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Out of Prison and Working for the ACLU
Larry Caldwell Discusses the Challenges of Re-Entry

After spending more than 30 years confined in U.S. prisons and jails, Larry Caldwell is an expert on prison conditions. Out since December 23, 2003, he now shares his insider knowledge and interest in improving conditions for the men and women who remain behind bars by working as a paralegal for the ACLU's National Prison Project. In a recent interview Caldwell discussed his experience returning to the free-world and how other prisoners can make the re-entry process a success.

Caldwell is not typical of most people leaving prison. While incarcerated he successfully brought several civil lawsuits against prison officials. At least two cases were filed and won against District of Columbia corrections officials for their repeated failures to provide adequate medical treatment for his diagnosed skin cancer. Caldwell's awarded damages accumulated over time and allowed him to re-enter society with enough money to make his transition from prison to home relatively smooth. Indeed, his savings were essential to meeting his half-way house release requirements that were contingent on his finding housing in the expensive Washington, D.C. rental market.

Caldwell points out that his unique financial situation allowed him a much easier reentry than most former prisoners experience. "Former prisoners need help- clothes, money and a place to stay," says Caldwell. "A lot of guys just go back to the streets and hang with their old friends. So, if all you know is crime, and you have no other options, you will go back to the streets and rob, steal or sell drugs to make money."

Surprisingly, his concern about the future and welfare of the over 650,000 people released every year from American prisons appears to be shared with some politicians in Washington. In January, President George W. Bush told Congress in his State of the Union address that, "America is the land of the second chance—and when the gates of the prison open, the path ahead should lead to a better life." Subsequently, a bipartisan group of U.S. representatives introduced the *Second Chances Act of 2004* (H.R. 4676).

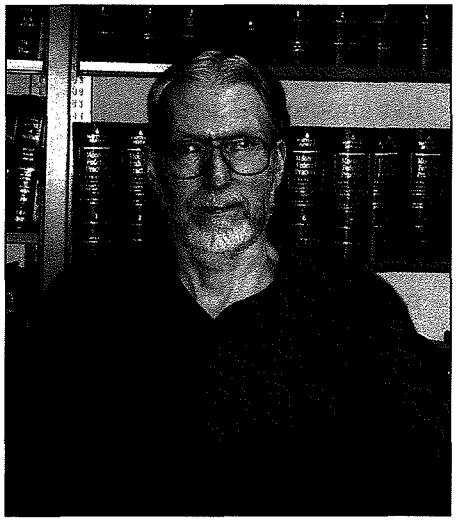

Photo by Darren Cambridge

Larry Caldwell works part-time at the National Prison Project as a paralegal.

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U.S. Must End Torture of Prisoners in America As Well As in Iraq

By Elizabeth Alexander

Like most Americans, I was horrified by the sexually degrading photographs and the reports of Iraqi detainees being threatened with electrocution and rape by members of our military at Abu Ghraib Prison in Iraq. Those who are shocked by these human rights violations, however, should be aware that equally depraved acts are committed against prisoners in the United States regularly without the outrage and disgust expressed by U.S. officials in response to conditions in Iraq.

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The legislation provides grants to state and local governments for mental health services, substance abuse treatment, aftercare, and infectious disease treatment for people in prison and for those recently released. It also funds collaborative efforts between departments of corrections and technical schools, community colleges and workforce development employment services to help improve prisoners' vocational skills and education. Federal dollars authorized by the House bill can also be used for creating post-release housing that provide for human service needs on-sight. The President has announced strong support for the legislation but the likelihood of its successful passage through Congress this year is uncertain.

During the last years of Caldwell's time behind bars, rehabilitative opportunities for prisoners dried up. He remembers when college courses were available, but they were mostly taken away in the 1990s. Paid jobs through Federal Prison Industries were an option for him when he was housed with the Bureau of Prisons but he calls them "mindless jobs that are repetitious and dangerous." He considers rehabilitative programming effective for many prisoners but believes training programs must advance to keep pace with technological progress and reflect the needs of the marketplace prisoners encounter upon their release. "[We] must give former prisoners meaningful employment that allows them to put food on the table," says Caldwell. "Unfortunately, guys who come out can make more money selling drugs. People in today's system don't have a choice because of poverty and poor education."

Working at the National Prison Project since March, Caldwell first started as a volunteer answering prisoners' letters but was quickly hired part-time to assist the office's attorneys with legal research and client interviews. He is now taking classes to learn computer skills. His advice to current prisoners is to "learn as much as you can, listen and watch, and speak very little."

Continued from cover

End Torture in American Prisons

Indeed, accepted correctional practice allows male officers to work in housing quarters that provide views of women showering, undressing and even using the toilet. In certain circumstances male guards even strip search confined women, many of whom are victims of sexual abuse, often leading to unnecessary trauma and pain.

For U.S. prisoners who have suffered treatment similar to what has been carried out in Iraq, Congress has banned them from bringing a lawsuit in our federal courts to gain redress for their injuries. The Prison Litigation Reform Act, passed in 1996 without any congressional hearings on its provisions, prevents prisoners, jail detainees and even confined juveniles from seeking damages for deliberate sexual misconduct and other forms of abuse, as long as the prisoner suffers no "physical injury." Indeed, if a prisoner in our nation's capital were threatened with electrocution by his captors and suffered a heart attack or a mental breakdown as a result, he would still have no remedy in federal court.

Degradation and humiliation are just the tip of the iceberg. The ACLU hears from thousands of incarcerated men and women in the United States whose human rights are violated. Many report repeated rapes and sexual assaults committed by prisoners and even staff. The best available data tell us that more than 200,000 prisoners have been raped nationally.

NATIONAL PRISON PROJECT **JOURNAL**

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Texas was identified as the worst state in the nation for prison rape in Human Rights Watch's 2001 book-length report, No Escape: Male Rape in U.S. Prisons. Independent observers, including a federal judge, have said that some prisoners in Texas are vulnerable and need protection -- which they are not getting.

In one class-action case about Texas prison conditions that has spanned 30 years, U.S. District Judge William Wayne Justice observed: "Evidence has shown that, in fact, prison officials deliberately resist providing reasonable safety to inmates. The result is that individual prisoners who seek protection from their attackers are either not believed, disregarded, or told that there is a lack of evidence to support action by the prison system." Judge Justice also said evidence "revealed a prison underworld in which rapes, beatings, and servitude are the currency of power."

The ACLU's National Prison Project won a damages settlement last year in Colorado on behalf of a woman who was sexually assaulted while being transported between jails after her arrest. In another particularly brutal case, the ACLU represents Roderick Keith Johnson, a gay African American man who was repeatedly raped and sold by prison gangs as a sexual slave for $5. The ACLU has filed other sexual assault cases and continues its investigations of abuse and rape.

Iraqi prisoner at Abu Ghraib.

The ACLU hopes that the justified outrage over these despicable acts in Iraq will lead Congress and the President to thoroughly investigate U.S. prison and jail conditions as well and protect American prisoners by repealing the physical injury provision of the PLRA.

Appeals Court Affirms that Mississippi Death Row Conditions are Unconstitutional

In the most comprehensive decision regarding death row conditions in the last ten years, the U.S. Court of Appeals for the 5th Circuit affirmed a lower court's opinion that Mississippi's death row is unconstitutional and requires improvements.

"We believe this decision will have far-reaching implications for thousands of other prisoners," said Margaret Winter, Associate Director of the ACLU's National Prison Project. "We know that brutal prison conditions have existed on Mississippi's death row for many years. The appeals court has now affirmed that while the state may be authorized to execute death-sentenced prisoners, it may not torture prisoners to death while they are pursuing their rights to appeal their sentences."

In a ruling issued in June in the case *Russell v. Johnson*, the appeals court ordered Mississippi prison officials to fix malfunctioning toilets that spill human waste into cells, provide fans and ice to prisoners on exceedingly hot days, stop mosquito infestations and properly treat prisoners suffering from mental illness. The ACLU brought the challenge to the death row conditions together with the law firm Holland & Knight, which provided pro bono assistance in the case.

"Official indifference has brought the men on death row to the brink of physical and mental breakdown," said Steve Hanlon, a partner at Holland & Knight. "We applaud the court's decision for the human rights protections it affords

to prisoners."

Commenting on the trial court's findings, the 5th Circuit panel wrote: "We agree that the conditions of inadequate mental health care. . . do present a risk of serious harm to the inmates mental and physical health." Furthermore, the court said, "frequent exposure to the waste of other persons can certainly present health hazards that constitute a serious risk of substantial harm."

