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Court Orders Immediate Remedies for Deplorable Conditions on Mississippi's Death Row

Ruling in a lawsuit brought by the American Civil Liberties Union, a federal magistrate judge ruled in May that conditions on Mississippi's death row inflict cruel and unusual punishment on the prisoners confined there and ordered the state to end its brutal practices.

"No matter how heinous the crime committed, there is no excuse for such living conditions," the court said in a strongly worded ruling. "It is the duty of the State of Mississippi to meet these minimal standards of decency, health and well-being."

Margaret Winter, Associate Director of the ACLU's National Prison Project, welcomed the ruling. "This decision upholds the basic principle that the state must not needlessly, wantonly inflict pain on any human being -- not even a prisoner condemned to death."

The order, issued by U.S. Magistrate Judge Jerry A. Davis in the Northern District of Mississippi, results from a case filed last July by the ACLU's National Prison Project and Holland & Knight on behalf of the death row prisoners housed in Unit 32 of the State Penitentiary in Parchman.

"The isolation of Death Row, along with the inmates' pending sentences of death and the conditions at Unit 32 C, are enough to weaken even the strongest individual," Judge Davis said. "If the state is going to exact the ultimate penalty against these inmates, then it must meet the mental health needs of each Death Row inmate and not merely warehouse them."

The ACLU first learned of the prisoners' complaints last year when they sought relief from the filthy, mosquito-infested and dangerously hot isolation cells in which they lived for many years while pursuing their appeals.

According to the report of expert psychiatrist Terry A. Kupers, who toured the facility last August, "the presence of severely psychotic prisoners who foul their cells, stop up their toilets, flood the tiers with excrement, and keep other prisoners awake all night with their incessant screams and shouts," are "virtually certain to cause medical illness and destruction of mental stability and functioning." Kupers added that conditions on the Unit include solitary confinement combined with "the extremes of heat and humidity, a grossly unsanitary environment, vermin, arbitrary and punitive disciplinary policies, and inadequate health and mental health care."

View of tier in Unit 32 at the State Penitentiary in Parchman.

The decision also addressed problems documented by environmental health and safety expert James Balsamo. Balsamo cited extreme temperatures, filth, grossly malfunctioning toilets, and mosquito infestations as major health hazards, especially during Mississippi's brutally hot summer months. He testified that with the heat index frequently exceeding 100 degrees, and a faulty plumbing system that can leave the cells without water for hours or even days at a time, the prisoners are at high risk for heat stroke or heat death.

Dr. Susi Vassallo, an expert in thermoregulation and a volunteer through Doctors

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Arizona Judge Strikes Down Law that Censored Anti-Death Penalty Web Sites

The American Civil Liberties Union welcomed a federal judge's ruling in May that permanently struck down a state law that punishes prisoners who post information about themselves on the Internet and denies organizations the right to post information about prisoners on their own web sites.

"We are delighted and encouraged by the judge's order to protect the First Amendment rights of prisoners and their advocates," said David C. Fathi, staff attorney with the ACLU's National Prison Project and lead counsel in the case.

The lawsuit, *Canadian Coalition Against the Death Penalty v. Charles L. Ryan*, was filed on behalf of anti-death penalty and prisoner advocacy organizations in July 2002. The lawsuit challenged broadly worded legislation that also barred prisoners from corresponding with a "communication service provider" or "remote computing service" and disciplined prisoners if any person outside of prison contacted one of these agencies at a prisoner's request.

In striking down the censorship law, the court said that it was unconstitutional and "not rationally related to legitimate penological objectives." Today's decision makes permanent a preliminary order issued last December that halted enforcement of the law.

The Arizona Department of Corrections imposed disciplinary sanctions on at least five prisoners found to be in violation of the law, according to the lawsuit. Penalties included disciplinary detention and loss of privileges like visits with family, phone calls and access to the commissary.

"The Internet provides an integral connection to the free exchange of ideas and information," said Eleanor Eisenberg, Executive Director of the ACLU of Arizona. "As the court found, attempts by the government to punish individuals in order to silence their unpopular voices are clearly illegal. Given the court's decision, I am hopeful other states will choose to avoid Arizona's mistakes."

National ACLU Associate Legal Director Ann Beeson and Alice Bendheim and Pamela K. Sutherland of the ACLU of Arizona all served as co-counsel in the lawsuit.

The ACLU's organizational clients are the Canadian Coalition Against the Death Penalty; Stop Prisoner Rape, a group that seeks to end sexual violence against individuals in detention; and Citizens United for Alternatives to the Death Penalty, a group that organizes public education campaigns with the intention of abolishing the death penalty. All of the ACLU's clients maintain web sites with prisoner information.

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Mississippi Death Row

Continued from cover

of the World-USA's Medical Advocacy Project, who also visited Mississippi's death row in August of last year, testified that the heat in the cells was "inhuman" and highly likely to cause heat stroke and other heat-related illness during the summer months. She testified that it was merely a matter of luck that no death row prisoner had yet died from the heat.

Of 183 death sentences imposed in Mississippi since 1976, the Mississippi Supreme Court has reversed the death penalty in 41 percent of the direct appeals it has ruled on. In fact, almost as many people have had their convictions reversed as have been executed.

Along with Winter, Steve Hanlon, a partner at the Washington law firm Holland & Knight, Amy Fettig of the ACLU's National Prison Project, ACLU of Mississippi attorney Sandi Farrell and Mississippi civil rights attorney Robert McDuff served as co-counsel in the lawsuit, *Russell v. Johnson*.

Prisoner Transport Company Pays Damages in Lawsuit Over Sexual Assault

A woman who was sexually assaulted and threatened with death by a guard during a four-day prisoner transport accepted a settlement in which the guard and the private prisoner transport company that employed him agreed to pay money damages, the American Civil Liberties Union announced in March.

Filed on behalf of Robin Darbyshire by the ACLU's National Prison Project, the lawsuit confronts the horror of sexual assault committed by correctional staff and the pitfalls associated with for-profit prisoner transport companies. It was the first of a series of lawsuits filed by the ACLU's National Prison Project as part of its new campaign to end rape and sexual assaults against prisoners.

"The rape and sexual assault of female prisoners is a nation-wide problem," said Craig Cowie, an attorney with the ACLU's National Prison Project and co-counsel in the lawsuit. "When officials choose to ignore or dismiss a woman's allegations of abuse they send a message that violence against women prisoners is acceptable," Cowie added. "This legal victory serves as a reminder that sexual violence against prisoners is cruel and unusual punishment and a violation of the Constitution."

The settlement ends a lawsuit that arose when Extraditions International, Inc. took custody of Darbyshire in Carson City, Nevada on May 13, 2001 to transport her to a Colorado jail. During the four-day van trip with two male officers and other mostly male prisoners, an Extraditions International guard sexually harassed and threatened to kill Darbyshire and another female prisoner.

The lawsuit said that the guard sexually assaulted Darbyshire during one of the few van stops where prisoners were permitted to use the restroom. The driver, Richard Almendarez, brought 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. He then masturbated while standing above her and ejaculated onto her breasts. The officer told Darbyshire that if she screamed he would shoot her and claim that she tried to escape.

A corrections expert investigating the case concluded that the offending officer, Almendarez, had a history of being "callous" in his treatment of prisoner transportees and the company that employed him, Extraditions International, was "deficient" in its operations.

"Extraditions International, Inc. hired Almendarez to transport prisoners for its company knowing that the Texas prison system had fired him for assaulting a prisoner there and failing to report it," Cowie said. "Darbyshire's cruel and violent treatment could have been prevented if the company effectively investigated its potential employee."

The lawsuit alleged that the company failed to train or supervise their staff appropriately, allowing the assault to occur. Despite complaints made by Darbyshire during a stop at the Extraditions International office in Commerce City, Colorado, the company placed her back in the van with the driver whom they knew had sexually harassed and threatened to kill her.

Information discovered after the lawsuit was filed revealed that Extraditions International operated illegally by transporting prisoners without proper licensing or insurance, and the ACLU contends, its successor, American Extraditions, continues to do so.

"This case provides an excellent example of why contracting with private for-profit companies to conduct correctional functions can be dangerous to prisoners and the public," said David C. Fathi of the National Prison Project and co-counsel in the case.

Another lawsuit filed against Extraditions International last year alleged similar inhumane and degrading treatment by its employees. In that case, officers left a woman alone overnight in a company holding cell with five male prisoners. The next day when guards returned to release the prisoners, the plaintiff overheard company workers state that they had left her in the cold and vacant warehouse because they did not want to pay to have her confined in a local jail.

The settlement, of an undisclosed amount of damages, resolves the lawsuit, *Robin Darbyshire v. Extraditions International, Inc.,* filed in U.S. District Court for the District of Colorado by Cowie, Fathi and Mark Silverstein, legal director of the ACLU of Colorado.

ACLU and Alabama Prison Project Release Report Urging Community Corrections as Cost Saving Measure

Citing Alabama's budget crisis and dangerously overcrowded prisons, the American Civil Liberties Union and the Alabama Prison Project released in April a new budget analysis highlighting a potential savings of $300,000 to $400,000 if the state accepted prisoners living with HIV into existing community-based corrections programs.

"I commend Governor Bob Riley and the state legislature for passing emergency legislation and for considering additional legislative efforts that reduce corrections costs by utilizing community programming," said Lucia Penland, director of the Alabama Prison Project. "But problems continue to plague Alabama's prison system," Penland added. "In light of the findings that support admission of HIV-positive prisoners into diversion and community corrections programs, the time is right to explore more cost-saving measures and stop the needless segregation of HIV-positive prisoners."

Alabama currently bars all prisoners living with HIV/AIDS from participating in activities with other prisoners and offers few alternative opportunities for rehabilitative programming. No other state in the country completely segregates prisoners with HIV/AIDS in this way. The misguided HIV/AIDS segregation policy applies both to in-prison programs -- such as education, jobs, vocational training, and religious services -- as well as to community-based programs run by the state or outside organizations. Community-based options include work release, supervised intensive restitution, boot camp, and other programs.

The April analysis examines the Alabama Sentencing Commission's findings that the state pays $26 a day to house an individual in prison but only $11 a day to divert a prisoner into intermediate sanctions. Another recent report on Alabama's corrections system by Carter Goble Associates found that the state pays $9000 per person per year for incarceration versus $2000 for community corrections programs. The analysis also goes on to illustrate that if HIV-positive prisoners could participate in these programs at the same rate as other Alabama prisoners, 56 men and women could be transferred resulting in a cost savings to the state of $300,000-$400,000.

"Governor Riley has publicly announced his commitment to expanding community-based correctional programs as an effective low-cost criminal justice sanction," said Jackie Walker, HIV/AIDS/Hepatitis Information Coordinator at the ACLU's National Prison Project. "His swift response to this new analysis could redress a misguided and expensive one-of-a-kind policy in Alabama."

The briefing paper, *Cost of Excluding Alabama State Prisoners with HIV/AIDS from Community-Based Programs*, was written by Dr. Rachel Maddow, an expert consultant for the ACLU's National Prison Project. Copies of the report are available on line at: www.aclu.org/Prisons/Prisons.cfm?ID=12495&c=123.

Judge Finds Poor Conditions at Virgin Islands Jail Violate Court Orders

Citing the defendants' willful failure to comply with court orders and provisions of a 1994 settlement agreement to eliminate unconstitutional jail conditions, a federal judge in May held territory and corrections officials in St. Thomas in civil contempt for the third time in six years, the American Civil Liberties Union said.

"Even after defendants agreed almost 10-years ago to improve medical and mental health care and end fire code violations, dangerous conditions within St. Thomas's Criminal Justice Complex continue to jeopardize the health and safety of the men and women housed there," said Eric Balaban, a staff attorney with the ACLU's National Prison Project.

The order, issued by U.S. District Judge Stanley Brotman, follows a November 2002 evidentiary hearing where medical and corrections experts cited numerous problems plaguing the St. Thomas facility. Dr. Charles Braslow testified that after touring the facility in September 2002 he found lapses in the treatment of prisoners with chronic illnesses. Despite a 2001 court order, prisoners were still not receiving care consistent with community standards.

The May ruling criticized St. Thomas officials for inadequacies in the jail's mental health care system as well. Judge Brotman found that prisoners who exhibit signs of mental illness were not appropriately referred to a psychiatrist for treatment.

Most striking is officials' continued failure to remedy problems with the complex's fire safety system despite repeated warnings, Balaban noted. In his order, Judge Brotman wrote, "the incomplete fire detection and suppression systems; the absence of fire safety training; inadequate numbers of correctional staff; inadequate fire drills; lack of fire system replacement parts and supplies; absence of a preventative maintenance contract for the fire detection, suppression, and alarm systems; and the lack of written policies and procedures of which all staff are knowledgeable, results in these facilities remaining a serious and imminent threat to the lives, safety, and health of the prisoners and staff."

Officials in the Virgin Islands -- which is a U.S. territory consisting of three islands: St. Thomas, St. Croix and St. John -- will have 45-days to submit a comprehensive progress report to prove claims that conditions at the jail complex have improved since last fall's facility tour. In addition, medical and correctional experts will again tour the jail within 30-days and issue new reports outlining their own findings.

"The contempt order against territory officials sends an important message that a laisez faire approach to maintaining constitutional conditions of confinement will not be tolerated," Balaban said.

Prisoners in the lawsuit, *Lawrence Carty, et al. v. Charles W. Turnbull, et al.* filed in the District Court of the Virgin Islands, Division of St. Thomas and St. John are represented by Balaban and local attorney Benjamin A. Currence.

New Report to Congress Describes Health Crisis in Prisons and Jails

With millions of people leaving prisons and jails every year, a new federal study highlighting the dismal health status of confined individuals demonstrates why Congress must investigate the medical care crisis in the country's correctional systems.

A press conference held on January 27 in San Antonio, Texas officially announced the publication of *The Health Status of Soon-To-Be-Released Inmates: A Report to Congress*, produced by the National Commission on Correctional Health Care (online at www.ncchc.org) and sponsored by the National Institute of Justice. The double volume document includes recommendations for care and promotes the adoption of nationally accepted clinical guidelines for treatment of prisoners.

Growing numbers of incarcerated individuals suffer disproportionately from tuberculosis, HIV/AIDS, hepatitis, mental illness, substance addiction and many chronic diseases. Corrections departments are overwhelmed by the high cost of providing medical care and face serious challenges to providing treatment to patients. Untreated patients jeopardize the health and safety of prison and jail staff, institution visitors, prisoners and the communities to which they return.

According to the report, releasees from prison or jail comprised 35 percent of the U.S. population infected with tuberculosis in 1996 and accounted for 17 percent of the AIDS infected population. Nearly 330,000 imprisoned individuals tested positive for Hepatitis C in 1997 and approximately 1.4 million Hepatitis C infected individuals left prison or jail in 1996.

Releasing sick prisoners into the community without proper treatment or opportunities to continue treatment presents a major threat to public health. The American Civil Liberties Union in Michigan filed suit in January alleging that some prisoners infected with hepatitis were not notified of their status or educated on how to prevent the disease. Last year, the *Philadelphia Inquirer* reported that numerous prisoners in New Jersey were released into the community never knowing they had been diagnosed with Hepatitis C. Infected persons can unwittingly spread the disease to loved ones and sexual partners.

A coalition of over 30 organizations, formed to support the report's findings and support federal legislation to improve correctional health care, called on Congress in January to conduct hearings to explore the report's findings. In May, Congressman Ted Strickland introduced H.R. 1993, the Office of Correctional Health Act of 2003. The legislation establishes and Office of Correctional Health within the Department of Health and Human Services and creates a small federal grant program for prisons and jails. The aid would allow local officials to vaccinate prisoners for Hepatitis A and B and/or provide for the care of prisoners with Hepatitis C. A Senate version of the bill has not yet been introduced.

Case Law Report: Highlights of the Most Important Prison Cases

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

U.S. Court of Appeals Cases

Protection from Inmate Assault/Staffing--Training/Class Actions--Effect of Judgments and Pending Litigation

Tucker v. Evans, 276 F.3d 999 (8th Cir. 2002). Prison staff are not liable for a fatal beating by other prisoners. There is no evidence of the prior danger to the particular prisoner. The existence of a prison policy forbidding the officer to enter the barracks until assistance arrived did not matter, since the assault was over by the time the officer knew anything was wrong. The allegation that he failed properly to supervise by returning to the officers' station after lights out and turning his attention elsewhere amounted to negligence at most, though the argument would have been stronger if he had had prior knowledge of the risk to the decedent.

The Warden and Director could not be held liable based on a prior Eighth Circuit decision holding that understaffing of a dormitory presented a triable issue of deliberate indifference. That case, *Smith v. Arkansas DOC*, involved noncompliance with an order governing a specific unit in a specific prison, and there is no evidence that dormitory understaffing has risen to unconstitutional levels at this prison.

