored to serve the goals of rehabilitation and protection of the public. The government's argument that supervised release conditions are akin to prison conditions is "patently without merit," rejected since it contradicts *Morrissey v. Brewer*'s statement about the difference between parole and prison (264 n. 5). The term "pornography" is so vague that the defendant is likely to avoid materials not necessary for rehabilitation and deterrence. Imposing a scienter requirement does not mitigate the vagueness. Nor does advising the defendant to consult his probation officer about particular items, since this gives the probation officer an unfettered power of interpretation.

Municipalities/Personal Involvement and Supervisory Liability/Negligence, Deliberate Indifference and Intent

Trigalet v. City of Tulsa, Okla., 239 F.3d 1150 (10th Cir. 2001). A municipality cannot be held liable for a constitutional violation under § 1983 unless there is a violation by individual officers.

Qualified Immunity/Use of Force/Personal Involvement and Supervisory Liability

Johnson v. Newburgh Enlarged School Dist., 239 F.3d 246 (2d Cir. 2001). The plaintiff eighth grade student alleged that his gym teacher choked him, slammed his head repeatedly against bleachers and then against a metal fuse box, and punched him in the face. The court applies the *Johnson v. Glick* balancing test to this "non-seizure, non-prisoner context" force case. The teacher is not entitled to qualified immunity despite the absence of precedent stating that teachers can't strike students.

The complaint alleged that the principal and superintendent knew of prior assaults but did not act on those reports. If those allegations are proved, a jury could find the supervisors liable as "either grossly negligent in supervising" or deliberately indifferent to the students' rights by failing to act on information that unconstitutional acts were occurring.

Use of Force--Restraints/State Law Immunities/Municipalities

Cruz v. City of Laramie, Wyo., 239 F.3d 1183 (10th Cir. 2001). Hog-tying an obviously mentally deranged suspect constituted excessive force, though the individual defendants were entitled to qualified immunity because it was not clearly established that such conduct was unlawful. However, defendants are not entitled to immunity under state law because their conduct was not reasonable.

Evidence that the municipality failed to train officers in the use of hobble restraints even

though they were available in police cars, and that high-ranking officials were aware of positional asphyxia attributable to them, raised an issue of material fact as to municipal deliberate indifference.

Pleading/Qualified Immunity

Currier v. Doran, 242 F.3d 905 (10th Cir. 2001). The court concludes that the Supreme Court decision in *Crawford-El v. Britton* overrules its requirement of heightened pleading in civil rights cases in which a qualified immunity defense is pled.

Indemnification

Navarro v. Block, 250 F.3d 729 (9th Cir. 2001). An allegation that decisions by the county Board of Supervisors to indemnify deputy sheriffs were made in bad faith and proximately caused a violation of the plaintiff's constitutional rights stated a claim and the defendants were not entitled to qualified immunity at the pleading stage.

Use of Force/Survival of Actions and Wrongful Death Litigation/Pendent and Supplement Claims; State Law in Federal Court/Pre-Trial Detainees/Mental Health Care/Evidentiary Questions

Andrews v. Neer, 253 F.3d 1052 (10th Cir. 2001). The decedent was found not guilty by reason of insanity and was committed to a mental hospital. He caused a ruckus and was restrained from five to 20 minutes by aides. He was placed in leather restraints and died; his autopsy was consistent with compression of the airway. Suit was brought by his daughter in her own name.

The plaintiff had standing to pursue a § 1983 claim for her father's death, even though she had not been appointed by the personal representative of the estate. The state wrongful death statute, which permits survivors to recover for the decedent's loss and not just their own, provides the only cause of action where the injury caused death and governs this § 1983 action and permits the action to survive.

U.S. District Court Cases

Pendent and Supplementary Jurisdiction; State Law in Federal Courts/Indemnification

Childress v. Williams, 121 F.Supp.2d 1094 (E.D.Mich. 2000). The federal court had ancillary jurisdiction over a garnishment action by a prevailing § 1983 plaintiff against a municipality which employed a police officer against whom he had obtained a judgment.

Evidentiary Questions/Use of Force/Indemnification

Munley v. Carlson, 125 F.Supp.2d 1117 (N.D.Ill. 2000). In a police brutality case, evidence pertaining to prior, unrelated disciplinary actions against the arresting officer is held inadmissible in the absence of a showing of any purpose other than to show that the officer acted in conformity with his character, which is forbidden by Rule 404(b), Fed.R.Ev.

Existence of liability insurance is inadmissible, but if the defendant officer offers evidence, testimony, or argument about his financial circumstances or inability to pay a judgment, liability insurance can come in as rebuttal evidence.

Use of Force--Restraints

Johnson v. City of Ecorse, 137 F.Supp.2d 886 (E.D.Mich. 2001). The plaintiff, who had a pre-existing deformity of his wrist, complained of being handcuffed too tightly and being pulled, kicked, and pushed during an arrest. These allegations would not state a claim absent injury, but the injury need not be significant, and unspecified injuries to his ankles from kicks and to his wrists from the handcuffs met the injury requirement.

Use of Force/Evidentiary Questions/Municipalities/State Law

Immunities

Wright v. City of Canton, Ohio, 138 F.Supp.2d 955 (N.D.Ohio 2001). The plaintiff arrestee suffered massive injuries in police custody. The police said he fell down, though the details of their claim changed as the extent of injury became known. The emergency room doctor who treated him was competent to offer an opinion as to whether the injuries were consistent with the cops' story, notwithstanding defendants' argument that only a forensic scientist or a biomechanical engineer could offer such an opinion.

The police chief's approval of the internal investigation which found no excessive force "constitutes municipal policy" because the police chief was the policymaker, and a reasonable juror could conclude that this constituted ratification of defendants' misconduct.

Religion/Drug Dependency Treatment/Waiver of Rights/Personal Involvement and Supervisory Liability

Bausch v. Sumiec, 139 F.Supp.2d 1029 (E.D.Wis. 2001). The plaintiff parolee argued that compelling his participation in a religiously-oriented substance abuse treatment program violated the Establishment Clause. His claim is governed by the "coercion test": "(1) whether there was state action; (2) whether the action amounted to coercion; and (3) whether the object of the coercion was religious or secular." (1033)

Because participation in the program was presented to plaintiff as a condition of remaining out of prison, defendants are not entitled to summary judgment. The Secretary of Correction waited three years before promulgating a directive implementing the Seventh Circuit decision on this point. A jury could find that this dereliction caused line staff to violate the plaintiff's rights.

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