At issue in the ruling was an appeal filed by the Mississippi Department of Corrections to stop a district court order that found officials had violated "minimal standards of decency, health and well-being" because of the deplorable conditions on Mississippi's death row. The state was required to remedy those conditions under the district court's order. U.S. Magistrate Judge Jerry A. Davis ruled in May 2003 that "no matter how heinous the crime committed, there is no excuse for such living conditions " on death row.

Expert testimony presented by the ACLU's National Prison Project and Holland & Knight at trial in February 2003 described torturous conditions at Mississippi's State Penitentiary in Parchman. "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," said psychiatrist Terry A. Kupers, who testified after touring Unit 32C where death row prisoners are confined. Kupers said 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."

Dr. Susi Vassallo, an expert in thermoregulation and a volunteer through Doctors of the World-USA's Medical Advocacy Project, visited Mississippi's death row in August 2002 and 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.

Appeals Court Urged to Enforce Fire Safety Regulations in Michigan Prisons

Citing the grave risks to the health and lives of prisoners and their guards, the American Civil Liberties Union in February urged a federal appeals court to uphold a ruling directing the Michigan Department of Corrections to ensure that its prisons conform to national fire safety standards.

"Cellblocks are nearly one hundred years old and they are not safe for prisoners or the officers who guard them," said Elizabeth Alexander, Director of the ACLU's National Prison Project. "Even though the state's own study confirmed the dangers, Michigan officials refuse to fix the life-threatening problems."

In arguments before the Sixth Circuit Court of Appeals, Alexander urged the court to uphold the Michigan District Court's February 2003 ruling, which came in response to an ongoing ACLU lawsuit over prison conditions in the state. As the district court noted, "The very substantial failures of these facilities to allow for timely egress in the event of a fire, to exhaust smoke, to sprinkle fire, and to unlock doors means, simply, that many inmates in each facility would likely suffer smoke inhalation or death in the event of fire. Simply put, these risks are grave and unacceptable."

The ACLU's brief explains the complicated and dangerous prison evacuation plan that requires correctional officers to manually unlock doors before prisoners can escape a burning facility. Each cellblock is approximately the size of a football field, and many prisoners are housed far from prison exits. Stairwells are often too small to accommodate large numbers of prisoners who would be fleeing during a fire. In addition, incomplete sprinkler systems and the lack of a smoke exhaust system mean that smoke from a cell fire would rise from that cell and expand, affecting more cells. When the smoke reached the top of the block, it would move horizontally through the block and then downward. The space above the occupied cells in a cellblock would be of limited use before smoke began affecting prisoners attempting to use the upper galleries to exit. Smoke would also form eddies in

areas that prisoners on other levels were trying to use as exits.

Witness testimony at a previous court hearing described a fire started in one of the cellblocks several years ago by a prisoner who put a few papers and a sheet in a trash can, ignited the material, and placed his mattress over the fire. There was so much smoke produced by the fire that someone in the cell on the other side of the open area could not see cells on the side of the block where the fire had been started. Smoke had come up in front of the tiers and into the cells on the opposite side from where the fire had started.

"The February hearing in the case Hadix v. Johnson was an important reminder to prison systems across the country that the health and safety of the men and women we choose to confine are protected by the Constitution," said Alexander. "Michigan's continued indifference to proper fire safety in its prisons is a tragedy waiting to happen."

Case Law Report: Highlights of the Most Important Prison Cases

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

U.S. Supreme Court Cases

Visiting/Deference/Cruel and Unusual Punishment

Overton v. Bazzetta, 123 S.Ct. 2162 (2003). The Supreme Court rules broadly on convicted prisoners' visiting rights.

In response to increasing prison population and volume of visits, with the attendant problems of maintaining order, supervising children, and preventing drug smuggling and trafficking, the prison system introduced new restrictions on visiting. This challenge to the restrictions applies only to the *non-contact* visits to which the highest security prisoners are limited.

The regulations do not infringe a constitutional right of association. This case is not appropriate for elaborating on it, because "the very object of imprisonment is confinement, and freedom of association is among the rights least compatible with incarceration." (2167) The court doesn't hold that any right to intimate association is ended by incarceration, but this is not a case in which that right need be explored, since the challenged regulations meet the requirements of *Turner v. Safley*.

The regulations barring minors unless they are children, stepchildren, grandchildren, or siblings of the prisoner; barring children if the prisoner's parental rights have been terminated; and requiring them to be accompanied by parent or legal guardian bear a rational relationship to the valid interest in internal security by reducing the total number of prisoners and by limiting the disruption caused by children, and are also rationally related to the legitimate interest in protecting children from sexual or other misconduct or from accidental injury (2168)

Requiring the presence of adults charged with protecting the child's best interests is reasonable, as is the consanguinity limit. *Id.*: "To reduce the number of child visitors, a line must be drawn, and the categories set out by these regulations are reasonable. . . . The prohibition on visitation by children as to whom the inmate no longer has parental rights is simply a recognition by prison administrators of a status determination made in other official proceedings." (The Court does not mention the evidence which shows that many prisoners give up their parental rights so their children can be adopted, but attempt to maintain a relationship with them anyway.)

The ban on former inmates, except for those who are members of the prisoner's immediate family *and* have been approved by the warden, "bears a self-evident connection to the State's interest in maintaining prison security and preventing future crimes." (2168)

The ban on visits for prisoners with two substance-abuse violations serves the legitimate goal of deterring use of drugs and alcohol in prison.

"Drug smuggling and drug use in prison are intractable problems." (2168)

Prisoners have alternative means of exercising their claimed constitutional rights of association: messages through those who are allowed to visit, letter, and telephone. At 2169: "Alternatives to visitation need not be ideal, however; they need only be available."

Accommodating the prisoners' demands "would cause a significant reallocation of the prison system's financial resources and would impair the ability of corrections officers to protect all who are inside a prison's walls," facts which invoke "particularly deferential" review. (2169)

The prisoners have not suggested an alternative that "fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal. [Citation to *Turner* omitted.] Respondents have not suggested alternatives meeting this high standard for any of the regulations at issue." (2169) Proposals that would increase the number of child visitors "surely would have more than a negligible effect on the goals served by the regulation" (i.e., reducing the number of child visitors). The ban on former prisoners could be time limited, "but we defer to MDOC's judgment that a longer restriction better serves its interest in preventing the criminal activity that can result from these interactions." Shortening the suspension of visits for those with substance abuse offenses or limiting it to the most serious violations "do not go so far toward accommodating the asserted right with so little cost to penological goals that they meet *Turner*'s high standard." (2170)

The ban on visits for those with substance abuse offenses does not violate the Eighth Amendment. At 2170:

> Michigan, like many other States, uses withdrawal of visitation privileges for a limited period as a regular means of effecting prison discipline. This is not a dramatic departure from accepted standards for conditions of confinement. . . . Nor does the regulation create inhumane prison conditions, deprive inmates of basic necessities or fail to protect their health or safety. Nor does it involve the infliction of pain or injury, or deliberate indifference to the risk that it might occur. . . . If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations.

An individual claim asserting such circumstances would not support invalidating the whole regulation.

Psychotropic Medication/Federal Officials and Prisons/Appeal

Sell v. United States, 123 S.Ct. 2174 (2003). Involuntary medication may be required to render a defendant competent "only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." (2184) That standard may permit involuntary medication only rarely, since "*important* governmental interests" (emphasis in original) must be at stake. Government has an important interest in bringing people accused of serious crimes to trial, but the facts of each case must be considered; e.g., if the defendant refuses to take medication and therefore will be confined for a long time in a mental institution, the risk of freeing a perpetrator without trial will be diminished. The court must find that medication will "*significantly further*" the government interests, i.e., that it's likely the medication will render the defendant competent and unlikely it will have side effects interfering with the defendant's ability to assist in his defense. Medication must be "*necessary*" for its purpose, i.e., less intrusive alternatives must be unlikely to work.

If forced medication is justified for some other reason, the foregoing standard need not be met, and there are often strong reasons to address those reasons before turning to trial competence (e.g., it's easier to be confident that medication is appropriate and necessary because someone is

dangerous than because the person may be rendered competent by it).

NON-PRISON CASES

Cruel and Unusual Punishment

Ewing v. California, 123 S.Ct. 1179 (2003). The appellant was sentenced to 25 years to life under California's "three strikes" law for stealing golf clubs. The sentence did not violate the Eighth Amendment. The majority adopts the standard of the plurality in *Harmelin v. Michigan* that considers "the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors," and "does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." (1187, quoting *Harmelin*)

Cruel and Unusual Punishment/Habeas Corpus

Lockyer v. Andrade, 123 S.Ct. 1166 (2003). The petitioner stole five videotapes worth $84.70 on one occasion and four videotapes worth $68.84 on a second occasion, was charged with two felonies under California's "three strikes" legislation, and was sentenced to two consecutive terms of 25 years to life. This case, with more extreme facts than *Ewing*, came up via habeas corpus rather than direct appeal and is subject to the AEDPA rule that remedies only violations of "clearly established law, as determined by the Supreme Court of the United States." The only thing "clear" about prior disproportionality jurisprudence is that there is a gross disproportionality standard. The lower court decision does not apply incorrect legal principles, nor does it apply the clearly established principles in a manner that is objectively unreasonable, which means "more than incorrect or erroneous," and indeed more than "clear error."