The officer defendant's attendance at a training academy plus on-the-job training were sufficient to support summary judgment for the supervisory defendants on plaintiff's training claim.

Searches--Person--Convicts/Staffing--Sex/Privacy/Mootness/Class Actions--Effect of Judgments and Pending Litigation/Personal Involvement and Supervisory Liability/Equal Protection

Oliver v. Scott, 276 F.3d 736 (5th Cir. 2002). The plaintiff challenged the use of female guards to monitor male prisoners in bathrooms and showers even though male guards were not used to monitor women under similar circumstances.

Officials cannot be held liable for strip searches and cross-sex monitoring "pursuant to" state policies unless the policies are unconstitutional or are the "moving force" of a constitutional violation. The policies are not unconstitutional and there is no explanation of how they cause constitutional violations. Even if the warden approved violations of the policies, since the directive narrowly restricts discretion and then delegates that discretion to the warden, the higher-ups can't be held liable.

The plaintiff has no privacy claim. At 744:

> Prisoners retain, at best, a very minimal Fourth Amendment interest in privacy after incarceration.
>
> The Fourteenth Amendment is an even more problematic source for a right to bodily privacy. Courts should not reverse the outcome of the Fourth Amendment analysis based on novel fundamental implied rights. [Footnote omitted.] And the existing set of fundamental implied rights--marriage, family procreation, and the right to bodily integrity--does not include a right to avoid exposure to members of the opposite sex.

The omitted footnote cites *Graham v. Connor's* holding that when the Fourth Amendment grants an explicit right to privacy, courts shouldn't engage in substantive due process analysis.

Even if there is a right to avoid being viewed naked by members of the opposite sex, the state's policy of "permitting all guards to monitor all inmates at all times" survives under the *Turner* standard. It "increases the overall level of surveillance" and bathrooms and showers could be the site of violence and sexual assault. Inmates were permitted to shield themselves with newspapers and paper towels (this is attributed to CCA and not the state policy). Gender restrictions on surveillance would have the "ripple effect" of requiring reassignment of a high percentage of its staff. The plaintiff offers no alternative at *de minimis* cost in terms of security or equal employment opportunities.

The disparate treatment of male and female prisoners with respect to cross-sex surveillance does not deny equal protection because the plaintiff did not show that male and female inmates were similarly situated, and he conceded that the prison housed six times more men than women and males had significantly more violent criminal records and incidence of violent gang activity and sexual predation, facts which justify more intensive surveillance. The court invokes *Turner*'s reasonable relationship standard in its equal protection analysis.

Federal Officials and Prisons/Protection from Inmate Assault/Pleading/Immunity--Federal Officials and Agencies

Alfrey v. United States, 276 F.3d 557 (9th Cir. 2002). Under the Federal Tort Claims Act, the government is immune for the exercise of or failure to exercise a "discretionary function," which protects conduct that (a) "involves an element of judgment or choice" that (b) "involves considerations of social, economic, and political policy." (561, citations omitted) The failure of prison staff to perform a Central Inmate Monitoring of the cellmate, who was a state prisoner, presented a triable issue of fact, since if the prisoner was in the particular institution solely to serve his state sentence, he was subject to CIM requirements by mandatory (i.e., non-discretionary) regulation. The failure to run a SENTRY search was subject to the discretionary exception because there is no mandatory duty to perform such a search, and the fact that a prison staff member might have thought there was does not matter.

Staff did essentially nothing in response to the plaintiff's complaint that he was in danger. The failure to take different action in response to the decedent's report of the threat was subject to the discretionary exception, since regulations give staff discretion in determining how to address such reports, and that sort of discretion involves policy considerations (how intrusive a search should be conducted, how to set priorities among all extant risks).

The plaintiff's constitutional claims are dismissed because a heightened pleading standard applies to *Bivens* claims with subjective intent as an element, and no facts were pled supporting such intent. (This holding is probably overruled by *Swierkewiecz v. Sorema*, which generally disapproves heightened pleading standards unauthorized by the Federal Rules of Civil Procedure.)

Habeas Corpus/Procedural Due Process--Disciplinary Proceedings

Piggie v. McBride, 277 F.3d 922 (7th Cir. 2002). The petitioner sought a writ of habeas corpus to overturn a disciplinary conviction which reduced his good time-earning classification. He complained that prison officials did not look at the videotape of the incident in question.

Prisoners may not be denied exculpatory evidence simply because other evidence supports their guilt; they "are entitled to have exculpatory evidence disclosed unless its disclosure would unduly threaten institutional concerns." (925) Prison officials need not explain denials of exculpatory evidence at the hearing but in subsequent litigation have the burden of proving that the denial was not arbitrary or capricious.

Here, the state did not provide any institutional or correctional justification, but said only that the petitioner failed to request the tape before or at the hearing. The court agrees that if that is the case, failure to review the tape did not deny due process. However, the prison superintendent's finding that the petitioner failed timely to request the tape is not binding on the district court under AEDPA. Prison disciplinary boards are not "courts" whose findings are entitled to deference in federal habeas proceedings, although it appears that if the state provided judicial review of disciplinary proceedings, the findings would benefit from such deference after judicial affirmance. The district court therefore should determine whether the tape had been erased and if so when, and whether the petitioner asked for the tape at or before the hearing. If the tape was extant and he asked for it, he should receive relief.

PLRA--Exhaustion of Administrative Remedies/Sexual Abuse/Pleading/Grievances and Complaints about Prison/Transfer and Admission to Mental Health Facilities

Morales v. Mackalm, 278 F.3d 126 (2d Cir. 2002). At 130: "Failure to exhaust administrative remedies precludes only the current lawsuit. . . . Therefore, the dismissal of claims for failure to exhaust should be without prejudice."

The defendant's involvement with a

decision to transfer the plaintiff shortly after the plaintiff had filed a grievance against him supports an inference of retaliatory motive. Calling the plaintiff a "stoolie" in front of other prisoners was not sufficient adverse action to support a retaliation claim, but transfer to a psychiatric facility was, and the plaintiff "should have the opportunity to develop facts that would demonstrate that the prospect of confinement in a psychiatric facility would deter a reasonable inmate from pursuing grievances." (132)

An allegation that a female staff member asked the male plaintiff to have sex with her and to masturbate in front of her and other female staff did not state a constitutional claim for sexual harassment.

Access to Courts/Municipalities/Transfers/ State Officials and Agencies/PLRA-Exhaustion of Administrative Remedies/Procedural, Jurisdictional, and Litigation Questions

Ali v. District of Columbia, 278 F.3d 1 (D.C.Cir. 2002). At 5-6: The PLRA's exhaustion requirement is not jurisdictional.

Habeas Corpus

Harvey v. Horan, 278 F.3d 370 (4th Cir. 2002). A prisoner serving a sentence for a sexual offense could not under *Heck* pursue a § 1983 action for an injunction to prove his innocence by retesting DNA evidence, and if his action was construed as a petition for habeas corpus, it was barred as a successive petition brought without leave of court.

Procedural Due Process--Disciplinary Proceedings

Riggins v. Walter, 279 F.3d 422 (7th Cir. 1995). A prisoner who was placed in segregation pending a hearing was provided due process by the "postdeprivation" disciplinary hearing he received.

Review of a disciplinary proceeding to determine if it was supported by "some evidence" must be limited to evidence in the administrative record. Evidence from confidential sources meets the "some evidence" test. Reliability of confidential sources may be established after the fact and not just from the administrative record. The magistrate judge "implicitly" found that the sources were reliable.

The plaintiff alleged that he was punished for refusing a polygraph test. There is no Fifth Amendment issue here because "it would be premature to find that punishing a refusal to attend a polygraph examination violated the privilege against self-incrimination because the witness, upon showing up at the examination and being asked potentially incriminating questions, still had the right to claim the privilege and to be informed of the availability of immunity." (431)

PLRA--Three Strikes Provision

Lewis v. Sullivan, 279 F.3d 526 (7th Cir. 2002). The three strikes provision is upheld against various constitutional challenges. There is no constitutional right to have one's litigation subsidized. The constitutionality of filing fees for civil litigation has been upheld.

It would be unconstitutional to leave prisoners in a situation where fundamental rights were at stake and no judicial forum was available. However, that's not the case here; the court sets out seven options by which a prisoner can get into court: (1) pay the fee, (2) save in advance, (3) refrain from frivolous litigation, (4) borrow from friends or relatives, (5) borrow from a lawyer by getting a lawyer to represent based on the prospect of a fee, (6) go to state court, (7) "if all else fails," rely on the serious physical injury provision. That provision applies "[w]hen a threat or prison condition is real and proximate, and when the potential consequence is 'serious physical injury.'" (531)

Procedural Due Process
Ex Post Facto Laws

Jones v. Ray, 279 F.3d 944 (11th Cir. 2001). The use of false information in a parole file can be a due process violation, but such a claim cannot be conclusory and must specify the false information.

Deference/Religion

Schreiber v. Ault, 280 F.3d 891 (8th Cir. 2002). The plaintiff complained that prison officials failed to dispose of his medical blood samples consistently with his religious beliefs, i.e., by pouring it on the ground and covering it with dust. Instead, they were sent to a contractor for decontamination and disposition. The plaintiff is a Jehovah's Witness, but "his interpretation goes beyond Jehovah's Witness teachings."

The prison's practice withstands scrutiny

under the *Turner* test. Given the dangers of infection from blood, it is rationally connected to the "legitimate, neutral government interest of protecting the health and safety of prison inmates and employees." (893) There is no alternative to accommodate the plaintiff's beliefs, accommodating his practice could jeopardize health and safety, and there are no ready alternatives that would accommodate the plaintiff without jeopardizing others.

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

Skrtich v. Thornton, 280 F.3d 1295 (11th Cir. 2002). The plaintiff alleged that officers extracting him from his cell first shocked him with an electronic shield and then kicked him repeatedly in the back, ribs, and side, and struck him with their fists. He did not resist. He had to be airlifted to a hospital, where he remained for nine days. He had left chest trauma with multiple fractures to the left ribs and left hemopneumothorax, back injury with fractured multiple transverse processes, right scalp laceration, abrasions and contusions with markings of shoes on back and chest.

At 1301:

> In this Circuit, a defense of qualified immunity is not available in cases alleging excessive force in violation of the Eighth Amendment, because the use of force "maliciously and sadistically to cause harm" is clearly established to be a violation of the Constitution by the Supreme Court decisions in *Hudson* and *Whitley*. . . . There is simply no room for a qualified immunity defense when the plaintiff alleges such a violation.

Absent evidence that *any* force was necessary after the plaintiff was shocked, the allegations make out an Eighth Amendment violation. The plaintiff's close-management status based on his disciplinary history did not justify the officers' conduct once he had been incapacitated by the stun shield. At 1302: "It is not constitutionally permissible for officers to administer a beating as punishment for a prisoner's past misconduct." The court is not impressed by the defendants' argument that they used *de minimis* force given the plaintiff's injuries. *Id.*: "Moreover, we reject the argument that the force administered by each defendant in this collective beating must be analyzed separately to determine which of the defendants' blows, if any, used excessive force." The evidence is that the cell extraction team acted in concert to inflict the injuries while others watched. Officers who are present and fail to take reasonable steps to prevent excessive force may be held liable.

The court then returns to qualified immunity, despite its earlier statement reading it out of the case entirely in Eighth Amendment excessive force cases. At 1303: "By 1998, our precedent clearly established that government officials may not use gratuitous force against a prisoner who has already been subdued or, as in this case, incapacitated." The fact that there is no prior case in which excessive force was found unconstitutional in the context of a cell extraction does not distinguish this case from precedent. At 1304:

> The law of excessive force in this country is that a prisoner cannot be subjected to gratuitous or disproportionate force that has no object but to inflict pain. . . . This is so whether the prisoner is in a cell, prison yard, police car, in handcuffs on the side of the road, or in any other custodial setting.

Two of the defendants moved to dismiss (rather than for summary judgment) based on qualified immunity. However, they did this in their third motion to dismiss, which was filed after their answer, all contrary to Rules 12(b)(6) and 12(g), Fed.R.Civ.P., and their motion should have been dismissed.

Federal Officials and Prisons/Procedural Due Process--Administrative Segregation

Tellier v. Fields, 280 F.3d 69 (2d Cir. 2000), *superseding* 230 F.3d 502 (2d Cir. 2000). The plaintiff was held in administrative segregation for over 500 days because he was considered an escape risk. He said he was neither informed of the reason nor permitted to be heard concerning the continuation of his confinement, contrary to defendants' regulations. When he complained of no hearings, he received false documentation of earlier hearings, and was brought to subsequent hearings where he did not have the opportunity to present evidence or be heard.

The court reaches the merits of the constitutional question on this qualified immunity appeal notwithstanding *Horne v. Coughlin*, which in any case "supports the need to address the constitutional question when a court finds that qualified immunity does not exist because the right asserted is clearly established." (79)

The plaintiff alleged a confinement of 514 days "under conditions that differ markedly from those in the general population, and we cannot conclude as a matter of law that this confinement was not 'atypical and significant'" under *Sandin*. The court does not specify what the "marked" differences were.

There is a liberty interest created by federal regulations (28 C.F.R. § 541.22). *Sandin* rejected only that portion of *Hewitt* holding that explicitly mandatory language plus specified substantive predicates "forces" a conclusion that the state has created a liberty interest. This regulation is "replete with words such as 'shall,' 'unless,' and 'only.' Although the mere use of these words is neither dispositive nor talismanic, [this fact] supports plaintiff's argument that the Bureau of Prisons intended to guide the decision making power of prison officials by *requiring* that certain prerequisites be met and certain procedures be followed whenever a prisoner was subject to segregated housing." (81) Most supportive of this conclusion is a statement that the official "shall release" the prisoner when the reasons for placement cease to exist.

At 82: "Because the regulation at issue clearly indicates that the Warden's decision to place a prisoner in SHU is discretionary as long as certain predicates are satisfied, *see* 28 C.F.R. § 541.22(a)(1)-(6), a prisoner has no protected liberty interest that is violated when the Warden removes him or her from the general population." (This idea that there can be discretion defeating a liberty interest if certain predicates must be satisfied for placement is directly contrary to *Hewitt v. Helms*.) But that discretion is not boundless and continuing; the regulations provide for hearings and reviews "that constrain the Warden's discretion in *maintaining* a prisoner in SHU" and further commands release when the reasons for placement cease to exist. The court rejects the claim that the procedures provided by the regulations are not intended to affect the duration of SHU time.

The court rejects defendants' claim that *Sandin* rejected the examination of regulations for mandatory language and substantive predicates: "we do not read *Sandin* to have so radically undone the tenets of *Hewitt*." (83) *Id.*:

> In returning to the approach used in *Wolff* and *Meachum*, the Supreme Court shifted the emphasis of the inquiry from the strict language of the statute to an analysis of the right safeguarded by the statute. Read together, *Sandin*, *Wolff*, and *Meachum*, all support the proposition that a statute or regulation which involves "state-created right[s]," *Wolff*, . . . creates a protectable liberty interest when an official's failure to adhere to the statute results in an "atypical, significant deprivation," *Sandin*, . . . of "real substance," *Wolff* . . . and not simply "ephemeral and insubstantial" violations. *Meachum*, . . .

The procedural due process rights at issue were clearly established under pre-*Sandin* law; the cases are from state prisons but they are grounded in federal rights. Decisions that occurred after the alleged violation of rights cannot establish that defendants' actions were objectively reasonable. Whatever good faith belief they might have had that a brief deprivation of the plaintiff's rights was lawful, "it is simply unreasonable for any official to believe that a continuing violation of 514 days without a required hearing was permitted by Section 541.22." (85) They cannot plausibly claim to have relied on unpublished decisions from other circuits, which are distinguishable anyway.

Habeas Corpus/Procedural Due Process--Disciplinary Proceedings

Eads v. Hanks, 280 F.3d 728 (7th Cir. 2002). The petitioner said that a hearing committee member at his disciplinary proceeding was the live-in boyfriend of one of the witnesses. The court suggests in dictum that such a claim would probably establish bias even in a prison disciplinary proceeding, but says that the prisoner did not raise the issue in his administrative appeal, so it is forfeited.

PLRA--Prospective Relief Restrictions/Use of

Force/Damages--Assault and Injury, Punitive/Qualified Immunity/Jury Instructions and Special Verdicts/PLRA--Attorneys' Fees

Johnston v. Breeden, 280 F.3d 1308 (11th Cir. 2002). The plaintiff alleged that he was beaten unconscious and suffered a seizure in addition to a laceration and multiple contusions. A jury awarded $25,000 in compensatory damages plus $45,000 in punitives divided between two defendants.

The district court's jury instructions (quoted at length) sufficiently conveyed the required mental state for an Eighth Amendment violation (though omitting defendants' requested phrase "specific intent"). The real issue was the relative prominence of the phrase "malicious and sadistic intent." The district court did not err in refusing to instruct the jury that "prison officials should be presumed to have properly discharged their duties" (1316), since it got the legal standard and the burden of proof right.