Rehabilitation/Ex Post Facto Laws/Punishment

Smith v. Doe I, 123 S.Ct. 1140 (2003). Convicted sex offenders and the wife of one of them brought an Ex Post Facto Clause challenge to the Alaska Sex Offender Registration Act (SORA), which requires the usual panoply of registration, verification, photography, fingerprinting, notification of changes of address, etc., with information on the offenders and their whereabouts made public.

The statute does not violate the Ex Post Facto Clause because it was not punitive in intent but was intended to protect the public, notwithstanding that it was codified in the criminal procedure code. Absent an identifiable punitive intent, the court examines the statute's effects under the punishment analysis of *Kennedy v. Mendoza-Martinez*. At 1149: "The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." Sex offender notification doesn't have much history, and the Court rejects the analogy to historical punishments involving public shaming, humiliation, and banishment. At 1150: "Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." The publicity may cause adverse consequences for the convicted defendant, but that isn't an integral part of the scheme's objective. Internet notification doesn't change that conclusion. *Id.*: "Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation."

The scheme does not impose an affirmative disability, since the offender need not update his registration in person. The scheme is not analogous to parole or probation or supervised release, since persons subject to it can go where they want and generally do as they wish, though they must report some actions to police.

At 1152: "A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." Alaska could conclude that a sex offense conviction itself is evidence of a substantial risk of recidivism; no case-by-case assessment of risk is necessary. At 1153:

"The *Ex Post Facto* Clause does not preclude a state from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." The scheme in *Kansas v. Hendricks* required individual assessment because the restraint was much more serious than here.

Rehabilitation/Procedural Due Process

Connecticut Dep't of Public Safety v. Doe, 123 S.Ct. 1160 (2003). The state sex offender registration statute, which provides for posting of the registry on the Internet and making it available in state offices, does not deny due process. The court does not reach the question whether under *Paul v. Davis*, there is a liberty interest in avoiding stigmatization as a sex offender. Even if there is, sex offenders are not entitled to a hearing to determine whether or not they are likely to be currently dangerous, since current dangerousness is irrelevant under the state statute, which operates solely on the basis of a criminal conviction. Only if that rule is substantively unconstitutional is there a due process problem, and the plaintiff disavowed any substantive due process argument.

Damages--Punitive

State Farm Mutual Automobile Ins. Co. v. Campbell, 123 S.Ct. 1513 (2003). Excessive awards of punitive damages constitute arbitrary deprivations of property. The Court has directed that appellate review of punitive damages "consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (1520) Under those standards, the punitive award is excessive.

The court declines "to impose a bright-line ratio which a punitive damages award cannot exceed," but "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." That may not be true where "'a particularly egregious act has resulted in only a small amount of economic damages,'" but conversely: "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." (1524)

Ex Post Facto Laws

Stogner v. California, 123 S.Ct. 2446 (2003). A revision of the statute of limitations permitting prosecution for sex-related child abuse after the prior limitations period has expired, if the prosecution is brought within a year of the victim's report to the police, violates the Ex Post Facto Clause. It is a new law that inflicts punishment on people who under the old law were not subject to punishment. It also changes the rules of evidence formerly applicable, since statutes of limitations rest largely upon evidentiary concerns about reliability of memory and unavailability of witnesses, and the new law permits conviction on some quantum of evidence while the old law forbade conviction on any quantum of evidence.

U.S. Court of Appeals Cases

Pre-Trial Detainees/Privacy/Damages--Intangible Injuries/Staffing--Sex/Pendent and Supplemental Claims; State Law in Federal Courts

Hill v. McKinley, 311 F.3d 899 (8th Cir. 2002). The plaintiff was arrested while drunk and behaved in a disorderly fashion. After being placed in a padded cell naked or nearly so, she was walked naked down a corridor and placed on a restraining board, where she remained for several hours. The defendants did not violate the Fourth Amendment by making her disrobe, requiring her to walk through the jail naked, and putting her naked on the restraint board, given her behavior. However, keeping her there in that condition did violate the Fourth Amendment. The defendants are entitled to qualified immunity.

The plaintiff's verdict is affirmed on the state law claim, based on the "intrusion upon seclusion" theory of invasion of privacy, the elements of which

are "intentional intrusion upon the solitude or seclusion of another which would be highly offensive to a reasonable person." There is enough evidence to support a jury finding that it was not necessary to restrain the plaintiff naked.

The $2,500 damage award is affirmed. At 906: "For tactical reasons, Hill did not claim the emotional distress damages ordinarily associated with intrusion upon seclusion, submitting instead only a claim for physical pain and suffering." A reasonable jury could have found that the plaintiff's physical injuries from the straps were caused by the invasion of privacy in that the complete exposure caused her such anger and anguish that she struggled against the bonds.

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

Hargis v. Foster, 312 F.3d 404 (9th Cir. 2002), *amending and superseding* 282 F.3d 1154 (9th Cir. 2001). The plaintiff, who suffers from a neurological disorder causing jerking and shaking, declined to shave because doing so with a razor blade endangered his safety (he had already cut himself trying to do so), and they wouldn't let him use an electric razor. He told an officer that his actions and statements could come up in pending litigation. He was convicted of a disciplinary action for coercion, which resulted in his being denied parole.

A regulation prohibiting "involvement in any disorderly conduct by coercing or attempting to coerce any official action" is not unconstitutional on its face. However, the plaintiff's argument that his conversation was not coercive should not have been dismissed. At 410: "We assign no heightened value to Hargis's speech." The court applies the *Turner* test. "To the extent the dissent argues that *Shaw [v. Murphy]* prohibits this sort of examination, we disagree. The Supreme Court specifically remanded *Shaw*" for that purpose. The record shows that the plaintiff's statements, "taken in the full context of his conversation with the guard," may not have been an attempt to coerce. A jury could reasonably conclude that he wanted to comply with the shaving rule, had tried to shave, and was offering a way to do so by asking for access to an electric razor, which he had been allowed to use in the past. The plaintiff depicted a patient and courteous effort to persuade the officer to back off or get a supervisor; the officer's version leaves out the details but does not contradict the plaintiff. Documentation from prison staff said, e.g., "The staff here are not in fear of your court action and I welcome inquiries from the court." These facts raise a material question whether the defendants' action had a rational connection with the legitimate security concerns of the defendants and could support a finding of "exaggerated response."

Publications/Religion/Law Libraries and Law Books

Tarpley v. Allen County, Indiana, 312 F.3d 895 (7th Cir. 2002). The plaintiff, on admission to jail, had his New International Version Bible confiscated per a policy that prohibits retention of personal reading materials. The jail implemented that policy "to curb fights over who owned what and to avoid compensation claims if the materials were lost or stolen." (897) They gave the plaintiff a jail copy of the same version of the Bible, which he was allowed to keep in his cell, but without the interpretive commentary in the plaintiff's own book. They gave his Bible back when he was released.

The jail policy is upheld under the *Turner* standard because it is "reasonably related to the general interest in maintaining safe conditions and in preventing later disputes over lost or damaged items." (898) The plaintiff had an alternative--the Bible the jail gave him. The plaintiff did not assert that the commentary in his Bible "has the status of something like the Jewish Talmud--non-Biblical writings that have become part of the fundamental texts of the religion as a whole. . . . Prisons are only required to make reasonable efforts to provide an opportunity for religious practice." (899) The jail couldn't let the plaintiff keep a personal book without compromising its general policy.

The plaintiff also alleged that he wished to pursue several civil actions and a state habeas corpus proceeding, but his claim is dismissed for lack of "concrete injury" since he provides no details of the cases he wished to pursue.

Grievances and Complaints about Prison/Qualified Immunity

Brown v. Crowley, 312 F.3d 782 (6th Cir. 2002). The plaintiff complained because he was repeatedly dunned for the same debt by prison authorities; after his grievances failed, he wrote to the state police to ask for prosecution of this "embezzlement," and they referred the complaint to the Department of Correction, which said it was meritless and charged him with misconduct for filing a false complaint. He was acquitted at a hearing.

A reasonable jury could conclude that the plaintiff was subjected to adverse action that would deter a person of ordinary firmness; the mere issuance of the charge "subjected him to the risk of significant sanctions." (789) The district court erred in holding that there was no causal connection between the retaliation and protected conduct because the defendants had determined that the plaintiff acted improperly and made false allegations; that fact does not negate a causal connection. (At 791: "We are dubious that the issuance of a major misconduct ticket under such circumstances could ever be deemed consistent with First Amendment principles.")

Verbal Abuse/Work Assignments/PLRA--Mental or Emotional Injury

Calhoun v. Hargrove, 312 F.3d 730 (5th Cir. 2002). The plaintiff alleged that because of his hypertension, asthma, epileptic seizures, glaucoma, and head and knee injuries, he was limited to a four-hour work schedule with restrictions on walking, standing, and lifting. He alleged that the defendant routinely made him work 10- to 14-hour days and would habitually call him into his office, tell him to pick up sunflower seeds and shells he had spit onto the floor, and spit more onto the floor while they worked. He alleged additional similar harassment, including being forced to beg for a meal.

At 734: "Neither the verbal abuse, nor the begging for the meal allege a physical injury to Calhoun and, though troubling, do not overcome § 1997e(e)." Claims of verbal abuse are not actionable under § 1983. The allegations of work beyond medical limitations state an Eighth Amendment claim, but they must also meet the requirements of the PLRA mental/emotional injury provision. The plaintiff alleged that his blood pressure was at near-stroke level, and the district court should have inquired into the severity of any resulting injury.

PLRA--Exhaustion of Administrative Remedies

Brown v. Croak, 312 F.3d 109 (3d Cir. 2002). At 111 n.1: The argument that it is never appropriate to dismiss for non-exhaustion at the pleading stage is without merit. The plaintiff's assertion that he was led to believe that he was required to wait for completion of an investigation before filing a grievance, and was then not informed for months that the investigation was concluded, was sufficient to preclude dismissal at this stage.

Defendants conceded that if the plaintiff's allegation was correct, their non-exhaustion argument would have no merit. "We agree." At 113:

> Assuming security officials told Brown to wait for the termination of the investigation before commencing a formal claim, and assuming the defendants never informed Brown that the investigation was completed, the formal grievance proceeding required by DC-ADM 804 was never "available" to Brown within the meaning of 42 U.S.C. § 1997e. *Cf. Miller v. Norris*, 247 F.3d 736, 740 (8th Cir.2001) (holding that "a remedy that prison officials prevent a prisoner from 'utilizing' is not an 'available' remedy under § 1997e").

Medical Care--Standards of Liability--Serious Medical Needs/Medical Care--Standards of Liability--Deliberate Indifference/Municipalities/ Staffing--Training

Olsen v. Layton Hills Mall, 312 F.3d 1304 (10th Cir. 2002). A jury could find that obsessive-compulsive disorder is a serious medical need (it allegedly gave rise to panic attacks in this case, but the court does not rely on that fact). Evidence that

the plaintiff twice told the arresting officer he was having a panic attack, without response, presents a jury question of deliberate indifference.

Evidence that the County failed to train its jail's prebooking officers to recognize obsessive-compulsive disorders and to know what to do about it (in this case, they took his medication away) presents a jury question as to deliberate indifference.

RFRA and RLUIPA/Establishment of Religion/State Officials and Agencies/Religion--Services Within Institution

Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002). The Muslim plaintiffs obtained injunctive relief forbidding prison officials from punishing prisoners for attending Jumu'ah services and from withholding good time credits for prisoners who attended them.

The Religious Land Use and Institutionalized Persons Act does not violate the Spending Clause, the Establishment Clause, the Tenth Amendment, the Eleventh Amendment, or the separation of powers.

PLRA--Mental or Emotional Injury/False Imprisonment

Napier v. Preslicka, 314 F.3d 528 (11th Cir. 2002). A prisoner who sued for arrest without probable cause that was unrelated to his current incarceration was nevertheless suing about mental or emotional "injury suffered while in custody," and since he was currently incarcerated, his claim was barred by the PLRA mental/emotional injury provision. "Custody" is interpreted in light of its common meaning and not consistently with the statutory term "prisoner."

The plaintiff himself alleged embarrassment and mental anguish, so the court is not presented with the argument that this case is not about mental or emotional injury but about loss of liberty.

PLRA--Three Strikes Provision

Dubuc v. Johnson, 314 F.3d 1205 (10th Cir. 2003). The three strikes provision is not discretionary. At 1207-08: "To the extent that the language of our cases or our practice may have departed from this absolute rule, they are contrary to the statute."

Medical Care--Standards of Liability--Serious Medical Needs/Personal Involvement and Supervisory Liability/Medical Care--Standards of Liability--Deliberate Indifference/Medical Care--Denial of Ordered Care/Grievances and Complaints about Prison

Brock v. Wright, 315 F.d 158 (2d Cir. 2003). The plaintiff complained that he was denied the care of a dermatologist for a painful and disfiguring keloid. The Regional Medical Director overruled a referral to a dermatologist; the statewide Chief Medical Officer had issued a policy forbidding treatment of keloids absent "collateral symptoms." The plaintiff won his grievance but the Superintendent overturned the decision in deference to the Regional Medical Director's decision, and the Central Office Review Committee affirmed the Superintendent. At 163:

> We will no more tolerate prison officials' deliberate indifference to the chronic pain of an inmate than we would a sentence that would required the inmate to submit to such pain. We do not, therefore, require an inmate to demonstrate that he or she experiences pain that is at the limit of human ability to bear, nor do we require a showing that his or her condition will degenerate into a life-threatening one.

The plaintiff's evidence shows "*chronic* pain the magnitude of which probably falls somewhere between 'annoying' and 'extreme.'" (163, emphasis in original). If the district court thought "only 'extreme pain' or a degenerative condition would suffice to meet the legal standard," it was wrong, "for we have long held that 'the Eighth Amendment forbids not only deprivations of medical care that produce physical torture and lingering death, but also less serious denials which cause or perpetuate pain.'" (*Id.*, citing *Todaro*)

Factors guiding a determination that a medical need is serious include but are not limited to (at 152)

> (1) whether a reasonable doctor or patient would perceive the medical need in question as "important and worthy of comment or treatment," (2) whether the medical condition significantly affects daily activities, and (3) "the existence of chronic and substantial pain."

The plaintiff has alleged "chronic pain that interferes with his ability to conduct tasks associated with daily living," supported by a doctor's affidavit. Another doctor recommended follow-up with steroid injections if the scar began to keloid. A prison doctor made a referral to a dermatologist. Whether or not he thought the request was "routine," he at least thought it "sufficiently serious to be 'worthy of comment.'" (163)

The Superintendent could not be held liable for overturning the favorable grievance decision in deference to the medical policy. The director of the grievance system, who signed the unfavorable decision but was not a voting member of the committee and was not shown to have had any power in the process, could not be held liable. However, the Chief Medical Officer could be held liable for promulgating an unconstitutional policy on keloids. A jury could find that the policy was intended to prevent treatment of keloids for purposes of alleviating moderate, but persistently chronic, pain, since the defendant said it allowed treatment only for "functional" reasons, and since he said that the policy was "properly implemented" in the plaintiff's case. A jury could also find that steroid injections administered by a dermatologist would have been more efficacious than no treatment and that they were denied, not because of a medical judgment that they weren't worthwhile, but because they were forbidden by policy. That would be a conscious choice to prescribe "easier and less efficacious treatment" as in *Williams v. Vincent.*

Use of Force/Emergency/Chemical Agents/Evidentiary Questions/Personal Involvement and Supervisory Liability/ Injunctive Relief/Pendent and Supplemental Claims; State Law in Federal Courts

Combs v. Wilkinson, 315 F.3d 548 (6th Cir. 2002). Three plaintiffs alleged that they were subjected to excessive force after a disturbance in the death row unit--tear-gassed in their cells, maced when they went to windows for air, beaten, kicked, hit with a sledge hammer, slammed into stairways and walls, etc. One plaintiff had a fractured skull.

The report of a prison system "use of force" committee should not have been excluded from consideration on defendants' summary judgment motion. Since the committee was appointed pursuant to state regulation, its report contains findings of an investigation made pursuant to law and is admissible under Rule 803(8), Fed.R.Ev. A deposition of its chairperson stating that she chaired the committee and the report was the report was sufficient foundation. The fact that the report's authors did not have personal knowledge of the incident did not matter--the whole point of the rule is to admit certain hearsay.

An officer's decision to use mace against a plaintiff who placed his face near an open window was made in haste and under pressure, and is therefore entitled to substantial deference. He is entitled to summary judgment.

Claims against unidentified officers (they wore black uniforms, gas masks, and no name badges) must be dismissed. Plaintiffs' argument to the contrary amounts to a *respondeat superior* claim.

The Director cannot be held liable. The most that he did was approve the tactical plan, but the plan itself is consistent with constitutional standards.