Punitive damages are prospective relief under the plain language of § 3626. Use of force is a "prison condition" for purposes of § 3626(g)(2). Therefore the restrictive standards of § 3626 apply to punitive damages awards, and the district court must find that the damages are no larger than reasonably necessary to deter the kind of violations of federal rights that occurred in the case, and against no more defendants than necessary for that purpose. The district court should have assessed the jury award in that light. The court does not explain this apparent holding that application of the PLRA factors is a question for the court and not for the jury in a case otherwise tried to a jury, or address the Seventh Amendment question thereby presented.

A conclusory recitation of the PLRA factors does not suffice to support the punitive award; the court cites the cases requiring provision-by-provision scrutiny of injunctions.

Food/Mental Health Care

Mabrey v. Farthing, 280 F.3d 400 (4th Cir. 2002). The decedent, held in a prison mental health unit, died of severe dehydration after the water to his cell was turned off as a response to his flooding his cell believing that he smelled smoke. Four days later he was sent to an emergency room; two days after that he died. At 402: "*One thing led to another, whether without fault*, by mishap, negligence or deliberate indifference, leading to Mabrey's death on the 29th from severe dehydration." (Emphasis supplied) But they do dismiss the qualified immunity appeal given the factual disputes.

Religion--Practices/Federal Officials and Prisons/Deference

Levitan v. Ashcroft, 281 F.3d 1313 (D.C.Cir. 2002). The plaintiffs, Catholic federal prisoners, challenged the denial of wine during Communion services, which had formerly been permitted. The result is a significant interpretation of the *Turner* standard in religious freedom cases, favorable enough to plaintiffs that one wonders if the same result would have been reached in a case brought by non-Christians.

The district court erred in holding that there was no violation because partaking of wine at Communion is not a mandatory practice from which the participant deviates "at peril of his soul." At 1319-20:

> A requirement that a religious practice be mandatory to warrant First Amendment protection finds no support in the cases of the Supreme Court or of this court. . . .
>
> The fact that a regulation affects a mandatory religious practice is, obviously, relevant evidence of an infringement on the free exercise of religion. But that is far from the only circumstance in which a rule impinges on free exercise. . . .
>
> Nor would such a requirement make sense. Under the District Court's formulation, religions that lack the concepts of commandments necessary for the salvation of the soul would find themselves outside the scope of First Amendment protection altogether. . . .
>
> Many cherished religious practices are performed devoutly by adherents who nonetheless do not or cannot insist that those practices are mandated. . . .

At 1320: "Instead, the First Amendment is implicated when a law or regulation imposes a substantial, as opposed to inconsequential,

burden on the litigant's religious practice." *Id.*: "In determining whether a litigant has met the threshold requirement, a court must consider several factors. The litigant's beliefs must be sincere and the practices at issue must be of a religious nature." The Supreme Court has warned that judging the centrality of different religious practices is akin to evaluating the relative merits of differing religious claims. At 1321: "Moreover, a rule that bans a practice that is not 'central' to an adherent's religious practice might nonetheless impose a substantial burden, if the practice is important and based on a sincere religious belief." *Id.*:

> A court may also consider whether the litigants' beliefs find any support in the religion to which they subscribe, or whether the litigants are merely relying on a self-serving view of religious practice. This inquiry is not a matter of deciding whether appellants' beliefs accord in every particular with the religious orthodoxy of their church. . . . Nor is it a matter of adjudicating intrafaith differences in practice or belief. . . . Instead, a court may determine whether the litigants' views have any basis whatsoever in the creed or community on which they purport to rest their claim.

The court remands for application of the foregoing test, making it pretty clear that it thinks the plaintiffs meet the threshold test, and stating that the *Turner/O'Lone* inquiry "should focus on whether the *change* in regulatory regimes . . . is justified by a legitimate penological interest. . . . [T]he District Court must bear in mind that, under the new rule, the prison still allows alcohol to be consumed on the prison grounds and in prisoners' presence under the supervision of the chaplain." (189)

This is important. This is the first time that I have seen a court limiting the *Turner* analysis to the incremental effect of a change in rules rather than to the new rule considered in isolation. In effect, it requires taking the earlier rule as an acceptable baseline under *Turner* unless prison officials show that it was causing problems, which indirectly takes a big bite out of the usual rule that prison officials don't have to show any actual problems justifying restrictive rules, they can anticipate whatever they want to. (At 190: "Under [the fourth *Turner* prong], the court should evaluate any asserted problems with the previous policy. . . .")

The court also discusses the relationship of the *Turner/O'Lone* standard to *Employment Division v. Smith*, although the government doesn't rely on *Smith*. The court says you can assume that *Smith* supplants *Turner*; that *Smith* has no application in "the unique and highly regulated prison context" (1318); or that *Smith* determines whether there is a First Amendment issue at all, and *Turner* provides the analysis for claims that get past that threshold. It notes that most courts have taken the second approach. It then drops the subject since the government didn't make an issue of it.

PLRA--In Forma Pauperis Provisions--Filing Fees

Taylor v. Delatoore, 281 F.3d 844 (9th Cir. 2002). The district court should not have dismissed for failure to pay the $6.62 initial filing fee. The plaintiff didn't pay because he didn't have the money, and had had no money since two months before the fee was ordered. At 848: "Several circuits have already considered constitutional challenges to § 1915(b) and have uniformly concluded that the PLRA fee filing requirements pass constitutional muster. [String cite omitted.] We agree." The court rules specifically on access to courts and equal protection challenges, cursorily reciting the standard justifications.

At 850: "Although the court can *collect* the initial fee only 'when funds exist,' the court is to *assess* the initial fee based on the prisoner's account deposits and balances in the six-month period immediately preceding the filing of the complaint." Dismissal for nonpayment was erroneous under the statute's "safety-valve provision," which says "[i]n no event shall a prisoner be prohibited from bringing a civil action . . . for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee." 28 U.S.C. § 1915(b)(4) (emphasis added).

PLRA--Three Strikes Provision

McAlphin v. Toney, 281 F.3d 709 (8th Cir. 2002). Plaintiff alleged that he needed dental

work, was sent to a half-completed prison that could not accommodate his needs, as of filing the complaint he had had five extractions and needed two more, and dental infection was spreading in his mouth. That allegation, made as of the time of filing the complaint, was sufficient as a pleading matter to qualify as "imminent danger of serious physical injury" under the three strikes provision. The concurring judge doesn't think this is serious physical injury and is most disgruntled by the defendants' concession that it is.

Municipalities/False Imprisonment

Fairley v. Luman, 281 F.3d 913 (9th Cir. 2002). The plaintiff alleged that he was arrested without probable cause and subjected to excessive force by the police. He was held for 12 days, despite his protestations that the warrant on which he was held was for his twin brother. After he was released, an internal affairs investigation found the City's policies and procedures had been fully complied with. A jury exonerated the individual officers but found liability based on a police department policy, custom, or practice.

The City is free from liability for excessive force as a matter of law because the officers were exonerated. However, it was properly held liable for the claims for arrest without probable cause and deprivation of liberty without due process, since "[t]hese constitutional deprivations were not suffered as a result of actions of the individual officers, but as a result of the collective inaction of the Long Beach Police Department." (917) *Id.*: "If a plaintiff establishes he suffered a constitutional injury *by the City*, the fact that individual officers are exonerated is immaterial to liability under § 1983." *Id.* at n.4: "This is true whether the officers are exonerated on the basis of qualified immunity, because they were merely negligent, or for other failure of proof."

At 917: "Even detention pursuant to a valid warrant but in the face of repeated protests of innocence will, after a lapse of time, deprive the accused of a constitutional 'liberty.'" The plaintiff had a liberty interest in avoiding 12 days of incarceration without procedural safeguards in place to verify that the relevant warrants were his and in the face of his protests of innocence. Evidence that the Chief of Police did not instigate procedures to avoid detaining persons on the wrong warrant, despite his testimony that he knew such occurrences were not uncommon, especially where twins were involved, sufficiently supported a claim of municipal policy. At 918: "A 'policy' can be one of action . . . or inaction. . . ."

Sexual Abuse/Personal Involvement and Supervisory Liability/Negligence, Deliberate Indifference, and Intent

Riley v. Olk-Long, 282 F.3d 592 (8th Cir. 2002). An officer engaged in a course of sexual harassment of the plaintiff; eventually another inmate reported it, and the plaintiff was placed in administrative segregation and the officer was fired about two weeks later and then criminally convicted. Several other prisoners had previously complained about sexual abuse by the officer; investigations had generally proven inconclusive. A jury awarded $15,000 in compensatory damages plus $5,000 in punitives against the director of security and $25,000 against the warden.

The jury had sufficient evidence upon which to base a finding of deliberate indifference. The security director was aware that such sexual misconduct was a "big concern" and was advised of the repeated allegations and investigations of the officer, was concerned that he may actually have done the things he was accused of, and admitted that his threat during one investigation "to get the snitch" could have been cause for termination; and she recognized that after the incident it would have been "prudent" to reassign the officer away from inmate contact. At 596: "We conclude that given her position as prison security director and her admitted awareness that Link was a problem guard," a jury could find that she knew the officer posed a substantial risk of sexually assaulting prisoners.

The warden had knowledge of the allegations and investigations, admitted that she was concerned about the officer's poor judgment and the possibility that an inmate's safety was jeopardized in his company, and had advised the officer he should consider another line of work. A jury could reasonably find that she "recognized that Link was a problem employee who posed a substantial risk of harm." (597)

The court brushes aside the defendants' claims that they acted reasonably. The investigations don't negate liability because the defendants' responses "were not adequate given the known risk." At 597:

Central to defendants' assertions in

> support of the reasonableness of their responses is the application of the prison collective bargaining agreement. Defendants contend that the collective bargaining agreement precluded the prison from either permanently assigning Link to an area without inmate contact or from assigning another employee to shadow Link. Furthermore, until the episode with Riley occurred, defendants believed that under the collective bargaining agreement, they had insufficient cause to terminate Link. Defendants cite the various unfounded investigations in support of their decision not to permanently remove Link from contact with the inmate population. The jury, however, reasonably could have found that Link was far too significant of a risk to be allowed unsupervised contact with inmates. Defendants were responsible for providing a safe environment for inmates at the prison, and in Riley's case, they failed to do so.

This amounts to a holding that prison officials must disobey collective bargaining agreements if following them results in an unconstitutional risk to prisoners. Qualified immunity is not mentioned.

Use of Force--Restraints/Mental Health Care/Rehabilitation/Equal Protection

Thielman v. Leean, 282 F.3d 478 (7th Cir. 2002). The plaintiff, committed involuntarily as a sexually violent person, challenged the requirement that persons in his status be fully restrained whenever transported, without an individualized determination whether he poses a danger or escape risk. The requirement is not unconstitutional. A state statute providing mental patients a right to be free from physical restraint and isolation "except for emergency situations or when isolation or restraint is part of a treatment program," and more generally that patients have the right to the least restrictive conditions necessary to achieve legitimate purposes, does not create a liberty interest under *Sandin*. *Sandin* applies to this civil commitment case because facilities dealing with sexual offenders are "volatile" environments and the logic of *Sandin* is equally applicable to them. The court distinguishes its precedent refusing to apply *Sandin* to pre-trial detainees.

The restraint requirement is not an atypical and significant deprivation. The plaintiff's complaint that he should not be subjected to a waist belt and leg chains in addition to handcuffs is "the stuff of nickels and dimes. . . . This 'incremental' deprivation is not one cognizable as a state-created liberty interest in the wake of *Sandin*."

The more restrictive treatment of committed sexual offenders as compared to other mental patients does not deny equal protection, since the rational basis test applies and defendants could consider sex offenders more dangerous than other mental patients.

Group Activity/Religion/Procedural Due Process--Transfers, Administrative Segregation/Deference/Publications

Fraise v. Terhune, 283 F.3d 506 (3d Cir. 2002). New Jersey prison authorities designated the Five Percenters a Security Threat Group (STG) and consigned "core members" including the plaintiffs to the Security Threat Group Management Unit (STGMU). Placement in that unit commenced with placement in the Pre-Hearing Security Threat Group Management Unit, where the prisoner received notice and a hearing at which the prisoner could appear in person (or by a representative, or in writing), and the hearing committee determined whether the evidence supported STG membership. There was an administrative appeal and judicial review was available in state court. Prisoners could theoretically get out of the STGMU by going through a "three-phase behavior modification and education program" involving anger management, conflict resolution, and "social interactive skills that feature alternatives to violence." The prisoner has to sign a form renouncing all affiliation with STGs to get out of the unit back into population. Five Percenter literature is prohibited.

The court actually sets out what the Five Percenters believe, which I have not seen before. Though the Five Percent Nation claims not to promote or advocate violence, it has been linked with numerous incidents of prison violence and planned or threatened violence, documented in the "Holvey report," prepared in the prison

system's intelligence unit.

The parties and the court agree that the *Turner* standard governs. (The Religious Land Use and Institutionalized Persons Act is not relied on.) The court raises the question whether it should first determine whether the regulation would violate the Constitution applied to persons not in prison, but doesn't pursue it because the defendants haven't argued the point (515 n.5).

The STG policy has a valid, rational connection to a legitimate interest; it does not target members of one religion (as the dissent accuses) but is entirely neutral (dedicated to "the legitimate and neutral objective of maintaining order and security"). The Holvey report provides sufficient basis to designate the Five Percenters as an STG; this is the kind of judgment *Turner* counsels courts not to second-guess. The majority takes the dissent to task for dismissing the report as anecdotal, requiring either proof that the group's tenets promote violence or systematic proof of disproportionately engaging in violence. Demanding such proof before officials can act against gang violence "is fundamentally inconsistent with *Turner* and would in all likelihood be paralyzing." (518)

The plaintiffs had sufficient alternative means of practicing their religion. One of their practices is "studying the lessons," but since their teachings include the Bible and the Koran as well as Five Percenter literature, banning the latter still allows them to study some of "the lessons." They are also permitted to discuss self-knowledge, self-respect, responsible conduct, and righteous living, even though they can't do it by studying and discussing doctrines and materials distinctive to the Five Percenters. As to core members, who must renounce their affiliation in order to get out of the STGMU, they don't have to renounce their *beliefs*, so they have alternatives too.

The *Turner* "ripple effect" factor supports defendants' policy, since the record shows that the Five Percenters are a security threat.

There is no *de minimis* cost alternative to the policy, since alternatives would have done less to minimize the threat.

Equal protection was not violated by the less harsh treatment of the Sunni Muslims, since the author of the Holvey report said in his deposition that the Sunnis have a lower propensity for violence than the Five Percenters.

The failure to give notice of the new policy before the day the plaintiffs were transferred to the STGMU did not deny due process by depriving them of opportunity to change their behavior. They were not deprived of a liberty interest, since "maximum custody" is within the terms of their sentences and is not atypical or significant. The majority gives no detail about what maximum custody involves; the dissent says it means only five hours out of cell a week, shower or shave every third day, strip searches every time they leave their cells, one non-contact visit a month, one monitored phone call a week; all meals in cells; no access to regular prison programs (523 n.1). In any case, the majority says, the procedures provided by the state satisfy due process.

Federal Officials and Prisons/Procedural Due Process--Disciplinary Proceedings

Espinoza v. Peterson, 283 F.3d 949 (8th Cir. 2002). The plaintiff lost 13 days' good time in a disciplinary hearing.

The identity of a confidential informant and the specifics of the informant's statement need not have been disclosed. Non-disclosure is acceptable when there is a valid reason for keeping the information confidential and a determination that the informant was reliable. However, the assurance of reliability is not necessary where the proof meets the "some evidence" standard without the confidential information. In any case a declaration from the hearing officer giving valid reasons for non-disclosure and supporting reliability was sufficient to support the outcome.

The refusal to bring a transferred inmate back to the prison to testify live at a disciplinary hearing did not deny due process. A written statement was obtained from the witness, and prison officials have discretion to accept such statements where the offered testimony was not necessary to resolve a conflict. Here, returning the witness to the sending prison would have been a security risk and his live testimony would have been cumulative of his written statement.

PLRA--Mental or Emotional Injury/Mootness

Thompson v. Carter, 284 F.3d 411 (2d Cir. 2002). The Second Circuit weighs in on the mental/emotional injury provision, adopting the consensus of other circuits without getting to the difficult fringe questions. At 416:

> . . . [W]e conclude that § 1997e(e) applies to all federal civil actions including claims alleging constitutional violations. Because § 1997e(e) is a limitation on recovery of damages for mental and emotional injury in the absence of a showing of physical injury, it does not restrict a plaintiff's ability to recover compensatory damages for actual injury, nominal or punitive damages, or injunctive and declaratory relief.