The regional director, who witnessed the cell extractions during which beatings allegedly occurred, cannot be held liable. He claims to have witnessed no brutality and plaintiffs fail to rebut that statement. At 558: "Simply viewing the extractions without evidence of more involvement is insufficient to demonstrate that Hills 'implicitly authorized, approved, or knowingly acquiesced' in the use of excessive force against plaintiffs."

The warden cannot be held liable. He approved the tactical plan, which was constitutional, did not participate in or encourage any misconduct, and gave instructions not to use excessive force ("no

Rambos").

The lieutenant who developed the tactical plan and commanded the Security Response Team is not entitled to summary judgment. Although plaintiffs present no evidence that he personally witnessed excessive force, the use of force committee's report found that he inadequately briefed the team members (only some were briefed at all, and none were briefed on cell extractions), that chemical agents were used to a potentially lethal level, he "failed to maintain fundamental control of the operation," and team members used "questionable force."

The sergeant who was tactical commander could not be held liable. The only evidence against him was that he heard officers making comments such as "this is the guy I want" and "I want to beat his ass," and did not admonish them. This at most proves negligence.

PLRA--Exhaustion of Administrative Remedies

Ferrington v. Louisiana Dept. of Corrections, 315 F.3d 529 (5th Cir. 2002). A grievance system that had been held unconstitutional under the state constitution in one respect did not abolish the administrative grievance system and did not make the remedy "unavailable" as a matter of federal law. At 532: "As long as a prison administrative grievance system remains in force (as the state assures us is the case), Ferrington must exhaust." The plaintiff's near blindness did not exempt him from exhausting--after all, he managed to file this suit.

Rehabilitation

Linehan v. Milczark, 315 F.3d 920 (8th Cir. 2003). The petitioner was committed under the state Sexually Dangerous Persons Act after several decades of incarceration for multiple sexual assaults. The standard announced by the state supreme court, requiring "a finding of 'lack of adequate control' in relation to a properly diagnosed disorder or dysfunction, as well as findings of past sexual violence and resultant likelihood of future sexually dangerous behavior," is consistent with the standard set by the Supreme Court in *Kansas v. Hendricks*.

Summary Judgment/PLRA--Exhaustion of Administrative Remedies/RFRA and RLUIPA/Pro Se Litigation

Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003). The PLRA exhaustion requirement does not impose a pleading requirement. Rather, it creates a defense, which defendants have the bvurden of raising and proving.

PLRA--In Forma Pauperis Provisions--Filing Fees

DeBlasio v. Gilmore, 315 F.3d 396 (4th Cir. 2003). At 397: "We hold that the PLRA fee requirements are not applicable to a released prisoner (assuming the prisoner made any required payments while in prison) and that his obligation to pay filing fees is determined by evaluating whether he qualifies under the general in forma pauperis provision of 28 U.S.C. § 1915(a)(1)."

Medication/Medical Care--Standards of Liability--Serious Medical Needs/AIDS

Smith v. Carpenter, 316 F.3d 178 (2d Cir. 2003). A jury rejected the plaintiff's claim of deprivation of HIV medication on two separate occasions for several days at a time, finding he had not proven a serious medical need. The defendants submitted evidence that his medical condition had not been adversely affected.

The finding that there was no serious medical need is upheld. Although AIDS itself is a serious condition, "the serious medical need inquiry must be tailored to the specific circumstances of each case." (185) When the complaint is about temporary delay or interruption of otherwise adequate treatment, the question is whether the delay or interruption in treatment--not the underlying medical condition--is objectively serious enough to support an Eighth Amendment claim. At 186:

> "[I]t's the particular risk of harm faced by a prisoner due to the challenged deprivation of care, rather than the severity of the prisoner's underlying medical condition, considered in the abstract, that is relevant for Eighth Amendment purposes."
>
> Evidence of the lack of adverse medical

effects was admissible (and "highly relevant") to gauge the severity of the medical need (187). While it is true that an Eighth Amendment claim may be based on exposure to an unreasonable risk of future harm, without a showing of injury, "the absence of present physical injury will often be probative in assessing the risk of future harm." (188) The court cautions that in other cases, prisoners may be able to present medical evidence of significantly increased risk "even in the absence of present, detectable adverse effects." (189)

Hazardous Conditions and Substances/Personal Involvement and Supervisory Liability/Access to Courts--Punishment and Retaliation/Qualified Immunity

Atkinson v. Taylor, 316 F.3d 257 (3d Cir. 2003). The plaintiff--blind, diabetic, and having had surgery for a pituitary adenoma--complained of being forced to share a cell with heavy smokers. His allegations satisfy to both prongs of the *Helling v. McKinney* test (exposure to unreasonably high levels of ETS and deliberate indifference) and therefore amount to a violation of clearly established law for which defendants are not entitled to qualified immunity. The plaintiff also presented evidence that society has become more intolerant of unwanted ETS.

The defendants are not entitled to qualified immunity with respect to the plaintiff's claims of present injury, since the court has previously held that *Estelle v. Gamble* clearly established that prison officials can't be deliberately indifferent to existing serious medical needs resulting from ETS. The plaintiff has alleged a serious medical need, since he claims nausea, inability to eat, headaches, chest pains, difficulty breathing, numbness in limbs, teary eyes, itching, burning skin, dizziness, a sore throat, coughing, and production of sputum. The fact that some people voluntarily tolerate such exposure is beside the point, since prisoners cannot protect themselves from it by leaving their cells. The plaintiff alleged that after he complained of these symptoms, a nurse said she couldn't transfer him to a cell with a nonsmoker, and after he told other prison officials about it, nothing changed. At 269: "This evidence demonstrates deliberate indifference on the part of prison officials."

The plaintiff's claim of retaliation implicates prisoners' clearly established First Amendment right of court access. Defendants argued that the deposition and interrogatory answers of a single prisoner are insufficient to raise a factual issue of supervisory knowledge and acquiescence. That is the sort of evidence weighing that cannot be done in an interlocutory qualified immunity appeal. They also argued that evidence that the plaintiff wrote or spoke to supervisors concerning his ETS exposure and retaliatory harassment was insufficient as a matter of law. However, these supervisory officials were mostly not state-wide officials, and the Commissioner was responsible only for a specific state entity housing prisoners. At 271: "The scope of his responsibilities are much more narrow than that of a governor or state attorney general, and logically demand more particularized scrutiny of individual complaints." The other supervisory defendants "have even narrower responsibilities as links in a chain of command within a single prison." Prior authority involving the state Governor and Attorney General is distinguishable, and defendants are not entitled to summary judgment.

PLRA--Exhaustion of Administrative Remedies/Mootness/Hazardous Conditions and Substances

Davis v. New York, 316 F.3d 93 (2d Cir. 2002). The plaintiff complained of exposure to second-hand smoke. His claim for injunctive relief was not mooted by transfer and a new smoking policy, since he asserted that actual conditions remained the same.

The plaintiff's allegations that he had been housed for years in areas where most inmates were smokers, that in the honor block area he had been surrounded by chain or frequent smokers and constantly exposed to smoke, and that it caused him to suffer dizziness, difficulty breathing, blackouts, and respiratory problems, raised a material issue as to whether he was subjected to unreasonably high levels of ETS as required to make out an Eighth Amendment claim under *Helling*.

The court notes a question whether the plaintiff exhausted administrative remedies, but

since the defendants did not raise it and the district court did not rule on it, the district court should consider whether the issue is waived.

Habeas Corpus/Procedural Due Process--Disciplinary Proceedings

Nonnette v. Small, 316 F.3d 872 (9th Cir. 2002). The plaintiff alleged that prison officials miscalculated his prison sentence and revoked good time in a disciplinary proceeding without supporting evidence. His claim would be barred by the *Heck/Balisok* rule except that he is no longer in prison and cannot use habeas corpus. Under the separate opinions in *Spencer v. Kemna*, he may proceed under § 1983.

The plaintiff did not present a challenge to the conditions of his segregated confinement, and therefore did not seek to show that this punishment was atypical and significant. At 878-79: "His entire challenge to the administrative segregation was that it was imposed as a result of a disciplinary hearing in which the adverse finding was supported by no evidence. We have held that such a lack of fair hearing violates due process, wholly apart from the conditions of confinement and without regard to the *Sandin* requirements. *Burnsworth v. Gunderson*, 179 F.3d 771, 775 (9th Cir. 1999)." This holding, and *Gunderson*'s, appear contrary to the Supreme Court's decision in *Sandin v. Conner*.

Qualified Immunity/Procedural Due Process--Temporary Release

Anderson v. Recore, 317 F.3d 194 (2d Cir. 2003). In 1978, the court in *Tracy v. Salamack* held that prisoners in a temporary release program must receive a hearing before their status is revoked. That law remained clearly established after the decision in *Sandin v. Conner*, which generally altered due process analysis in prison cases. *Sandin* did not place *Tracy* in any reasonable doubt because it reaffirmed the due process principles on which *Tracy* rested ("grievous loss" analysis combined with a state law-based entitlement). *Sandin* did not dispense with statutory or regulatory-based entitlements, it just required atypical or significant deprivation in addition. It relied on *Wolff* and *Morrissey*, as did *Tracy*. This case differs from *Sandin* in that the plaintiff, as in *Tracy*, was not in prison but was living outside the institution. The existence of contradictory views among district court judges on the viability of *Tracy* does not matter, since those views had not emerged when the plaintiff's temporary release was revoked, and in any case the Circuit will follow its own non-overruled precedent rather than district court decisions.

Rehabilitation/Deference

Ainsworth v. Stanley, 317 F.3d 1 (1st Cir. 2002). The plaintiffs alleged that defendants' sex offenders program violated their Fifth Amendment right against self-incrimination by requiring them to disclose their histories of sexual misconduct in order to participate. The court upholds the program under the *Turner* standard. It does not involve any new penalties, since the prisoners are not being given new sentences. The burden on the prisoners' rights is mitigated by the voluntariness of the program. The denial of parole is not 100% automatic (just 97% or 98%, it appears). The state does have a reasonable alternative that would not impair its interests, i.e., granting limited immunity to sex offenders who engage in compulsory disclosures. However, doing so "is a policy choice that lies in the state's hands." (The idea that if there is a readily available alternative, the state is not obliged to use it appears contrary to the analysis of *Turner v. Safley*.)

Media/Deference/Federal Officials and Prisons

Kimberlin v. U.S. Dep't of Justice, 318 F.3d 228 (D.C.Cir. 2003). A federal statute (the "Zimmer Amendment," a provision in an appropriations act which has been re-enacted yearly since 1997) prohibits the use of federal funds for "the use or possession of any electric or electronic musical instrument" in federal prisons. The Bureau of Prisons promulgated a policy that said electric instruments that were already present could stay put but would not be repaired and new ones would not be allowed, except for equipment used in conjunction with religious services, stored in the chapel area, and under the supervision of the Religious Services Department.

The BOP's policy prohibiting prisoners'

possession of electric or electronic instruments does not exceed statutory authority, since the statute may reasonably be construed to prohibit paying for incidental costs such as those for storage, supervision, and electricity. It is also consistent with the statutory purpose of making prisons more punitive.

The prohibition does not implicate First Amendment rights and is not subject to the *Turner* standard, because Congress is not required to fund the exercise of First Amendment rights. Even under *Turner*, there would be no First Amendment violation. The policy has a reasonable relationship to the legitimate interest of conserving correctional department funds. There are alternative ways of making music, such as voice and acoustic instruments. Striking down the policy would have an adverse impact on prison resources since the policy saves money. As for alternatives at minimal cost, the court doesn't know how much money is involved here, but since the other *Turner* factors all weigh in defendants' favor, they win regardless.

By taking this approach, the appeals court avoids discussing the holding of the district court, which is that deterrence and punishment alone are sufficient purposes to sustain measures making prison more unpleasant. *Kimberlin v. United States Dept. of Justice*, 150 F.Supp.2d 36, 44-45 (D.D.C. 2001). One concurring judge thinks that is the preferable rationale. The other judge, concurring in part and dissenting in part, says that the "incidental cost" approach is "a broad--indeed limitless--legal principle under which prison officials may ban not only the use and possession of electric guitars, but also the exercise of virtually any other constitutional right that requires electricity, guard supervision, or other prison resources--including the sending and receiving of inmate mail, and even the use and possession of books and magazines." (236) The notion that the BOP relies on, that punishment and deterrence are sufficient justification to restrict constitutional rights, is also an open-ended principle, and one which in general is inconsistent with the *Turner* analysis.

Transportation to Court/Pre-Trial Detainees

Simmons v. Sacramento County Superior Court, 318 F.3d 1156 (9th Cir. 2003). A default judgment was entered against the plaintiff in a personal injury action because at the time of trial he was in jail and representing himself and the Sheriff refused to take him to court.

Because the plaintiff's action neither challenged his conviction (which had not yet happened) nor addressed the conditions of his confinement, under *Lewis v. Casey*, the failure to take him to court was one of the "incidental (and perfectly constitutional) consequences of . . . incarceration" (1160, quoting *Lewis*). The plaintiff's pre-trial status does not alter this conclusion because it was not the result of an intent to punish. Punitive intent "cannot be inferred from the nature of the restriction--the failure to transport. . . . Keeping detainees in jail, rather than transporting them to court dates unrelated to their criminal charges or conditions of confinement, serves a legitimate penological interest" and is not excessive in relation to it.

Pre-Trial Detainees/Color of Law and Liability of Private Entities/Medical Care--Staffing--Access to Medical Personnel/Medical Care--Standards of Liability--Serious Medical Needs, Deliberate Indifference/Medical Care/ Medication/Intake/Pendent and Supplemental Claims; State Law in Federal Courts

Natale v. Camden County Correctional Facility, 318 F.3d 575 (3d Cir. 2003). The diabetic plaintiff was brought to jail by way of an emergency room, where he received a dose of insulin and a note stating that he "must have insulin," but not how often and in what form. Nobody asked at the jail, he was admitted to the general population, and received another dose of insulin only after 21 hours. He was released the same day and then had a stroke, which he attributes to delay in providing insulin.

The state law malpractice claim need not be supported by an "affidavit of merit" where common knowledge is sufficient to determine the merit of the case. The district court erred in framing the question as whether the defendants failed to give the plaintiff insulin timely. What they did wrong was fail to call the plaintiff's treating physician, or even ask the plaintiff, how often it was required. At 580:

"While laypersons are unlikely to know how often insulin-dependent diabetics need insulin, common sense--the judgment imparted by human experience--would tell a layperson that medical personnel charged with caring for an insulin-dependent diabetic should determine how often the diabetic needs insulin."

This court has applied the same standard for medical care claims under the Fourteenth Amendment as under the Eighth Amendment, though it is careful to note (581 n.5) that it isn't really deciding that the standards are the same. Since it is applying an identical standard, it doesn't matter that the plaintiffs pled their case under the Eighth Amendment.

The parties agree that insulin-dependent diabetes is a serious illness and the plaintiff had a serious medical need.

At 582: "Because PHS [Prison Health Services] is a state actor, employees of PHS are considered prison officials."

Evidence that jail personnel knew that the plaintiff was an insulin-dependent diabetic, that he needed insulin, and that "PHS employees delayed medical treatment for non-medical reasons," i.e., their policy was to have everyone seen within 72 hours, but "there was no practice in place to accommodate inmates with more immediate medication needs" (583), supported a claim of deliberate indifference.

Prison Health Services cannot be held liable on a *respondeat superior* basis, but only on the basis of a relevant corporate policy or custom that caused the constitutional violation alleged. There is no evidence of an affirmative policy or custom that prevented employees from asking how often the plaintiff required insulin, but there is "evidence that PHS turned a blind eye to an obviously inadequate practice that was likely to result in the violation of constitutional rights" (584), i.e., a screening policy under which nobody could get medication to an inmate until the inmate had seen the doctor, and he or she might not see a doctor for 72 hours.

State-Federal Comity

Broussard v. Parish of Orleans, 318 F.3d 644 (5th Cir. 2003). Imposition of fees intended to cover the costs of the bail bond system as a prerequisite for release on bail did not deny due process or constitute an unreasonable seizure or cruel and unusual punishment. (The sheriff was authorized to charge $15 unless the charge was suspended by the judge, and the clerk could charge $5.)

PLRA--Exhaustion of Administrative Remedies/PLRA--Mental or Emotional Distress

Mitchell v. Horn, 318 F.3d 523 (3d Cir. 2003). The district court dismissed for non-exhaustion. At 529: "Mitchell argues that he did not file a grievance because prison officials denied him the necessary grievance forms and, as a result, he lacked 'available' remedies. (The grievance policy says that grievances should be filed on the proper form.) The Commonwealth concedes this point." In any case, failure to exhaust is an affirmative defense, so dismissal for non-exhaustion before defendants were even served was error.

On the plaintiff's separate claim that he was subject to retaliatory discipline, he exhausted by appealing the hearing examiner's decision all the way up. The court does *not* hold as some courts have that the alleged retaliatory action (setting plaintiff up for a false disciplinary ticket) must be separately grieved.