The court rejects the argument that claims of constitutional tort are outside the statute's scope because they are premised on constitutional wrongs and not mental or emotional injury. The prior decision in *Liner v. Goord* does not mean that the statute has no application to constitutional claims; it just means that a plaintiff might be able to recover "certain damages for an Eighth Amendment violation even if he also requests damages for emotional and mental suffering." (417) The *Canell* holding that First Amendment claims are not governed by the statute "arguably could be extended to the Eighth Amendment. . . . However, the weight of authority is to the contrary." The court cites both Eighth Amendment cases and the First Amendment decision in *Allah v. Al-Hafeez*, suggesting that it is the theory of *Canell* and not just its application to the Eighth Amendment that the court is rejecting. This discussion does not get to the point of asking, much less answering, whether a claim for violation of intangible rights *is* a claim for mental/emotional distress.

At 418: The statute does not limit injunctive or declaratory relief, nominal damages, or punitive damages.

The court acknowledges the plaintiff's argument that it would be unconstitutional to deny him a damages remedy, but says (a) it doesn't have to reach the question since its holding does allow for some damages, and (b) other circuits have upheld the limitation.

PLRA--In Forma Pauperis Provisions--Three Strikes

Dupree v. Palmer, 284 F.3d 1234 (11th Cir. 2002). At 1236: When a court denies IFP based on the three strikes provision, it should also dismiss the complaint without prejudice, rather than just let the prisoner pay, since the statute says that the filing fee must be paid at the initiation of suit.

Pre-Trial Detainees/Protection from Inmate Assault

Butera v. Cottey, 285 F.3d 601 (7th Cir. 2002). The plaintiff was raped by other prisoners. He had previously told officers that he was "having problems in the block," and his mother said she told an unidentified jail employee shortly before the assault that her son had been threatened with sexual assault. The Sheriff had instituted a classification system that segregated persons with violent records; jail policy required "clock rounds" by staff through each cellblock at least once per hour, and transfers of detainees if any conflict was reported; there was a system for writing notes to officers requesting assistance.

The Sheriff did not have sufficiently specific notice of a risk of harm to support a finding of deliberate indifference; complaining of "having problems" and wanting off the block is not sufficient, and there was no evidence that any complaint got to the Sheriff or any other policymaker.

The plaintiff did not show a "systematic pattern of violence" that would put the Sheriff on notice that the policies of putting all the male violent detainees in one cellblock and patrolling it only once an hour were inadequate. A police detective testified that he investigated about 50 fights and 10 to 15 allegations of sexual assault in a five-year period, but there was no evidence that any of them occurred in the cellblock at issue, and there were no sexual assaults in the two years before the plaintiff's incident. Evidence that officers attend a two-week specialized training and yearly in-service training dealing with issues including violence, and of the other policies mentioned above, also negated any finding of deliberate indifference. The fact that the Sheriff could have done more, like putting video surveillance cameras in the block, did not establish deliberate indifference.

PLRA--Exhaustion of Administrative Remedies

Ray v. Kertes, 285 F.3d 287 (3d Cir. 2002). Where both parties agree that the time for exhausting administrative remedies has expired, dismissal without prejudice for non-exhaustion is appealable.

At 292: The exhaustion requirement is an affirmative defense that must be pleaded and proven by the defendants. The mandatory language in the PLRA's exhaustion requirement, which does not make that requirement jurisdictional, also doesn't determine the burden of proof; the court analogizes to statutes of limitations, which are often phrased in mandatory language.

The court relies on its own and other courts' similar holdings about Title VII exhaustion and ADEA exhaustion. The reasons this court has cited for the exhaustion requirement are similar to the reasons it has cited in Title VII cases.

At 294-95: Congressional concerns in enacting this exhaustion requirement were to lessen the burden of frivolous prisoner claims and to reinforce the power of prison administrators to control prison problems. These policies are not inconsistent with holding exhaustion an affirmative defense. Courts can dismiss frivolous claims under other PLRA provisions, and the concern with giving prison administrators first crack at problems is addressed by the exhaustion requirement itself. Pleading and proof rules don't bear on the issue.

Also, "considerations of policy and fairness" support placing the burden on defendants: ". . . it appears that it is considerably easier for a prison administrator to show a failure to exhaust than it is for a prisoner to demonstrate exhaustion.' They have greater legal expertise and superior access to records. They can also 'readily provide the court with clear, typed explanations, including photocopies of relevant administrative regulations. Pro se prisoners will often lack even such rudimentary resources.'"

The district court dismissed *sua sponte* and held that the plaintiff had failed to meet a heightened pleading requirement. Wrong on both counts. *Sua sponte* dismissal is allowed by the PLRA for specified reasons, and exhaustion is not one of them; *expressio unius*, etc. The statute's provision for dismissal on the merits even when the case has not been exhausted further proves that exhaustion is not a ground for *sua sponte* dismissal. *Sua sponte* dismissal also is generally inappropriate unless the basis is apparent from the face of the complaint, and non-exhaustion was not.

At 297: The district court's requirement that exhaustion be "demonstrated" is wrong in light of the Supreme Court's disapproval of interpreting statutes to raise heightened pleading standards. The court cites *Leatherman*, *Crawford-El* and *Swierkiewicz* as supporting a general rule on this point.

Religion--Practices--Diet/Financial Resources/Deference

Beerheide v. Suthers, 286 F.3d 1179 (10th Cir. 2002). Jewish prisoners challenged the failure to provide them a kosher diet. The district court granted a preliminary injunction and the defendants set up a modified kosher kitchen in the prison; the injunction was made permanent, and the district court directed that the prisoners could not be charged a co-payment for the kosher meals, which were more expensive than the usual meals.

This opinion, as is common in cases involving Jewish and Christian religious observance, applies the *Turner* standard in a remarkably plaintiff-oriented fashion.

At 1185: "*Turner* constituted a corrective to decisions that granted prison officials next to no deference in how they accommodated the rights of prisoners. At the same time, it did not take from the courts all power to interpret and apply the Constitution within the prison context." Id. (after summarizing *Turner* standard): "*Turner* thus requires courts, on a case-by-case basis, to look closely at the facts of a particular case and the specific regulations and interests of the prison system in determining whether prisoners' constitutional rights may be curtailed." At 1189: "In order to warrant deference, prison officials *must present credible evidence* to support their stated penological goals." (Emphasis supplied)

At 1185: "This circuit recognizes that prisoners have a constitutional right to a diet conforming to their religious beliefs."

At 1186: "To satisfy this prong of the test [the valid, rational connection requirement], the prison administration is required to make a minimal showing that a rational relationship exists between its policy and stated goals." At 1186: "Without doubt, prison administrators have a legitimate interest in working within a fixed budget. Moreover, there is a legitimate concern that other inmates' [sic] might react negatively to providing some prisoners with a kosher diet." This factor weighs in prison officials' favor. The district court correctly rejected prison officials' invocation of a

fear of lawsuits as speculative at best. Also (at 1186 n.2): "Denying protection of a constitutional right in order to prevent other inmates from seeking recognition and enforcement of their constitutional rights is contrary to the most basic principles of our system of government."

The plaintiffs did not have reasonable alternatives for exercising the right to maintain a kosher diet. They couldn't buy it in the prison canteen because the meals cost too much. Also it was not feasible for the local Jewish community to provide the food, and the court can't order them to do so. The prison's "common fare" diet (i.e., no pork or pork products, much of it vegetarian) was not an alternative at all because it wasn't really kosher, not being prepared in a kosher kitchen and not obeying other rules about source, storage, and preparation of ingredients, and service of meals.

The district court correctly declined to allow prison officials to impose a co-payment of 25% of the cost of meals (estimated by defendants at $2.50 to $4.50 per meal), which would have amounted to about $90 a month. At 1188: "While $90 dollars a month may seem like a pittance, it must be assessed in the prison context where inmates make between $1.00 and $1.87 per day for a maximum of $56.58 per month." Prisoners would have to go into debt to pay this. "One prison official testified that . . . he had yet to see the state pursue a debt after a prisoner is released. . . . Such an admission underscores the unreasonable nature of the 25% co-payment program." It would force prisoners into unpayable debts, thus failing to teach them about responsible spending, while doing little to curb costs since the money would not actually be collected. Even those prisoners fortunate enough to receive money from outside would be required to sacrifice nearly all of that income, leaving little or nothing for "essentials such as stationary [sic], telephone calls, medication, medical visits, and clothing." At 1189: "Forcing prisoners to decide between communicating with family and legal representatives, seeking medical treatment, and following religious tenets constitutes a Hobson's choice rather than a true alternative."

The effect of accommodating the right on guards, other prisoners, and prison resources does not help the defendants. While kosher meals are more expensive than others, "evidence of the *actual* cost of kosher meals was elusive," with one witness providing three different estimates, and the district court was not clearly erroneous in holding it could not evaluate the budgetary impact; defendants could not present *reliable* evidence of a more than *de minimis* impact. As for other impacts, a food service supervisor testified that serving kosher food put inmates who prepare the food in a position of power relative to guards because the guards are unfamiliar with kosher rules and the prison's policy; but that is a problem with any new policy, and will ease. It certainly has nothing to do with the co-payment policy. Evidence of problems in Oregon is irrelevant because that program placed no restrictions on who could participate, while this program screens before admission. (It also throws people out if they are observed violating kosher requirements, giving the food to others, etc.) The court again rejects the "floodgate of litigation" claim.

The district court correctly found that providing kosher meals while screening admission to the program was an available alternative with a *de minimis* impact on the overall food budget ($13,000 out of $8.25 million, or .158%, even under defendants' unreliable cost estimates).

Grievances and Complaints about Prison/Transfers/Federal Officials and Prisons/Privacy

Toolasprashad v. Bureau of Prisons, 286 F.3d 576 (D.C.Cir. 2002). The plaintiff alleged that he was transferred and reclassified as a "special offender" in retaliation for filing grievances and contacting public officials, and not for the reasons stated in an allegedly falsified transfer memorandum. He sued under the Privacy Act.

The plaintiff makes out the necessary elements of a Privacy Act claim for damages: that an agency failed to maintain accurate records, that it did so intentionally or willfully, and that an adverse determination was made against the plaintiff as a proximate result. An allegation that prison staff "fabricated and falsified" documents to punish him for grievances sufficiently alleged agency intent even if other decision-makers relied on the information reasonably. An allegation of deprivation of constitutional rights sufficiently alleges an adverse determination.

The plaintiff sufficiently alleged a constitutional violation. The right to petition for redress of grievances "extends not just to court

filings but also to the various preliminary findings necessary to exhaust administrative remedies prior to seeking judicial rule." (584) Prison officials may reasonably limit inmates' ability to file administrative grievances for penological purposes, but they cannot retaliate for grievances that are "truthful and not otherwise offensive" to penological interests.

The plaintiff sufficiently alleged retaliatory action "likely to deter a person of ordinary firmness" from protected activity. He lost access to jobs and was moved a distance from his ill parents and from staff members who could have testified at his parole hearing. The fact that he can still exercise his First Amendment rights is immaterial. At 585: "The relevant question is . . . whether the threat of a transfer would, in the first instance, inhibit an ordinary person from speaking."

Procedural Due Process--Temporary Release/State Officials and Agencies

Kitchen v. Upshaw, 286 F.3d 179 (4th Cir. 2002). The Regional Jail Authority is not an arm of the state for purposes of the Eleventh Amendment, since it sues and is sued under its own name, the state is not obliged to pay judgments against it, and the state doesn't substantially control its operations. A state-sponsored insurance plan that pays judgments does not bring the case within the Eleventh Amendment. Two or more political subdivisions, neither of which is entitled to Eleventh Amendment immunity, can't create an agency that is entitled to it.

The plaintiff alleged that he was kept from participating in work release by jail officials. There is no liberty interest, since not being allowed to leave jail to work is not atypical and significant under *Sandin*. The court notes that two circuits have held that even removal from work release once granted does not implicate a liberty interest, not mentioning that other circuits have held to the contrary. The parties assumed that *Sandin* was inapplicable, but the plaintiff loses under a pre-*Sandin* analysis. The relevant statutes do not support a liberty interest, and the court's sentence, which said that the plaintiff "may" participate in work release "if he is eligible," doesn't either.

Disabled/Medical Care/Municipalities/ Negligence, Deliberate Indifference, and Intent

Lawson v. Dallas County, 286 F.3d 257 (5th Cir. 2002). The paraplegic plaintiff was jailed for two months awaiting a parole revocation hearing. He was transferred to jail from a hospital where he had been successfully treated for bedsores and took with him instructions for his care. He got little of the care, suffered the familiar abuses of paraplegics in ill-equipped and uninterested correctional institutions, and wound up with new bedsores. The jail failed to follow the dressing change prescription for the new bedsores, and then put him in a solitary cell because he was offensive to other prisoners because he was frequently smeared with his own wastes. The jail nurses did not document the progress of his bedsores. An order for hospital treatment was not carried out and he did not receive dressing changes. Additional orders from a hospital for dressing changes were not carried out. Eventually the hospital refused to return him to the jail and arranged a transfer to state custody, by which time he had enormous infected bedsores and eventually had to have flap repair surgery resulting in extensive painful treatment and convalescence. He is in continuing chronic pain.

The plaintiff's treatment violated the Eighth Amendment. At 262: "To apply the *Farmer* test, each individual's subjective deliberate indifference must be examined separately." The court construes the district court's references, e.g., to "the jail" being put on notice, as a finding that all the nurses who treated the plaintiff has the necessary knowledge and engaged in the challenged neglect. The jail nurses all had actual knowledge of his condition, since it was plainly visible, and they did not follow the instructions they were given.

The evidence was sufficient to support municipal liability. The plaintiff's injuries were caused by official policies restricting the nurses' ability to provide adequate care including, e.g., initial assessments of paraplegics were not routinely done; dressing changes were done twice a day (the plaintiff was prescribed them three times a day); foam mattresses are not allowed; hospital policies that conflict with jail policies are disregarded; nurses are not allowed to enter prisoners' cells; etc. There was evidence that the County was aware of the seriousness of the plaintiff's condition and should have been aware of the danger its policies posed.

The last point is important. At 264:

"Unlike the deliberate indifference standard applied to individual employees, this standard is an objective one; it considers not only what the policymaker actually knew, but what he should have known, given the facts and circumstances. . . ." The *Canton* standard applies to municipal claims even in cases where *Farmer* governs claims against individuals.

This is a case where egregious facts seem to have caused the analysis to tilt significantly toward the plaintiff.

PLRA--In Forma Pauperis--Filing Fees

In re Alea, 286 F.3d 378 (6th Cir. 2002). A plaintiff who is barred from IFP under the three strikes provision must still pay the filing fee on the installment plan.

PLRA--Exhaustion of Administrative Remedies

Pozo v. McCaughtry, 286 F.3d 1022 (7th Cir. 2002). The plaintiff grieved and had 10 days to appeal. He waited a year. The grievance system has discretion to permit late appeals, but they didn't in this case. The plaintiff is barred for non-exhaustion. At 1023-24:

> . . . [U]nless the prisoner completes the administrative process by following the rules the state has established for that process, exhaustion has not occurred. Any other approach would allow a prisoner to "exhaust" state remedies by spurning them, which would defeat the statutory objective of requiring the prisoner to give the prison administration an opportunity to fix the problem--or to reduce the damages and perhaps to shed light on factual disputes that may arise in litigation even if the prison's solution does not fully satisfy the prisoner.

The court notes the distinction between administrative law exhaustion and collateral attack exhaustion, then says that after *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), the two are the same. "After *Boerckel*, a procedural default also means failure to exhaust one's remedies." At 1024:

> Exhaustion under § 1997e(a) is administrative only; a prisoner who uses all administrative options that the state offers need not also pursue judicial review in state court; but a prisoner who does not properly take each step within the administrative process has failed to exhaust state remedies, and thus is foreclosed by § 1997e(a) from litigating. Failure to do what the state requires bars, and does not just postpone, suit under § 1983.

The fact that the system has discretion to permit late appeals doesn't mean that its failure to do so means the prisoner has exhausted. That position "would leave § 1997e(a) without any oomph." (1025)

At 1025: "To exhaust administrative remedies, a person must follow the rules governing filing and prosecution of a claim." If the system accepts a belated filing and considers the merits, that step makes the filing proper and avoids exhaustion, default, and timeliness hurdles.

Qualified Immunity/Use of Force/Food/Religion--Practices--Diet

Walker v. Horn, 286 F.3d 705 (3d Cir. 2002). The Muslim plaintiff fasted periodically for three to 15 days. On the fourth day of a fast, the defendant doctor declared him to be on a "hunger strike" and said he was lethargic, slow walking and talked with a slight slur, and he should receive nutrition and hydration as soon as possible. The doctor did not examine him, just talked with him through the cell bars. At prison officials' request a state court entered an order authorizing force feeding. As he was being hooked up, he said he would stop his fast, but was told it was too late to avoid force feeding. He was fed meat and milk products even though he said he was a vegetarian and his records confirmed that. He was threatened with force feeding again when he said he would not eat the meat on the menu. He was required to eat five or six meals with the feeding tube in his body, strapped to the bed by ankle and wrist restraints.