The plaintiff's claim that drugs were planted in his cell as retaliation for his complaints was not frivolous; actions which, standing alone, might not be unconstitutional, may be unconstitutional if motivated in substantial part by a desire to punish someone for exercising constitutional rights. The elements of such a claim are (at 530):

> (1) constitutionally protected conduct, (2) an adverse action by prison officials "'sufficient to deter a person of ordinary firmness from exercising his [constitutional] rights,'" and (3) "a causal link between the exercise of his constitutional rights and the adverse action taken against him." [Citation omitted.]

Several months in disciplinary confinement "would deter a reasonably firm prisoner from exercising his

First Amendment rights."

The plaintiff complained he was denied due process in his disciplinary hearing, for which he served several months in disciplinary custody. At 532: "In deciding whether a protected liberty interest exists under *Sandin*, we consider the duration of the disciplinary confinement and the conditions of that confinement in relation to other prison conditions." The inquiry is fact-specific. This case seems similar to one in which this court held that 15 months in administrative custody under similar conditions was held not to have deprived the prisoner of a liberty interest. Differences like one visitor per month and one pack of cigarettes per two weeks versus one visitor and two packs of cigarettes a week are "marginal." However, the district court should develop the record further, and should consider whether the "deplorable conditions" the plaintiff experienced during four days in a cell smeared with feces and infested with flies constituted a deprivation of liberty.

The mental/emotional injury provision of the PLRA applies only to compensatory damages and not to injunctive and declaratory relief. At 534 n.10: Requests for damages for loss of "status, custody level and any chance at commutation" are unrelated to mental injury and are not affected by the statute.

The plaintiff argued that his four-day confinement under filthy conditions, during which he said he was deprived of food, drink, and sleep, described a physical injury meeting the requirement of the mental/emotional injury provision. At 534: "Mitchell [asserts] that physical injury--including starvation, dehydration, unconsciousness, pain, and hypoglycemia--follow inevitably from the conditions he alleges, and that he should not be penalized for inartful pleading." *Id.*: "Loss of food, water, and sleep are not themselves physical injuries. However, physical injuries could result from such deprivation after four days." He gets a chance to amend. The injury must be more than *de minimis*.

Searches--Person--Prisoners/PLRA--Mental or Emotional Injury

Calhoun v. DeTella, 319 F.3d 936 (7th Cir. 2003). The plaintiff complained of a strip search done in the presence of female guards. This allegation states an Eighth Amendment claim if the search was "not merely a legitimate search conducted in the presence of female correctional officers, but instead a search conducted in a harassing manner intended to humiliate and inflict psychological pain." (939) This *seems* to mean that the presence of opposite sex staff is neither here nor there as long as the search is otherwise legitimate. But then, at 940:

> Calhoun alleges that the officers sexually harassed him through behavior unrelated to legitimate prison needs. In particular, he alleges that the guards made "ribald comments" and sexually explicit gestures during the search, and that they forced him to perform sexually provocative acts. Furthermore, he alleges that the female guards present during the search were neither mere passersby nor performing the legitimate penological function of conducting or monitoring the search; they were instead invited spectators. These allegations, if true, can only lead to the conclusion that the prison guards conducted the strip search in a manner designed to demean and humiliate Calhoun, and we therefore conclude that he sufficiently states a claim under the Eighth Amendment.

Here, the court seems to allow that the presence of opposite sex staff can *be* part of the harassment.

The PLRA mental/emotional injury provision applies to this claim. The state Attorney General argues that the statute bars suit entirely, requiring physical injury for any suit involving mental or emotional injury. At 940: "We cannot agree. This contention if taken to its logical extreme would give prison officials free reign to maliciously and sadistically inflict psychological torture on prisoners, so long as they take care not to inflict any physical injury in the process." That sweeps too broadly and is foreclosed by prior decisions. If there is a non-physical injury other

than mental or emotional injury, it is compensable. At 940-41:

> Indeed, in the context of First Amendment claims, we have held explicitly that prisoners need not allege a physical injury to recover damages because the deprivation of the constitutional right is itself a compensable injury, regardless of any resulting mental or emotional injury. . . . Using a similar rationale, several of our sister circuits have concluded that § 1997e(e) does not bar all recovery for violations of due process or the right to privacy. . . . These decisions reflect an emerging view that § 1997e(e), as the plain language of the statute would suggest, limits recovery "for mental and emotional injury," but leaves unaffected claims for nominal and punitive damages which seek to remedy a different type of injury.

That reasoning applies to Eighth Amendment claims involving no physical injury--the violation of the right itself is a cognizable injury. At 941: "This conclusion readily follows from the fact that nominal damages 'are not compensation for loss or injury, but rather recognition of a violation of rights.'" The same is true of punitive damages. At 942: "Punitive damages are awarded to punish and deter reprehensible conduct." They are based on evil motive or recklessness, says the Supreme Court. Punitives can be awarded without compensatory damages. *Id.*

PLRA--Three Strikes Provision/Work Assignments

Martin v. Shelton, 319 F.3d 1048 (8th Cir. 2003). The plaintiff alleged that he was forced to work in 30-degree weather without warm clothing and subsequently forced him to work in humid, 98-degree weather despite his high blood pressure.

To invoke the three strikes imminent danger exception (at 1050), the danger must exist when the complaint or appeal is filed, and must threaten continuing or future injury. The plaintiff's complaint that defendants forced him to work outside in inclement conditions on two occasions five months apart under dissimilar conditions did not support a claim of ongoing danger.

Psychotropic Medication

Singleton v. Norris, 319 F.3d 1018 (8th Cir. 2003) (en banc). Executing a prisoner who has regained competency through forced medication does not deny due process or constitute cruel and unusual punishment as long as the forced medication is medically appropriate.

Correspondence--Legal and Official/Grievances and Complaints about Prison

Davis v. Goord, 320 F.3d 346 (2d Cir. 2003) (opinion by Stein, D.J., joined by Calabresi and B.D. Parker). The plaintiff alleged that items of legal mail were opened outside his presence.

At 351: "Interference with legal mail implicates a prison inmate's rights to access to the courts and free speech as guaranteed by the First and Fourteenth Amendments to the U.S. Constitution. . . ." A court access claim requires action that hinders a plaintiff's efforts to pursue a legal claim. *Id.*:

> In addition to the right of access to the courts, a prisoner's right to the free flow of incoming and outgoing mail is protected by the First Amendment. . . . Restrictions on prisoners' mail are justified only if they "further[] one or more of the substantial governmental interests of security, order, and rehabilitation . . . [and] must be no greater than is necessary or essential to the protection of the particular governmental interest involved." . . . In balancing the competing interests implicated in restrictions on prison mail, courts have consistently afforded greater protection to legal mail than to non-legal mail, as well as greater protection to outgoing mail than to incoming mail. . . .
>
> While a prisoner has a right

> to be present when his legal mail is opened, *Wolff v. McDonnell*, . . . an isolated incident of mail tampering is usually insufficient to establish a constitutional violation. . . . Rather, the inmate must show that prison officials "regularly and unjustifiably interfered with the incoming legal mail." . . .

Retaliation claims are approached with skepticism, since any adverse action can be characterized as retaliation. At 352:

> Thus, in order to survive a motion to dismiss a complaint, "a plaintiff asserting First Amendment retaliation claims must advance non-conclusory allegations . . . (1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action."

Since filing grievances is constitutionally protected (352), the plaintiff meets that prong of the test. At 353, *quoting Dawes v. Walker*: "Only retaliatory conduct that would deter a similar situationed individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action for a claim of retaliation." "Insulting or disrespectful comments" generally do not meet that standard. However, not being given a high fiber diet, having to wait for a medical appointment, and having to get around defendants' obstruction of his grievances meet that standard at the pleading stage (even though he managed to get the grievances resolved through "extraordinary efforts").

Procedural Due Process--Disciplinary Proceedings, Visiting/Punitive Segregation/Recreation and Exercise/Religion--Services Within Institution

Phillips v. Norris, 320 F.3d 844 (8th Cir. 2003). 37 days in punitive segregation for carrying contraband, with denial of contact visits, exercise, and religious services, did not constitute a deprivation of liberty under the *Sandin* atypical and significant test.

At 847: "A prisoner does not have a liberty interest in contact visitation."

Id.: "A prisoner may have a liberty interest in some access to exercise, but we have never set a time limit on how often prisoners must be allowed to exercise. . . . While thirty-seven days is perhaps pushing the outer limits of acceptable restriction," it isn't atypical and significant.

Id.: "Limitations on religious services, especially for a short period of time, have also been found not to present an atypical and significant hardship."

The foregoing conditions do not violate the Eighth Amendment, since the plaintiff fails to show "that the defendants were deliberately indifferent to his health or safety, . . . and that they acted maliciously for the purpose of causing him harm, *Whitley v. Albers*. . . ." This court has upheld worse conditions against Eighth Amendment challenge.