Defendants' qualified immunity appeal turns on the factual dispute whether the plaintiff actually did tell the doctor he would eat before he was force fed. Since that fact is disputed, the court lacks appellate jurisdiction. At 711 n. 2: Defendants could not plausibly claim qualified immunity based on the facts assumed by the district court, which were that the plaintiff did tell

the doctor he would eat.

Mental Health Care/Medical Care--Standards of Liability--Deliberate Indifference/Theories--Due Process/Medical Care--Physical Facilities

Terrance v. Northville Regional Psychiatric Hospital, 286 F.3d 834 (6th Cir. 2002). The decedent, an obese diabetic suffering from hypertension with a heart condition with abnormal EKG readings, was involuntarily committed to a psychiatric hospital where he took psychotropic medications. He died on a day with 90 degree heat and 90% humidity, of acute cardiopulmonary arrest and hyperthermia exacerbated by psychotropic medications.

At 842-43: "As the decedent was involuntarily committed to NRPH for psychiatric treatment, he was similarly situated to a prisoner with regard to the Eighth Amendment right to medical care." (The court later does a *Youngberg v. Romeo* analysis in the alternative.) The court cites the *Farmer* definition of deliberate indifference and then says (at 843): "The federal courts have also held that less flagrant conduct may also constitute deliberate indifference in medical mistreatment cases. For example, the Eleventh Circuit has held that 'deliberate indifference may be established by a showing of grossly inadequate care as well as a decision to take an easier but less efficacious course of treatment.'" The court is guided by *Waldrop v. Evans*, which says the relevant question is "whether a reasonable doctor . . . could have concluded his actions were lawful."

His treating physician could be found deliberately indifferent given his knowledge of the decedent's condition and the weather for not following the facility protocol and ordering that the decedent stay within a cool area; in fact, he went outdoors and over-exerted himself. He also took an hour to respond to a page when the patient went into crisis.

Another doctor could be found deliberately indifferent for continuing to increase the decedent's dosage of psychotropics, despite her knowledge of the patient's condition and the weather, and for failing to give immediate care even when she suspected hyperthermia.

A nurse who referred the prisoner to off-ward activities given his condition and the weather could be held deliberately indifferent. The failure to ensure that the decedent's ward was properly equipped, e.g., with ice, an ice water enema, and a rectal thermometer, and to provide emergency care when the treating doctor didn't show up promptly, could also support such a finding.

Defendants' conduct also presents questions under the Fourteenth Amendment "professional judgment" standard of *Youngberg v. Romeo*. At 850: ". . . [W]here hospital staff admittedly fail to follow institutional procedures, questions about the State's adherence to accepted professional conduct are not unwarranted."

Use of Force--Stun Devices, Restraints

United States v. Durham, 287 F.3d 1297 (11th Cir. 2002). The application of a stun belt to a criminal defendant is governed by the same considerations and body of law as restraint devices. Such a decision "must be subjected to close judicial scrutiny to determine if there was an essential state interest furthered by compelling a defendant to wear shackles and whether less restrictive, less prejudicial methods of restraint were considered or could have been employed." (1304) The reasons for a decision to restrain must be placed on the record. At 1306:

> . . . [S]tun belts plainly pose many of the same constitutional concerns as do other physical restraints, though in somewhat different ways. Stun belts are less visible than many other restraining devices, and may be less likely to interfere with a defendant's entitlement to the presumption of innocence. However, a stun belt imposes a substantial burden on the ability of a defendant to participate in his own defense and confer with his attorney during a trial. If activated, the device poses a serious threat to the dignity and decorum of the courtroom.
>
> Therefore, a decision to use a stun belt must be subjected to at least the same "close judicial scrutiny" required for the imposition of other physical restraints. . . . Due to the novelty of this technology, a court contemplating its use will likely need to make factual findings about the operation

> of the stun belt, addressing issues such as the criteria for triggering the belt and the possibility of accidental discharge. A court will also need to assess whether an essential state interest is served by compelling a particular defendant to wear such a device, and must consider less restrictive methods of restraint. Furthermore, the court's rationale must be placed on the record to enable us to determine if the use of the stun belt was an abuse of the court's discretion. [Footnote omitted]

The lower court failed to make the appropriate inquiry and findings. It should not have relied on unsworn statements by the U.S. Marshals Service about, e.g., what steps they take to avoid accidental discharge. It should have considered whether, e.g., leg shackles were sufficient to prevent escape.

The defendant's right to be present at trial and participate in his defense was violated, so the government has to prove that the error was harmless beyond a reasonable doubt. The court orders a new trial.

On remand, the district court re-entered its order after a hearing, 219 F.Supp.2d 1234 (N.D.Fla. 2002), finding *inter alia* that the defendant is a serious security risk, and that the belt has been worn 63,000 times and activated 45 times, with only 11 accidental activations, seven of them before the manufacturer put a plastic shield over the "on" switch. The court also emphasizes the importance of amperage over voltage.

Federal Officials and Prisons/Searches--Person--Prisoners/Deference/Summary Judgment

Farmer v. Perrill, 288 F.3d 1254 (10th Cir. 2002). The pre-operative transsexual plaintiff (same as in *Farmer v. Brennan*), housed in SHU, challenged visual strip searches required before going to the recreation yard, arguing that they were unnecessary because the yard was secure and closely supervised. The plaintiff provided affidavits showing that the searches were conducted in full view of other inmates. Defendants appealed based on qualified immunity.

The right "not to be subjected to a humiliating strip search in full view of several (or perhaps many) others *unless the procedure is reasonably related to a legitimate penological interest*" is well established. The district court correctly held that the defendants "cannot altogether ignore plaintiff's privacy rights whether or not compelled to do so by valid and important penological interests." (1260) Justifying the searches does not end the inquiry; defendants must justify doing them in the open.

The district judge did not err in placing the burden on defendants to justify their policy by denying summary judgment; both parties proffered evidence and the district court concluded that material facts were in dispute. Under the *Turner* standard, it is not the case that the plaintiff must in all cases identify an alternative means of safeguarding the prison's interests; doing so may be evidence that the practice does not satisfy the standard.

Procedural Due Process--Disciplinary Proceedings/Habeas Corpus

Portley v. Brill, 288 F.3d 1063 (8th Cir. 2002). A claim challenging a decision that took away good time is barred by *Heck* and *Balisok* even if the plaintiff dropped the request for restoration of good time. The fact that the plaintiff made an equal protection claim alleging racial discrimination is not a relevant distinction, since the *Heck* rule applies to all claims that would necessarily require proof of unlawfulness of conviction or sentence.

Procedural Due Process/Rehabilitation/Mental Health Treatment/Habeas Corpus

Leamer v. Fauver, 288 F.3d 532 (3d Cir. 2002). The plaintiff was sentenced under a "somewhat unique" statutory scheme, now repealed, that provided for an indeterminate term, treatment, and release only when he "is capable of making an acceptable social adjustment in the community." He was placed on "Restrictive Activities Program" (RAP) and was denied participation in therapy while simultaneously being further restricted because of "poor institutional adjustment"--for not communicating with his therapist!

Plaintiff's claim need not be pursued via habeas corpus. The *Heck/Balisok* rule does not apply to all prison disciplinary proceedings, just those that affect the length of sentence (relying on

Jenkins v. Haubert). This plaintiff complains about a condition of confinement. It doesn't matter whether the plaintiff would, if successful, appear before the parole board; the question is whether victory would "necessarily imply" a shorter sentence.

The statutory scheme at issue here presents "the type of liberty interest that is at the heart of procedural and substantive due process." The plaintiff's sentence links confinement inextricably with treatment. "Therapy is thus an inherent and integral element of the scheme, and its deprivation is clearly a grievous loss not emanating from the sentence." (544) Therefore there is a state-created liberty interest in receiving therapy.

During the course of the litigation, the state changed its position from "denial of therapy was justified" to "he wasn't denied therapy, RAP is therapy." Without directly confronting this claim, the court says that therapists' reports appear to have been generated "without any contact, either therapeutic or evaluative," with the plaintiff, and that "*pro forma* reviews that were not based on actual evaluations of Leamer's clinical condition and progress would be violative of procedural due process."

Placement in RAP--as opposed to the denial of therapy--may not deny due process under *Sandin*'s atypical and significant standard.

The plaintiff's substantive due process claim is reviewed under a deliberate indifference and "shock the conscience" standard under *County of Sacramento v. Lewis*. The plaintiff's Eighth Amendment claim is one of deliberate indifference to his physical and mental well-being. Both are remanded for reconsideration.

PLRA--In Forma Pauperis--Filing Fees

Atchison v. Collins, 288 F.3d 177 (5th Cir. 2002). Filing fees are to be collected per case, up to 100%; the statutory language is unambiguous and the constitutional qualms expressed by the Second Circuit are meritless, since the Supreme Court has said there is no constitutional right to proceed IFP.

PLRA--Mental or Emotional Injury/Pre-Trial Detainees

Oliver v. Keller, 289 F.3d 623 (9th Cir. 2002). The plaintiff alleged that he was subjected to crowded conditions, sleeping on the floor without bedding, 24-hour lighting, excessive air conditioning, and medical neglect.

At 627: The court joins the Second, Fifth and Eleventh Circuits in holding that "for *all claims to which it applies* [emphasis supplied], 42 U.S.C. § 1997e(e) requires a prior showing of physical injury that need not be significant but must be more than de minimis. . . . This interpretation reflects Congress's intent in passing the PLRA" (i.e., to curtail frivolous suits and reduce the volume of prisoner litigation). *Id.* at n.5: This doesn't disturb the prior holding in *Canell v. Lightner*, 143 F.3d 1210 (9th Cir.1998), refusing to apply § 1997e(e)'s prior physical injury requirement in a case alleging violation of First Amendment rights because "deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from the physical injury he can show, or any mental or emotional injury he may have incurred . . . regardless of the form of relief sought." *Id.* at 13. At 628:

> . . . [I]n embracing the de minimis physical injury standard under § 1997e(e) adopted by the Second, Fifth, and Eleventh Circuits, we do not subscribe to the reasoning set forth by the Fifth Circuit in *Siglar*, which purports to follow established Eighth Amendment standards for determining when a prisoner has been subjected to cruel and unusual punishment, stating that "the injury must be more than de minimis." *Siglar*, 112 F.3d at 193. This does not accurately describe the Eighth Amendment standard enunciated by the Supreme Court in *Hudson v. McMillian*. . . . In *Hudson*, the Court held that "de minimis uses of physical force" are not constitutional violations, focusing on the amount of force used, not the nature or severity of the injury inflicted. . . . The Fifth Circuit has read *Hudson* to create a de minimis physical injury requirement under the Eighth Amendment, stating . . . that "to support an Eighth Amendment excessive force claim a prisoner must have suffered from the

excessive force a more than de minimis physical injury." The Eleventh Circuit in *Harris*, while embracing a de minimis physical injury requirement for § 1997e(e) as we do today, criticized the Fifth Circuit's reasoning, pointing out that the Fifth Circuit's interpretation of *Hudson* differed from its own Eighth Amendment jurisprudence. . . .

In ruling that the requisite physical injury must be more than de minimis for purposes of § 1997e(e), we are not importing the standard used for Eighth Amendment excessive force claims, which examines whether the use of physical force is more than de minimis. . . . Nor do we alter our jurisprudence in the Eighth Amendment arena, "but only use the well established Eighth Amendment standards to guide us in our section 1997e(e) analysis." *Harris*, 190 F.3d at 1286.

We decline appellant's invitation to hold that "any" physical injury is sufficient to meet the demands of § 1997e(e), because such an interpretation would ignore the intent behind the statute. However, we also decline the invitation of appellees to adopt an even more restrictive approach than the "bare" de minimis interpretation countenanced by *Siglar*. Appellees cite *Luong v. Hatt* . . . to argue that de minimis "physical injury" under § 1997e(e) should be understood as "an observable or diagnosable medical condition requiring treatment by a medical care professional," which would cause a " 'free world person' to seek such treatment." If appellant's proposed standard requires too little, appellees' proposed standard requires too much. Accordingly, the district court did not err in applying a de minimis analysis to evaluate whether appellant's mental and emotional injury claims could proceed.

The plaintiff alleged back and leg pain from sitting and sleeping on the benches and floor of a temporary cell; he said this was "nothing too serious" at his deposition. He was in a fight, but failed to describe the nature of the injuries he sustained. He also complained of a canker sore. These are all de minimis.

At 629: "To the extent that appellant has actionable claims for compensatory, nominal or punitive damages--premised on violations of his Fourteenth Amendment rights, and not on any alleged mental or emotional injuries--we conclude the claims are not barred by § 1997e(e)." *Id.*: "To the extent that appellant's claims for compensatory, nominal or punitive damages are premised on alleged Fourteenth Amendment violations, and not on emotional or mental distress suffered as a result of those violations, § 1997e(e) is inapplicable and those claims are not barred." Exactly what this distinction means is not explained.

PLRA--Exhaustion of Administrative Remedies/Appeal/Pro Se Litigation

Casanova v. DuBois, 289 F.3d 142 (1st Cir. 2002). At 147: "Finding the analysis of our sister circuits to be sound, we join the chorus of voices concluding that exhaustion is not a prerequisite to federal jurisdiction."

The court remands for the district court to address exhaustion. Implicitly it rejects defendants' argument that exhaustion must be pled.

The notice of appeal in this *pro se* case was signed by only one plaintiff, supposedly on behalf of all. The court directed the clerk's office to give the others a chance to sign, which they took. Nonetheless the defendants move to dismiss their appeals. The court criticizes the defendants for waiting 18 months to call this "error" to the court's attention, and says that whether or not the plaintiffs intended to appeal originally, they all responded within the time set for the court, and the Supreme Court said in *Becker v. Montgomery* that exhaustion is not jurisdictional. At 146: "In this case, the other prisoners may very well have believed that Casanova's appeal was sufficient to preserve the rights of all plaintiffs, and they corrected the error as soon as it was brought to their attention. In light of *Becker* and our

general obligation to read pro se complaints generously, . . . we find that dismissal of the appeal of the other inmates is unwarranted."

Publications/Qualified Immunity/Procedural Due Process--Property

Sorrels v. McKee, 290 F.3d 965 (9th Cir. 2002). Prison officials promulgated a policy at one prison forbidding prisoners to receive publications as gifts; the decision striking that policy down as unconstitutional was affirmed on appeal. Meanwhile they had promulgated a similar policy at the plaintiff's prison and applied it to him. The defendants are entitled to qualified immunity, since the right at issue is "the First Amendment right to receive publications that the inmate himself did not pay for from his own prison account," and that law was not clearly established until the policy was struck down at the first prison. While defendants' justifications for the policy were held inadequate under *Turner*, "it at least passes the laugh test. . . ." (970)

The plaintiff also alleged that he was denied due process because a gift publication sent to him was rejected without notice. *Procunier* requires reasonable procedural safeguards for rejecting inmate mail. However, there was no evidence that the failure to give notice was other than a rare and inadvertent mistake, so it wasn't official policy, but negligence, which is not actionable.

Mental Health Care/Medical Care--Examinations/Pre-Trial Detainees/Medication/Use of Force/Municipalities/Negligence, Deliberate Indifference and Intent

Gibson v. County of Washoe, Nev., 290 F.3d 1175 (9th Cir. 2002). This extremely long and complicated opinion is one of the most sophisticated and plaintiff-favorable discussions I have seen of municipal liability and the interaction of the *Farmer* deliberate indifference standard with the *Canton v. Harris* municipal liability standards.

The mentally ill decedent was jailed as a result of conduct during a manic period. The arresting officers delivered the drug containers found in his truck to the nurse on duty, who confirmed to one of them that the medications were to stabilize mental illness, but told no one else. The decedent continued to be disruptive while locked in a cell, and was ordered to be transferred to a special watch cell, which was done after spraying him in the face with pepper spray. At the watch cell, he was restrained face down with two deputies on his back and legs and two more helping hold his arms and legs as he continued to struggle. During the struggle, he had a heart attack and died as a result of severe arteriosclerosis, which neither he nor his wife knew he had. Defendants' medical expert said his psychiatric state combined with the restraint efforts resulted in physiological stress which precipitated a heart attack.

Jail policy provided for immediate medical screening on intake for obvious signs of sickness or injury requiring immediate attention, but screening is to be delayed if the inmate is "combative, uncooperative or unable to effectively answer questions due to intoxication." It also provided that the jail nurse will evaluate it and determine whether it is put in secured property or in the infirmary for follow-up care. During the relevant period there was no mental health worker at the jail "because of a soured relationship between the jail's medical staff and the mental hospital."

At 1186 n.7:

> The municipal defendants . . . assert that if we conclude, as we do, . . . that the individual deputy defendants are not liable for violating Gibson's constitutional rights, then they are correspondingly absolved of liability. Although there are certainly circumstances in which this proposition is correct, *see Cityof Los Angeles v. Heller*, . . . it has been rejected as an inflexible requirement by both this court and the Supreme Court.

Exceptions include cases in which the individuals are exonerated via qualified immunity, cases in which the injury was inflicted *by the City*, and cases in which liability cannot be ascribed to a single individual officer. The court quotes *Owen v. City of Independence*, which states that a "'systemic' injury" may "result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith." *Id.*

The Due Process Clause "imposes, at a

minimum, the same duty the Eighth Amendment imposes" as to medical care during incarceration, and that includes psychiatric needs. (1187)

The court distinguishes the Eighth Amendment deliberate indifference standard from the *Canton v. Harris* deliberate indifference standard based on the different mental elements (1187 n. 8).

The evidence could support a finding that the failure to respond to the decedent's medical need was a direct result of an affirmative county policy that was deliberately indifferent to the need, *i.e.*, the policy mandating delay in medical care for those who are combative or uncooperative. There is evidence that this is a common symptom of someone in a manic state--which means that the decedent's serious medical need was not met because of his serious medical need. The problem could also be found to have been aggravated by the policy that medication would be confiscated and either put in secure property or given to the nurse for evaluation, rather than used for immediate medical needs. The court notes that the decedent's deranged mental state was obvious even to the lay deputies.

A jury could find that County policymakers knew that inevitably some prisoners would arrive at the jail with urgent health problems, and it is obvious from the County's policies that policymakers were "keenly aware" that mental illness, especially manic phases, were within the range of urgent health problems. Other jail policies pertaining to the mentally ill showed that the policymakers "knew that they needed to deal safely and effectively with the special challenges posed by the mentally ill. . . ." In previous years, the County had a full-time mental health professional on site at the jail to screen detainees, and a reasonable jury could infer the County's knowledge that one was needed to avoid serious harm, and that a four-year lapse in this service showed that the County chose to ignore acknowledged mental health needs.

The court rejects the argument that the decedent's serious medical need was arteriosclerosis and not mental illness. This is an argument about foreseeability, and there is sufficient evidence to find that death is a foreseeable result of not treating a manic person and placing him in a penal setting, even if the precise mechanism of the decedent's death was not foreseeable. His other injuries besides death (confinement, restraint, and use of force) were certainly a foreseeable consequence of not identifying a manic condition. Under tort principles applicable in § 1983 cases, the tortfeasor takes his victim as he finds him.

The County could also be held liable based on custom or policy amounting to deliberate indifference (as opposed to the previously discussed theory, which focuses on policies which *are* deliberately indifferent). Such a finding would require a County employee to have violated the decedent's rights, unlike the other theory. Here, the jail nurse could be found to have been deliberately indifferent based on her medical training, the fact that decedent behaved in a way consistent with mental illness, and her knowledge that he possessed medication that would stabilize him. A jury could find that this violation resulted from an omission in County policy concerning detainees' medication, which said it should be put in property or in the infirmary, without making provision for medical personnel to use it to address urgent needs. A jury could find that the County made a deliberate choice to disregard a known or obvious risk in adopting that policy along with the policy of delaying medical evaluations for combative and uncooperative persons.

The deputies present could not be found deliberately indifferent because, absent medical training, there is no evidence that they knew the decedent's behavior connoted serious, treatable mental illness.

The force used against the decedent was reasonable. At 1197: "The Due Process clause protects pretrial detainees from the use of excessive force that amounts to punishment. . . . [W]e have determined that the Fourth Amendment sets the 'applicable constitutional limitations' for considering claims of excessive force during pretrial detention." (Actually, the case they cite for this proposition, *Pierce v. Multnomah County*, says that the Fourth Amendment applies during the period before an arrestee is arraigned or released.) Here, the deputies had no reason to believe that the decedent's crazed behavior was related to treatable mental illness, so "we cannot hold them accountable for having treated Gibson as a dangerous prisoner rather than a sick one. . . ."

At 1188 n.9: "Because [the record shows that the denial of medical attention directly resulted from an affirmative County policy], we do

not address whether it is necessary to prove the subjective *Farmer* state of mind in suits against entities rather than individuals." Nor does the court determine whether there are any circumstances in which detainees can prove a constitutional violation without meeting the *Farmer* deliberate indifference standard. That standard is based on the presence of the word "punishment" in the Eighth Amendment; that word does not appear in the Fourteenth Amendment, and detainees are not subject to punishment. The Fourteenth Amendment standard also applies not only to penal settings but to anyone restricted by a state from obtaining medical care on his own. "It is quite possible, therefore, that the protections provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided convicted prisoners by the Eighth Amendment." *Id.*

At 1188 n.10: The fact that *Farmer* says it is difficult to determine the subjective state of mind of a government entity does not preclude the possibility that a municipality might have the subjective state of mind required by *Farmer.* "First, it is certainly possible that a municipality's policies explicitly acknowledge that substantial risks of serious harm exist. Second, numerous cases have held that municipalities act through their policymakers, who are, of course, natural persons, whose state of mind can be determined."

U.S. District Court Cases

Searches--Person--Arrestees

Roberts v. Rhode Island, 175 F.Supp.2d 176 (D.R.I. 2000). In Rhode Island, pre-trial detainees and convicts are both held by the state Department of Correction. The prison system policy calls for visual body cavity searches of all new admissions. That policy is unconstitutional under First Circuit law requiring such searches of arrestees to be based on reasonable suspicion that the arrestee is concealing contraband or weapons. On reconsideration, the court says its holding is restricted to pre-arraignment detainees.

Heating and Ventilation/Length of Stay

Scotti v. Russell, 175 F.Supp.2d 1099 (N.D.Ill. 2001). The court rejects the plaintiff's claim that he was kept in an unconstitutionally cold cell for two winters, since temperature measurements showed nothing colder than 64.6 degrees, except for a 24-hour period with no heat, and that period was too short to "cause sufficient damages." Also, prison officials provided extra blankets and taped plastic over the cell windows to keep the wind out. There was no substantial risk to the plaintiff's health and the defendants took reasonable measures to protect him, like maintaining the heating system, covering the windows, etc.

Emergency/Length of Stay

Waring v. Meachum, 175 F.Supp.2d 230 (D.Conn. 2001). The prison was locked down for a week and plaintiffs sued for damages over the conditions.

At 237-38: "While prison officials may impose institutional lockdowns, the conditions under which the inmates are confined must not violate the Eighth Amendment." The court holds these conditions constitutional and says the defendants would be entitled to qualified immunity in any case.

Food (239-40): The prisoners were served cold cereal and sandwiches in their cells. "Prisoners are guaranteed a nutritionally adequate diet. . . . The provision of cold food is not, by itself, a violation of the Eighth Amendment as long as it is nutritionally adequate and is 'prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it.' . . . The court agrees with the Eighth Circuit in noting that 'a diet, such as this one, without fruits and vegetables might violate the eighth amendment if it were the regular prison diet.'" Because it was short-term, however, it was not unlawful. The court says there are no allegations that plaintiffs did not receive nutritionally adequate meals. There were statements that one prisoner lost seven pounds during the lockdown and another was escorted to the medical unit because of weakness and dizziness from lack of food, but the court says there is no evidence of *serious* injury, which appears to be part of the court's definition of nutritionally adequate.

Medical Care--Special Diets (240): one plaintiff did not receive his prescribed diet for six days. "Although in a different context the failure to provide a special diet could constitute an Eighth Amendment violation, the court does not believe it

to be so here." There is no deliberate indifference under the circumstances, even though he told the guards of his diet, and he failed to allege any harm.

Hygiene (241-42): The failure to provide inmates with showers was not unconstitutional. "Although in some instances the failure to provide inmates with clean clothing could constitute cruel and unusual punishment," it isn't in this emergency context.

Medical Care (242-43): temporary denial of routine medical care, such as treatment for rashes, headaches, nausea, and one complaint of blood in stool, did not violate the Constitution.

Heating and Ventilation (243): Complaints of lack of heat, broken cellblock windows, and only a single sheet and blanket do not establish an Eighth Amendment violation under the circumstances. Prison officials said that the heat was fully operational during the entire period, temperatures were always above 60 degrees, and the officers had no ability to adjust the temperature. Broken windows were promptly covered.

Pre-Trial Detainees/Medical Records/Federal Officials and Prisons/Color of Law/Medication/Non-Constitutional Rights

United States v. Wallen, 177 F.Supp.2d 455 (D.Md. 2001). The criminal defendant, a federal detainee held at a Maryland jail, has multiple medical problems and requires multiple medications. He complained that he did not receive his medication at the prescribed times, but instead all in a single batch once a day, and sometimes he did not receive some medication at all. He lost consciousness in his cell and was hospitalized for several days. The court says it was initially skeptical of such claims, but changed its mind when it learned that the Prison Health Services medication records indicated that his medication was properly dispensed *when he was not even in the jail*. A hearing revealed that even when the system is working right, medication dispensation is recorded by looking at what medication is left over *after* dispensation. At 458:

> If the Constitution forbids the custodians of pretrial detainees from being deliberately indifferent to detainees' legitimate and apparent needs for medical care, then of necessity it forbids deliberate indifference in the management, dispensing and documentation of prescribed drug therapy, a critical component of overall medical care.
>
> . . . The inadequate design and deficient implementation of the medication record system prevents those in charge from being able to determine whether the inmate-patients in their custody are receiving the medical care--specifically drug therapy--ordered by their treating physicians.

The court concludes it cannot be assured that the defendant will receive the medical care he requires. At 458-59:

> It can be questioned whether the Court may treat the Defendant's oral request as a plea for constitutional relief. Regardless, and without deciding that question, the Court no doubt has the inherent authority to enter orders necessary to protect persons detained by its authority from the potentially life-threatening consequences of poor medical care.

The court therefore orders that until the defendant is discharged or transferred to the Federal Bureau of Prisons, the United States Marshal shall hold him at an infirmary or hospital, and the defendant shall receive medical care "compliant with the relevant standard of care" in whatever facility he is placed in.

Medical Care--Standards of Liability--Deliberate Indifference/PLRA--Exhaustion of Administrative Remedies

Lindsay v. Dunleavy, 177 F.Supp.2d 398 (E.D.Pa. 2001). The plaintiff was punched in the jaw by another prisoner and was given pain medication and cotton to bite on by medical staff. He went back five of the next six days complaining of continued severe pain, numbness, and swelling in his jaw, and was told that it would take time to heal and that if his jaw was broken he wouldn't be able to talk. No x-rays were taken. When he was sent to state prison on the seventh day, his jaw was found to be broken.

The court declines to dismiss for non-exhaustion, since the plaintiff had been

transferred to state prison by the time he learned his jaw was broken. Defendants provide no information on what sort of remedies were available at either institution or what remedies are available in state prison for a prisoner complaining of events elsewhere.

The plaintiff's claim is dismissed because he has not pled facts sufficient to establish deliberate indifference--for example, that the defendant recognized his need for an x-ray and refused to order it. At 402: ". . . [A] doctor's decision not to order specific forms of diagnostic treatment, an x-ray for example, constitutes medical judgment, which is not actionable."

Medical Care/PLRA--Exhaustion of Administrative Remedies

Gomez v. Winslow, 177 F.Supp.2d 977 (N.D.Cal. 2001). The plaintiff filed a grievance about treatment of his Hepatitis C. He did not complete the grievance process because, in the course of its various stages, he got satisfactory results, including a grievance decision stating that he was being referred to physicians to consider starting interferon. Defendants asserted he hadn't adequately exhausted because he really had three claims: failure to timely diagnose, failure to timely treat, failure to inform, and each of these had to be fully exhausted.

The court declines to dismiss for non-exhaustion. The exhaustion requirement's most relevant purpose is to give prison officials notice of complaints so they can take proper action. The court holds that a grievance that made clear that his concern was over his inadequate treatment for Hepatitis C gave prison officials sufficient notice of the problem. It was not necessary for him to file separate grievances about different aspects of the problem such as failing to tell him he had tested positive for the disease, long delay in beginning treatment, failing to inform him adequately about the disease, etc. At 982 n.3: Defendants' argument would be better in a case where the claims were unrelated, i.e., where "it would be clear that the facts involved are distinct, and thus require separate exhaustion. . . ."

The plaintiff's grievance was granted at an intermediate stage and he did not appeal all the way up. The court holds that he has exhausted. Since he sought effective treatment and information about side effects, got them, said his concerns had been addressed, and won his appeal on the remaining issue, there was nothing more he could get from the administrative process. At 985: "Because Gomez had, in essence, 'won' his inmate appeal, it would be unreasonable to expect him to appeal that victory before he is allowed to file suit. Indeed, it appears that plaintiff would have been rebuffed by prison officials had he for some reason tried to pursue his grievance to another level. At oral argument on this motion, counsel for plaintiff noted that one of the grounds for rejecting or canceling an appeal is that the issue had been resolved at a previous level."

Use of Force/Municipalities/State Law Immunities

Perrin v. Gentner, 177 F.Supp.2d 1115 (D.Nev. 2001). A statement by one police officer that the defendant officer who shot the plaintiff's decedent was "known to use 'heavy handed' tactics with citizens and was 'out to perform [his] job overzealous[ly] with prejudice towards people'" and that he was uncomfortable working with him, plus two accounts of prior excessive force and threats to shoot citizens, supported a claim against the municipality. At 1124: "If Officer Gentner's own fellow officers [i.e., one of them] were afraid to work with him, surely Metro [Las Vegas] was on constructive notice that Gentner was not only a potential threat to public safety, but that he regularly flaunted [sic] constitutional safeguards intended to protect citizens against the use of excessive force." The plaintiff also presented sufficient evidence of inadequate training, which the court does not detail.

The decision to stop the decedent may have been discretionary, but subsequent actions including the decision to shoot at him 14 times were operational, so the municipality is not immune from state law claims.

The decedent was shot after he jaywalked, had a brief conversation with another person, and then refused to show his hands at the officer's order.

Religion

Freedom From Religion Foundation, Inc., 179 F.Supp.2d 950 (W.D.Wis. 2002). A contract between the Department of Correction and "Faith Works," a "faith-based program designed to meet the needs of individuals recovering from addiction to alcohol and other drugs," to operate a halfway

house raises an Establishment Clause issue because Faith Works engages in religious indoctrination which can be attributed to the state, since probation or parole agents determine which individuals are referred to which programs, and since Faith Works is the only such long-term program in the Milwaukee aea. The defendants will have to prove at trial that the offender makes a genuinely independent, private choice to attend Faith Works in order to refute the claim that its contract amounts to "direct funding" of a religious organization. It is not possible to separate the religious components of the program from its secular components for funding purposes.

Faith Works' argument that barring it from its government contracting activities would violate its free speech rights is wrong. Government's contracting out its responsibilities does not create a public forum for private speech.

Procedural Due Process--Disciplinary Proceedings/Injunctive Relief--Preliminary

Espinal v. Goord, 180 F.Supp.2d 532 (S.D.N.Y. 2002). The plaintiff's request for a preliminary injunction releasing him from punitive segregation is a challenge to "government action taken in the public interest pursuant to a statutory or regulatory scheme" and would alter the status quo, and must therefore be supported by a showing of irreparable harm and a clear or substantial showing of likelihood of success on the merits, not the lesser "fair ground for litigation/balance of hardships" standard. The plaintiff fails to show a likelihood of success.

The plaintiff met the *Sandin* requirement of atypical and significant hardship, having spent nearly 1,300 days in SHU under conditions in "stark contrast" to general population conditions, especially since he was in Southport, where SHU conditions are harsher than in other SHUs.

A notice charging the plaintiff with both fighting and assault was not defective even though the two offenses are different; it was reasonable for the officers to charge him with both since further fact-finding might have been necessary to figure out which charge was correct. The lack of information about the basis for knowledge or veracity by a confidential informant was not required to appear on the notice.

The plaintiff's claim that the hearing officer was biased because he is the supervisor of the involved security staff and because he assumed the role of a quasi-prosecutor in his questioning did not establish lack of impartiality. At 539: "As Schneider neither witnessed nor investigated the incident in question, he was sufficiently impartial under the legal standards laid down in *Powell v. Ward*. . . ."

The court cannot determine on this record whether the hearing officer made an independent assessment of the reliability of the confidential informants. It notes that the Second Circuit has said the existence of a right to such an assessment remains an open question; since this is the plaintiff's motion, not the defendants', it is not necessary to resolve the question in denying relief.

Religion--Practices--Beards, Hair, Dress/Injunctive Relief--Preliminary

Goodman v. Money, 180 F.Supp.2d 946 (N.D.Ohio 2001). The court issues a temporary restraining order allowing two Orthodox Chassidic prisoners to maintain their religious beards and hairstyles. The fact that they had been allowed to do so until recently suggests that defendants are engaging in an exaggerated response to security needs, and the loss of their hair would be irreparable harm. At 947: "Once their hair is cut, their loss cannot be restored." Temporary relief will not adversely affect the public interest in letting prison officials maintain order. The court says that although the regulations "may be enforceable, . . . that fact does not preclude the plaintiffs from going forward with an as-applied challenge to the regulation." The plaintiffs alleged that they had been permitted to maintain their beards and sidelocks previously, then had been "encouraged to transfer" to another prison where they would be able to practice all religious tenets freely.

Use of Force--Restraints

Ball v. Baker, 180 F.Supp.2d 1293 (M.D.Ala. 2000). The court makes findings of fact memorializing its decision to require the plaintiff to be leg-shackled during his jury trial. He had a history of one escape, significant mental disability, and numerous disciplinary charges. The court relied in part on the "independent assessment" of the United States Marshal. The court notes that it ameliorated the effect of the shackles by allowing the plaintiff to remain behind the counsel table and have exhibits brought to him by court personnel to

minimize the visibility of the restraints.

Communication with Media/Prison Records/Damages--Intangible Injuries, Conditions of Confinement, Punitive/Transfers

Spruytte v. Hoffner, 181 F.Supp.2d 736 (W.D.Mich. 2001). Plaintiffs were transferred after writing a letter to the local newspaper responding to another letter saying prisoners should be less comfortable. That conduct was protected by the First Amendment. The court cites the holding of *Thornburgh v. Abbott* that outgoing mail is entitled to greater protection than incoming mail. Sending the letter did not violate any legitimate prison regulation or constitute a security risk. The letter's contents "were a matter of concern to the public" (742), though the court does not hold that this is a necessary element of the claim.

Plaintiffs must show that they "suffered adverse action that would deter a person of ordinary firmness from continuing to engage in that conduct." (742) Transfer alone is insufficient to constitute adverse action, but the plaintiffs lost library jobs which were paid at the highest rate; they were labeled security threats; and they lost personal property pertaining to official impropriety. These facts meet the "ordinary firmness" threshold.

The court concludes that the transfer was caused by the letter to the newspaper. The court rejects as pretextual the claim that the real reason was circulation in prison of a satirical "Trivia Contest," since there was no evidence that either plaintiff was involved in writing it, some prison officials testified that they didn't believe they were responsible for it, and other prisoners had signed for the copying of the contest and were not investigated or suspected. The court rejects the argument that investigation showed the plaintiffs should be transferred to keep order because staff were angry about the Trivia Contest, since the investigation was not neutral and was directed at the plaintiffs by a staff member angry at them about the letter to the newspaper. This decision is generally remarkable for the court's willingness to probe the credibility of prison staff's testimony.

The court declines to order rescission of the transfers because the plaintiffs are still in the same security level and no worse off than before the transfer, and the plaintiffs no longer press that request anyway. It awards damages of $3,330 and $2,430 respectively. (The fact that there is no due process liberty interest in prison jobs doesn't mean they can't recover damages for loss of them as an element of their First Amendment claim.) The court awards them $500 apiece for "non-economic damages, such as pain, suffering, and mental anguish," after finding they didn't suffer any pain and suffering. The PLRA mental/emotional injury provision is not mentioned.

The court denies punitive damages absent evidence of evil motive or intent or callous indifference to rights.

The court directs defendants to clear plaintiffs' records of the label of security threat, insofar as it is based on this incident.

PLRA--In Forma Pauperis Provisions--Filing Fees/Personal Property

Doty v. Doyle, 182 F.Supp.2d 750 (E.D.Wis. 2002). Prison "release accounts" of $500 "are held in trust for the prisoner, and thus are trust fund accounts and are subject to trust law. . . . The terms of a trust are set when the trust is created." Those terms may be changed if their purpose becomes impossible, but that is not the case, since the plaintiff's release will not be affected by his transfer out of state. Therefore there is no ground to terminate the trust. However, the court directs the Department of Corrections to pay the appellate fee out of the release account, and not to replenish the release account out of the plaintiff's out of state income.

PLRA--Exhaustion of Administrative Remedies/Correspondence--Legal and Official/Access to Courts

John v. N.Y.C. Dept. of Corrections, 183 F.Supp.2d 619 (S.D.N.Y. 2002). Once again, a New York federal judge mistakenly applies the New York State grievance regulations to a claim that arose in the New York City jails.

The plaintiff filed two grievances and then when he got no response appealed directly to the Commissioner and still did not receive a response. The court rejects the argument that he must wait for a response. He didn't fail to appeal properly to the Central Office Review Committee because he didn't get a decision to appeal. He did not get a hearing within seven days as regulations require. Nevertheless, he apprised the Commissioner of the situation. These actions are sufficient to exhaust.

At 627: "To state a valid constitutional claim . . . for denial of access to the courts due to interference with an inmate's legal mail, an inmate must allege that a defendant's deliberate and malicious interference actually impeded his access to the court or prejudiced an existing action." Here, material was seized from him after an interview with counsel; he had the interview and was able to review the material. Since the materials were given back to his attorney, there was no interference with his defense.

At 629: "Prison inmates have a First Amendment right to the free flow of mail. . . . Although an inmate must be present when his legal mail is opened, . . . in order to state a constitutional claim for the mistreatment of mail, plaintiff must allege facts which show that defendants acted with invidious intent." Injury must also be alleged. The absence of a claim of injury requires dismissal here.

Use of Force--Stun Devices/Personal Involvement and Supervisory Liability/Procedural Due Process--Classification/Medical Care--Standards of Liability--Serious Medical Needs/Medical Care--Denial of Ordered Care/Eye Care

Shelton v. Angelone, 183 F.Supp.2d 830 (W.D.Va. 2002). The plaintiff alleged that he was beaten and repeatedly shocked with an electric stun gun by staff without justification and while he was in restraints. These allegations are sufficient to defeat summary judgment for defendants since the conduct alleged is "repugnant to the conscience of mankind" and "would not require proof of any permanent, serious physical effect." (835)

Supervisory defendants who were not alleged to be responsible for developing the prison's use of force policy could not be held liable for the plaintiff's injuries absent evidence of tacit authorization of misconduct that has a causal relationship to the injuries. No such causal relationship was shown here.

The plaintiff's reclassification to a higher security level was not atypical and significant under *Sandin*; except that the court then says it can't decide whether it was atypical and significant because it can't tell which security level the plaintiff would have been in previously; but he got due process anyway, since he had the opportunity to be heard and to appeal, and since classification is based on an objective scoring system.

The plaintiff was not denied medical care. Though a doctor prescribed glasses with shields and sides, he was told that they would present a security threat and the doctor agreed. (Allegedly sunglasses could be used as a weapon or as disguise.) The security director also testified that he understood that the doctor ordered the special glasses more for convenience than as a matter of medical necessity. The court concludes that the plaintiff's ailment, sensitivity to the fluorescent lighting in his cell, was not shown to be a serious medical need, and that no physician who examined him mandated it. (Actually, two ordered the glasses: the one who was talked out of it, and another one later.)

Pre-Trial Detainees/Protection from Inmate Assault/Medical Care

Hedrick v. Roberts, 183 F.Supp.2d 814 (E.D.Va. 2001). The two plaintiffs were subjected to serious assaults by other prisoners. While the plaintiffs were subjected to an objectively serious risk, the Sheriff was not deliberately indifferent. He inherited an aged, overcrowded jail but began an aggressive campaign to clean things up, requesting relevant studies, implementing work release and diversion programs, suing the state to get rid of state ready prisoners, and complaining to the local and state legislatures. The plaintiffs (one of them a former police officer) were put in multi-person cells and not single cells because the latter were not available. Although there is no evidence of anything the Sheriff did to try to prevent assaults in general or on these particular individuals within the limits of the facilities, the court finds he acted reasonably. There is no discussion of an official capacity or municipal claim that would permit the plaintiff to claim that the lousy facilities themselves demonstrated a municipal policy of deliberate indifference.

The Sheriff also acted reasonably with respect to medical care. The court reaches this conclusion despite the fact that one of the plaintiffs did not get hospitalized until 12 hours after the attack, at which time he was said to be within an hour of death. ". . . [A]lthough there is some dispute regarding when Jones requested transportation to the hospital, there is no question that he was eventually transported to the hospital." This is bad judgment at worst.

Religion--Services Within Institution/Injunctive Relief--Preliminary/PLRA--Exhaustion of Administrative Remedies

Pugh v. Goord, 184 F.Supp.2d 326 (S.D.N.Y. 2002) (Lynch, J.). The plaintiff Shi'ite Muslims alleged that they were subject to discrimination because the Muslim worship and accommodation program in the state prisons combines Shi'ite and Sunni observance and the Sunnis are in charge. A state court held earlier in *Cancel v. Goord* that discrimination against Shi'ite belief and practice was arbitrary and capricious and violated the state statutory right to religious freedom. To comply with that court's order, DOCS officials met with a Shi'ite scholar and promulgated a new protocol calling for equal treatment for Shi'ites, but still providing for joint services. After implementation of those changes, plaintiffs sought a preliminary injunction seeking separate services.

The preliminary injunction is denied because plaintiffs cannot show likelihood of success on the merits. The *Turner* standard governs. The plaintiffs do not argue that the new policies are unconstitutional on their face, but that their administration at one prison by a Sunni Imam who has shown overt bigotry against them is unconstitutional. At 334: "While the First and Fourteenth Amendments do not require that prison inmates have access to religious advisors whose own views are completely congruent to their own, their protections are certainly not satisfied where the religious leader purportedly responsible for inmates' spiritual guidance overtly despises the deeply held beliefs of inmates under his charge." Therefore the question is whether the actions taken by defendants are reasonable.

Having said that, the court does not address whether the defendants reasonably responded to the alleged bias of the Imam because that issue had not been exhausted. The grievances filed by plaintiffs addressed only the question of separate services. The new procedures provide for addressing complaints such as plaintiffs'.

Under the *Turner* standard, the combined service practice is upheld. There is a valid, rational connection between that practice and avoiding the burdens on space, personnel, and budget that separate services would impose. The Muslim program "provides more than adequate opportunities for plaintiffs to worship in a manner that is both meaningful and consistent with their faith" (336)--on its face, that is. *Id.*: ". . . [P]rison officials have documented that multiplying the number of sects or groupings entitled to separate services would have an adverse impact upon security . . . by increasing opportunities for inmates to exchange contraband and carry on gang-related activity under the cloak of religion." There are no readily available alternatives that would be any better for the plaintiffs than the policies DOCS has already adopted.

The court notes (at 336 n.6) that the current protocol was devised in consultation with a Shi'a scholar, and as to plaintiffs' claims that that scholar's sanctioning of the protocol is incorrect, that "[i]t is not for this Court to adjudicate differences of opinion regarding Shi'a doctrine. . . . The Constitution does not require prison officials to accommodate particular inmates' views concerning the orthodoxy of those authorities' recommendations."

The court not only denies the preliminary injunction but dismisses the complaint, since resolution of the motion has essentially resolved the dispute and further discovery won't help.

At 332 n.3: It is disputed in this Circuit whether claimed loss of First Amendment rights is presumed to constitute irreparable harm. Here, where plaintiffs claim the DOCS program is administered by an openly hostile Sunni chaplain, they have sufficiently alleged non-speculative irreparable harm regardless of any presumption.

PLRA--Exhaustion of Administrative Remedies/Pro Se Litigation

Evans v. Nassau County, 184 F.Supp.2d 238 (E.D.N.Y. 2002). The plaintiff said there was no prison grievance procedure; the defendants attached parts of an inmate handbook describing such a procedure (with a 6-day time limit). The plaintiff said that he filed three grievances as prescribed and never received a response. These claims raise disputed factual allegations regarding whether he filed a grievance and whether jail officials responded.

The opinion is full of boilerplate about the appropriate lenient treatment of *pro se* litigants.

Protection from Inmate Assault/Medical Care/Procedural Due Process--Disciplinary Proceedings

Nichols v. Maryland Correctional

Institution--Jessup, 186 F.Supp.2d 575 (D.Md. 2002). The plaintiff said he told a defendant officer that his cellmate was threatening him with assault, and the officer responded, "I don't roll like that. Deal with it." The plaintiff was assaulted and seriously injured. The officer could not be held liable. Even if plaintiff's version is true, that statement, coupled with the advice to talk to the captain about a cell change and the acknowledgement that assignment to protective custody would follow if there was really a threat, shows that the officer did not draw the inference that his failure to act would increase the danger to the plaintiff. That is, the court is using the defendant's failure to act as evidence that he did not know about the risk!

The plaintiff was prescribed Tylenol 3 and then disciplined for a positive drug test; his appeal was denied; only after one of his relatives interceded was the sanction overturned and the plaintiff released from segregation. However, placement in segregation does not deny liberty under *Sandin*.

Medical Care

Baker v. Blanchette, 186 F.Supp.2d 100 (D.Conn. 2001). The plaintiff complained of long delay in surgery to close his colostomy. A reasonable jury could find that the plaintiff had a serious medical condition because (at 103)

> (1) the colostomy prevented him from eliminating waste in a normal manner; (2) the colostomy required him to wear a bag that constantly emitted a foul odor; and (3) the colostomy required significant maintenance by the plaintiff and medical personnel. "Though these consequences do not inevitably entail pain, they adequately meet the test of 'suffering' that *Gamble* recognized is inconsistent with contemporary standards of decency."

A jury could also find the potential to develop a hernia, which could produce pain and affect the ability to perform normal activities.

While some of the delay was explained, four months of it was not. At 105: "On the plaintiff's version of the facts, which has some evidentiary support, he was denied access to reasonably necessary surgery, not because of medical decisionmaking involving the use of professional judgment, but solely because of cost."

At 105 n.4: ". . . [C]lassifying surgery as elective does not abrogate a prison's duty to promptly provide treatment necessary to address a serious medical need."

Mental Health Care/Psychotropic Medication/Medical Care--Serious Medical Needs

Page v. Norvell, 186 F.Supp.2d 1134 (D.Ore. 2000). The plaintiff was receiving treatment including medication for bipolar disorder; the psychiatrist resigned. The plaintiff shouted angrily at the mental health director and refused to calm down; he was escorted out and later sanctioned for use of abusive speech. Two days later, the mental health director sent plaintiff a memo stating that he was removing the plaintiff from scheduled mental health treatment based on "clinical findings" that he was highly antisocial and did not have an Axis I mental disorder. He added: "I am now your primary mental health worker and will decide the level of service you require. If you violate this order I will hold you accountable for disobedience of an order as provided by the DOC disciplinary code." Nonetheless the plaintiff continued to receive his medication, though nobody met with him before renewing it.

The plaintiff's mental disorder and the anxiety resulting from lack of medication review constitute a serious medical need.

A reasonable jury could find that the defendant caused the plaintiff not to receive a medication review. Evidence suggests that the defendant downgraded the plaintiff's mental health status after meeting with him for less than two minutes and may have purposefully misdiagnosed him. There is no evidence in the record to support the cited "clinical findings."

At 1139: "When a claimed Eighth Amendment violation results from a delay in medical treatment, the delay must cause some sort of harm," but it need not be "substantial" or "significant." The plaintiff said he was concerned that his medications were not having the desired effect and he "desperately wanted to talk to a qualified mental health professional" and felt like his world was falling apart. When he eventually saw a practitioner, his Lithium dose was increased. There is a material issue of fact as to

the seriousness of his psychological harm.

Medical Care

El-Uri v. City of Chicago, 186 F.Supp.2d 844 (N.D.Ill. 2002). The plaintiff alleged that he accompanied police officers to the station to assist in an investigation and that an officer kicked him and punched him, then told him the investigation was over and he could go home. After they took him home he went to the hospital and was treated for a ruptured spleen, which was removed.

There was a deliberate indifference claim against the officer who beat the plaintiff. At 848: "A reasonable person would know that, other things being equal, someone who had been beaten in the head hard enough to knock him to the floor and then kicked in the midriff would need medical attention, especially if, immediately afterwards, he was screaming in pain, throwing up bile, walking bent over and extremely slowly. . . . As for the subjective element, [the beating alleged] was conduct that was "so dangerous that the defendant's knowledge of risk can be inferred," and anyway the plaintiff's condition was observed by the defendant. The court adds later, "Now, normally screaming in pain will do to register a complaint."

PLRA--Exhaustion of Administrative Remedies

Martinez v. Dr. Williams R., 186 F.Supp.2d 353 (S.D.N.Y. 2002). At 357: The failure of prison officials to respond to a grievance did not excuse plaintiff's failure to exhaust; he could and should have appealed anyway per the grievance procedures.

Use of Force/Municipalities/Pre-Trial Detainees/Personal Involvement and Supervisory Liability

Gailor v. Armstrong, 187 F.Supp.2d 729 (W.D.Ky. 2001). The plaintiff's argument that there is a municipal custom of failing to follow the jail's use of force policy is not supported by evidence of a single incident which violated the policy or by evidence that there were 30 or 40 instances of excessive force over ten years (in 31 of which the officers were punished). At 734: "To support his claim, plaintiff would need to show the existence of a significant number of credible complaints of force in violation of the policy where no discipline or review occurred." The lack of a policy providing for availability of a CERT team at all times is unsupported by evidence of a causal relationship to the present excessive force incident. The alleged policy of not providing enough videotapes to tape incidents of misconduct has no causal connection since part of this incident was videotaped.

At 735-36: "Because Reynolds was in pretrial detention, the Eighth Amendment determines his relevant constitutional protections."

Allegations that four officers repeatedly struck the decedent while he was shackled, baited him and beat him when he responded, disregarded requests from a nurse to stop so she could treat him, and helped roll him over so a fifth defendant could stand on his neck, supported an Eighth Amendment claim. Even those defendants who did not strike the plaintiff acted in concert to restrain him and to turn him over, and could be held liable on that basis.

The claim against a sixth defendant who applied no force but knew excessive force was being used and did not intervene was governed by the deliberate indifference standard, which these allegations met.

Trial--Conduct of Trial/State, Local and Professional Standards/Color of Law/Evidentiary Questions/Medical Care--Standards of Liability--Deliberate Indifference/Mootness/Evidentiary Questions

Bowman v. Corrections Corporation of America, 188 F.Supp.2d 870 (M.D.Tenn. 2000). Here, the court appears to hold unconstitutional certain contract incentives for medical providers, even though a jury ruled for the defendants on the individual damage claim and, since the prisoner had died, his claim appeared to be moot. The court cites "exceptional circumstances" justifying a ruling.

The contract between CCA and the doctor made the doctor the sole medical provider, gave him a "capitated rate" per prisoner for his services, subject to adjustment which gave the doctor more money the lower the corporation's non-personnel medical charges were (i.e., the less money was spent on referrals and hospitalization). Those expenses went from $3.07 per capita to $1.48 per capita in three and a half years even though *the same doctor* was the provider both before and after introduction of the capitated rate scheme.

The contract is a corporate policy for § 1983 purposes, since it represents a "written

understanding for a fixed plan to provide medical care for inmates at SCCF."

The court determines that the financial incentives placed on the contract doctor, a general surgeon with some psychiatric experience, to reduce referrals, viewed in light of the drastic reduction in referrals by the same physician under the capitated rate system, is unconstitutional. It relies on a report of the AMA Council on Ethics and Judicial Affairs and Medicare regulations, and says (at 889): "Applying these professional medical standards, CCA's contract permits Dr. Coble effectively to double his income under the contract, that is clearly at variance with these medical standards." At 890:

> [The policy] violates contemporary standards of decency, by giving a physician who provides exclusive medical services to inmates, substantial financial incentives to double his income by reducing inmates' necessary medical services. Under this contract, Dr. Coble is the sole and exclusive person to determine if referrals to medical specialists are necessary as well as which prescriptions and laboratory tests are necessary for an inmate's medical care. According to the proof, Dr. Coble reached the maximum of his financial incentives for each year of his contract. Although CCA argues that Dr. Coble would not make medical decisions based upon costs because to do so increases long term costs, that is an economic analysis. The Eighth Amendment forbids unnecessary suffering in the short term for inmates who are wholly dependent upon the state to provide such basic medical care.
> . . .
> The Court's conclusion should not be construed as barring a managed health care system with physician incentives in a prison setting. . . . The Court simply concludes that this contract goes too far, as reflected in the actual expenditures. . . .

The court grants the plaintiff's motion for judgment as a matter of law as to this contract and "enjoin[s] the current contract." Exactly what this means, it does not say.

Procedural Due Process--Administrative Segregation/PLRA--Prospective Relief Provisions/Injunctive Relief--Changed Circumstances/Habeas Corpus

Austin v. Wilkinson, 189 F.Supp.2d 719 (N.D.Ohio 2002). Prisoners alleged that their placement and retention at the supermax Ohio State Penitentiary denied due process. The court notes that opening the OSP had created too much capacity for the highest security level, that no clear standards govern assignment to it, and that defendants consider prisoners for it that don't need its restrictions. Higher officials frequently and unilaterally overruled the recommendations of classification committees that particular prisoners not be sent there.

The *Heck* rule does not bar plaintiffs' procedural due process claims, since they seek prospective relief against administrative decisions to transfer and retain in OSP, not to invalidate past decisions. (738 n.21)

Conditions at OSP are atypical and significant. The court rejects defendants' suggestion that since inmates are often transferred to OSP, the appropriate comparison is between OSP and itself. At 739: "However, the [*Sandin*] Court did not suggest that the existence of a condition somewhere within a state's prison system automatically made such a condition *normal*." *Id.*: ". . . [T]he better approach is to compare the range of prison conditions experienced by the plaintiffs against the complete range of conditions experienced by a broad range of similarly situated inmates." The court usefully inventories the bases of comparison used by the various circuits in the "atypical and significant" analysis.

The court notes that the vast majority of prisoners sent to OSP stay a minimum of two years, and 200 have been there more than three years. Length of stay is a result of the timing of reclassification under OSP procedures, which call for annual reviews; at other high-security units, review is every 30 days. OSP terms are indefinite. At 741:

> In contrast [to death row], inmates at the OSP have extremely

limited contact with other individuals. The inmates remain alone in their solid-door cells for twenty-three hours a day. Metal strips along the cell doors do not allow conversation with adjacent inmates. Only a small, inoperable window allows the inmate to view the outside his cell. [sic] A correctional officer only opens the small "cuff-port" in the cell door to affix handcuffs or to drop off food. An OSP prisoner only goes outside the building in the rare case of a necessary medical procedure or a court appearance. . . .

Inmates at the OSP also are never allowed outdoor recreation. Their closest contact to the outdoors is exercise in a completely enclosed room with a grated opening approximately six inches wide and four feet long. The Court finds it hard to believe anyone would seriously suggest such a space constitutes "outdoor" recreation. The lack of outdoor recreation is important to the Court as denial of outdoor recreation can impair a liberty interest. . . .

In those instances when the OSP inmates are allowed out of their cells, they are escorted by two or three officers. In contrast, inmates on death row walk without a hands-on escort. At the OSP, when inmates leave their cellblock, they are strip-searched, shackled, and placed in full restraints, which include the uncomfortable rigid "black box" enclosing their hands. Inmates at the OSP are strip-searched before and after meeting visitors even though physical contact with visitors, who are behind solid glass, is impossible. In all, other correctional facilities have significantly less intrusive conditions than the OSP.

In addition, confinement at the OSP affects the duration of some inmates' incarceration. . . .

> [The court agrees that this] is one factor, among many, showing that placement and retention at the OSP imposes an atypical and significant hardship.

OSP inmates are ineligible for parole until they have been reclassified to maximum security for a year and then reclassified to close security.

At 744: "Under *Wolff* and *Hewitt*, the amount of process a prisoner requires depends on whether the prisoner's transfer is characterized as disciplinary or administrative. In deciding the nature of the transfer, nomenclature is less important than the substance of the transfer." It's not clear that all transfers to OSP are administrative. "In light of the lengthy and indeterminate time inmates are held at the OSP, the minimal procedural requirements of *Hewitt* are insufficient." Also, conditions and length of confinement are harsher and longer than for disciplinary offenses. The court resorts to *Matthews v. Eldridge* and notes that additional procedural protections will advance an important interest of the prisoners, won't impair defendants' interest in putting only "the worst of the worst" in OSP, and will cause minimal hardship because giving specific notice of all the grounds for placement in OSP would not be burdensome and would make overall operations more efficient by keeping prisoners from being placed unnecessarily in this expensive housing.

The court concludes that the plaintiffs are entitled to *Wolff* process before their placement in OSP.

Defendants argued that they had promulgated a new policy and under the PLRA's prospective relief provisions, no relief was necessary. The court finds that the new policy is still inadequate. It doesn't ensure that inmates are given notice of the evidence relied upon and the specific grounds for placement at OSP. It doesn't specify the offenses that can lead to placement there. It is vague about the type of gang involvement that may lead to placement at OSP (the criterion is whether the prisoner has been "identified" as a leader, enforcer, or recruiter, rather than what the prisoner has actually done). The new policy fails to require that the true ultimate decision maker identify the evidence relied upon and explain his reasoning. As to reclassification, the new policy does not call for any information to be given to the prisoner before

the hearing as to the reason for their retention, and it is completely unspecific as to what is necessary for prisoners to get out of the OSP. The standard for retention--"whether there has been a diminishing of the inmate's risk to the safety of persons or institutional security"--is too vague. Written dispositions should be set out in sufficient detail to show the evidence actually considered and that a reasoned judgment was made, rather than by boilerplate language and form decisions.

The parties are directed to file proposed injunctive orders meeting the PLRA standards.

Use of Force/Class Actions--Certification of Classes/PLRA--Exhaustion of Administrative Remedies/Pleading/Procedural, Jurisdictional, and Litigation Issues/Emergency

In re Bayside Prison Litigation, 190 F.Supp.2d 755 (D.N.J. 2002). The plaintiffs--hundreds of them--alleged reprisals against the inmate population during a lockdown after an injury to a guard. The district court previously denied class certification on the ground that individual differences in injury, treatment, time, etc. overwhelmed the common issues.

There is no heightened pleading standard under § 1983. The court concludes that contrary Third Circuit precedent, which has not been revisited in ten years, has been overruled by *Leatherman v. Tarrant County* and by the reiteration of the *Leatherman* reasoning in a different context in *Swierkiewicz v. Sorema N.A.*, which relies on the underlying rule that all civil actions are governed by Rule 8(a)'s liberal pleading requirements except for matters set out in Rule 9(b).

There are some 300 plaintiffs as to whom there are yet no specific factual allegations. However, until the completion of discovery, those plaintiffs may be retained in the case based on the general allegations of the complaint about the conduct of defendant officers.

The plaintiffs have sufficiently pled a conspiracy under § 1983 by stating the relevant time period, the names of many alleged conspirators, and the object and purpose of the conspiracy. (765) Several of them have pled a conspiracy motivated by racial animus under § 1985(3).

At 770-71: The court rejects the *Concepcion* holding that only a procedure promulgated statewide through the state APA constitutes an administrative remedy for PLRA purposes. The Supreme Court in *Booth* "set an arguably low threshold" for "availability, and the Third Circuit has never mentioned any requirement of formal promulgation but rather has focused on "minimum standards necessary to deem administrative procedures to be 'available.'" Quoting *Nyhuis*, the court says that regardless of compliance with the APA, "procedures contained in a prison handbook may constitute such an administrative remedy if they are 'understandable to the prisoner, expeditious, and treated seriously' and enable prison authorities to take 'some responsive action' to prisoner complaints."

Nonetheless the court concludes that the handbook procedure is not an administrative remedy under the PLRA. At 771-72, the court notes that the handbook indicates that the grievance procedure is "optional not mandatory" and not intended to restrict access to courts. "No one reading that language would understand that it was necessary to exhaust the ARF process before filing a civil action with the courts." It is not "expeditious" because there is no time period for response. It does not appear that the complaints are taken seriously. A separate Ombudsman procedure is no better, since it is presented as optional and has only the power to "make recommendations for change," which is not the type of "responsive action" envisioned in *Booth*. It appears that Ombudsman investigations are resisted and recommendations are not taken seriously.

Hazardous Conditions and Substances

Jones v. Bayer, 190 F.Supp.2d 1204 (D.Nev. 2002). Placing the non-smoking plaintiff in a cell for 42 days with a heavy smoker did not violate the Eighth Amendment, since he suffered only discomfort, irritation, and coughing, and 42 days doesn't pose an unreasonable risk to future health (based on what evidence, the court doesn't say).

Disabled/Exhaustion of Remedies/State Officials and Agencies

Mitchell v. Massachusetts Dept. of Correction, 190 F.Supp.2d 204 (D.Mass. 2002). The plaintiff complained of exclusion from certain programs because he had a heart condition and diabetes, resulting in his loss of good time credits.

He sued under the disability statutes.

At 209: "Every decision unearthed by the court with respect to this issue . . . holds that administrative exhaustion is not required for a Title II claim." The plaintiff has been released, so there is no issue of PLRA exhaustion. The defendants raise the issue in a novel form late by arguing laches, i.e., that the plaintiff should be barred from challenging conditions at a prison when he did not raise his concerns contemporaneously. At 215: "Defendants cite no authority stating that Plaintiff was *required* to bring his concerns to the attention of NCCI officials as they were happening." Defendants' claims of lost evidence, diminishing recollection, etc., are no different than in many other civil cases (plaintiff filed suit nine months after he was transferred from prison at issue).

The ADA's abrogation of state sovereign immunity does not violate the Eleventh Amendment.

Individuals are not subject to liability under Title II (211, citing "resounding authority"). However, officials may be named in their official capacities (n.6).

Defendants don't dispute that diabetes and heart conditions are physical impairments and that work and education are major life activities; they claim the plaintiff is not disabled because he isn't in such bad shape. At 212: ". . . Defendants miss the central theme of Plaintiff's Title II claim, namely, that Defendants 'regarded' him as having an impairment which substantially limits a major life activity, whether or not such limitation actually exists."

The Rehabilitation Act claim survives on the same ground, though it must be dismissed as to individual defendants.

Searches--Person--Convicts/PLRA--Mental or Emotional Injury/Injunctive Relief

Seaver v. Manduco, 178 F.Supp.2d 30 (D.Mass. 2002). The plaintiff sex offenders alleged that they were harassed because of their status and were subject to retaliatory body cavity searches.

Injunctive relief was not appropriate because there was no allegation that the misconduct was ongoing. Declaratory relief is inappropriate for the same reason. At 37: "The court will dismiss all claims of harassment under § 1997e(e) as being claims for emotional distress without an accompanying physical injury. . . . The court . . . recognizes that at some point, if discriminatory harassment occurs, its nature and consequences may support claims of constitutional violations that would permit recovery of damages against defendants in their individual capacities even where no physical injury is proved." But harassment that is primarily if not entirely verbal is barred.

The searches present a more difficult issue. At 37:

> First, a visual cavity search causes a physical invasion of privacy that may qualify as a physical injury for the purposes of § 1997e(e). Second, different views have been expressed about whether a claim for recovery for violation of a constitutional right is materially different from a claim for recovery for emotional or psychological distress and thus is not precluded by § 1997e(e).

The court notes that the First Circuit has not addressed the issue, but quotes with approval the statement in *Shaheed-Muhammad v. Dipaolo* that where the harm alleged is violation of intangible rights, rather than physical or emotional injury caused by a violation of rights, the provision does not apply. At 38: "It appears likely that the conducting of an unwarranted visual cavity search could be determined to be the type of rights violation that would be actionable under Judge Gertner's formulation. A visual cavity search is a very serious intrusion on any individual's privacy." However, the court ultimately avoids the issue by deciding on the basis of qualified immunity.

The defendants had qualified immunity because the searches were preceded by an alarm indicating that inmates were fighting, creating reasonable suspicion for searching everyone in the area.

Your Right to Reproductive Health Care in Prison or Jail

FACT: If you are pregnant, being in prison or jail does not mean you lose your right to decide to continue your pregnancy or to have an abortion.

Your constitutional rights are being violated, if you are told that you must:

1. Have an abortion you do not want.
2. Get a court order before getting an abortion.
3. Pay for prenatal care or an abortion out of your own pocket if you cannot afford the care.
4. Pay for the costs of the jail transporting you to a clinic or hospital to have an abortion or otherwise get care related to a pregnancy.

If you are experiencing any of the above, you should:

1. Determine if it is one particular nurse or guard who's giving you a hard time. If it is, then ask other medical staff or officials to help you.
2. Document your requests, both by making them in writing and by keeping a list of the people you've spoken to when, what responses they've given, and when and to whom you've made written requests.
3. File an "administrative grievance" as well as a written request for medical assistance. If officials refuse to give you the forms you need, write letters making the requests (and again, keep track of the people you send them to and when). Make these requests even if they don't seem to get you anywhere and mark them "urgent".

If you are still told that you must terminate a wanted pregnancy or you are unable to get an abortion, you should contact your lawyer or the ACLU Reproductive Freedom Project (212-549-2633). The ACLU may be able to help your lawyer file a lawsuit on your behalf as quickly as possible. If you are facing pressure to continue your pregnancy, or obstacles to ending your pregnancy, be sure to call your lawyer or the ACLU quickly.

Contact:

American Civil Liberties Union
Reproductive Freedom Project
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 549-2633
e-mail: rfp@aclu.org

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