Dental Care/Grievances and Complaints about Prison

Farrow v. West, 320 F.3d 1235 (11th Cir. 2003). The plaintiff entered prison with only two lower teeth, having had several extractions during his previous prison term and having been unable to get dentures in the three years he was out. As a result he experienced pain and difficulty eating. He received dentures 15 months after they were prescribed, but less than one month after he filed suit.

The plaintiff had a serious medical need. At 1244-45: "We are not saying that merely having few or no teeth and a definite need for dentures constitutes a serious medical need in each case. But in Farrow's case, the evidence shows pain, continual bleeding and swollen gums, two remaining teeth slicing into gums, weight loss, and such continuing medical problems, establishing a serious medical need." The plaintiff need not show a "life-long handicap or permanent loss"; such a showing is required when a need for immediate or emergency attention is claimed.

There was evidence that the dentist had knowledge of the seriousness of the plaintiff's

condition but failed to provide dentures for 15 months, and there were hiatuses in treatment of eight and three months. At 1247: "This substantial and inordinate delay in treatment" raises a jury question of deliberate indifference even though the plaintiff didn't require immediate treatment, given that the defendants have not come forward with any reasonable explanation for the delays.

NON-PRISON CASES

Color of Law and Liability of Private Entities

Miranda v. Clark County, Nevada, 319 F.3d 465 (9th Cir. 2003). The plaintiff spent 14 years on death row before his conviction was overturned based on ineffective assistance of counsel. The state did not reprosecute. Now he sues the county and the public defender, alleging that his conviction resulted from two policies promulgated by the head of the public defender's office: (a) giving all defendants a lie detector test and allocating minimal resources to those who failed, and (b) assigning the least experienced lawyers on the staff to capital cases without training or experience in the special demands of such cases. (The lawyer who defended the plaintiff was "fresh out of law school and an assistant public defender for a little over a year [and] had never tried a murder case, much less a capital case.")

The assistant public defender did not act under color of law in representing the plaintiff, consistently with the decision in *Polk County v. Dodson*. However, the head of the public defender's office acted under color of law and was a municipal policymaker in his capacity as the administrative head of the agency, responsible for allocating the office's resources. The court describes the lie detector policy as "a policy of deliberate indifference to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt." The policy of assigning inexperienced counsel is not held unconstitutional, but the plaintiff has sufficiently alleged a claim of deliberate indifference to training needs. The court is unimpressed by the state's argument that "as a matter of law, attorneys who have graduated from law school and passed the bar should be considered adequately trained to handle capital murder cases."

Habeas Corpus/Transfers

Harden v. Pataki, 320 F.3d 1289 (11th Cir. 2003). The plaintiff could pursue his allegation of unlawful extradition via § 1983, notwithstanding *Heck*, since a favorable decision would not invalidate his conviction or sentence. Also, a person abducted from one state to another and placed in the demanding state's custody has no claim for release in habeas corpus. Where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be.

U.S. District Court Cases

Sexual Abuse/Procedural Due Process--Administrative Segregation

Ortiz v. Voinovich, 211 F.Supp.2d 917 (S.D.Ohio 2002). A jury could reasonably find that a shift supervisor who told a prisoner who was being sexually harassed by staff to stay around her friends and "do anything you have to do to protect yourself" did not take sufficient action to protect the prisoner, who was sexually assaulted the next day. The supervisor could have reassigned the officer or ordered him to take the evening off work, or assigned another officer to keep a close watch on him; if she lacked the authority, a jury could find she should have reported the complaint to someone who did.

The supervisor is not entitled to qualified immunity. The right to be protected from violence in prison was clearly established. A reasonable official would know that doing little to protect the plaintiff constituted deliberate indifference. Relying on the "buddy system" is ineffectual since the prison presumably has a curfew and the plaintiff would be alone at some point during the evening.

Plaintiff's allegation that she was placed in the "hole" ("security control") in retaliation for reporting staff misconduct survives summary judgment. Although placement in administrative segregation generally is not atypical and significant under *Sandin*, this is. At 929-30:

> Placement in segregation based on such a retaliatory motive, as opposed to legitimate penological interests, is an atypical and significant hardship. It is not an ordinary incident of prison life for a person claiming to be the victim of sexual assault by a prison guard to be thrown into "the hole" for no reason other than the fact she reported the assaults to prison officials. Due process demands some legitimate justification for putting Ortiz in security control.

This is a pretty idiosyncratic view of how to do an "atypical and significant" analysis.

Procedural Due Process--Temporary Release

McGoue v. Janecka, 211 F.Supp.2d 627 (E.D.Pa. 2002). The plaintiff did not have a liberty interest in staying on work release, since his placement on work release was part of his criminal sentence, and the sentencing judge made the decision to remove him from work release. Nor is there a state-created liberty interest, since revocation "did not impose anything upon plaintiff outside of the ordinary incidents of prison life."

PLRA--Exhaustion of Administrative Remedies

Peoples v. Beldock, 212 F.Supp.2d 141 (W.D.N.Y. 2002) (Larimer, J.). Plaintiff said he shouldn't have to exhaust because *Porter v. Nussle* hadn't been decided and the law didn't require exhaustion of his claim at the time he filed it. The court dismisses without prejudice, saying he should present his argument based on the change in law in a new grievance and try to show that the change in law constitutes "mitigating circumstances."

Pro Se Litigation

Lindell v. Litscher, 212 F.Supp.2d 936 (W.D.Wis. 2002). The court declares that *pro se* prisoner litigants will no longer be allowed to join their claims; they will have to file individually. This conclusion is reached based on manageability grounds, and not on PLRA filing fee grounds as in *Hubbard v. Haley*.

The court cites the Rule 11 requirement that anyone who files a lawsuit certify by his signature that the allegations of the complaint are well founded based on reasonable inquiry, and questions whether multiple *pro se* litigants will actually be able to do this. At 943: "The cost to prisoner pro se litigants of managing a multi-plaintiff suit quickly outpaces their ability to pay the costs. Prisoners earn meager wages, if they earn wages at all. The cost of photocopying documents alone is often prohibitive." Prisoners who allow other prisoners to prosecute joint actions on their behalf risk subjection to the three strikes provision of the PLRA. Exactly how any of this reasoning authorizes the court to overrule Rule 20, Fed.R.Civ.P., on permissive joinder of parties, is not explained.

Drug Dependency Treatment/Medical Care--Standards of Liability--Serious Medical Needs, Deliberate Indifference/Qualified Immunity

Gonzalez v. Cecil County, Md., 221 F.Supp.2d 611 (D.Md. 2002). The decedent was arrested and told jail medical personnel that he was a heroin addict likely to undergo withdrawal. The only treatment he got was Clonidine, a blood pressure medication, twice a day, and Kaopectate. He died two days after arrest of "pneumonia, complicating narcotics abuse."

The allegation that the defendant nurses knew the plaintiff was a heroin addict likely to undergo acute withdrawal symptoms and that he died of causes known to be related to drug withdrawal support the claim that heroin addition is a serious medical need and that the defendants were deliberately indifferent. The fact that they provided some treatment does not exonerate them if the treatment was completely inappropriate.

Defendants are not entitled to qualified immunity based on the claim that they acted in conformity with established protocols. They cite no authority for the proposition that they are entitled to qualified immunity for "just following orders."

Homosexuals and Transsexuals/Medical Care--Standards of Liability--Deliberate Indifference, Serious Medical Needs/Financial Resources

Kosilek v. Maloney, 221 F.Supp.2d 156

(D.Mass. 2002). The plaintiff, a pre-operative male-to-female transsexual, challenged the failure to provide him treatment and sought an injunction requiring prison officials to retain a gender disorder specialist and then do what the specialist says. Defendants' policy---made by the Commissioner rather than medical authorities--is to "freeze" transsexuals in the condition they are in when first incarcerated by providing only the treatment they received at that time. This policy was motivated by a combination of sincere security concerns and a fear of public and political criticism. At 162: "As stated earlier, security is a legitimate consideration for Eighth Amendment purposes. A concern about political or public criticism for discharging a constitutional duty is not."

The court says that going forward the Commissioner is on notice of the plaintiff's serious medical need and lack of proper treatment, and that it expects he will respond reasonably, by allowing qualified medical professionals to recommend treatment. If hormones or gender reassignment surgery are recommended, he may properly consider whether security issues make it impossible to provide adequate medical care in prison, keeping in mind that the plaintiff is already living largely as a woman in a medium security male prison without presenting a security problem. Denial of the recommended care for reasons of cost or controversy will violate the Eighth Amendment. At 161: "It is not, however, permissible to deny an inmate adequate medical care because it is costly. In recognition of this, prison officials at times authorize CAT scans, dialysis, and other forms of expensive medical care required to diagnose or treat familiar forms of serious illness."

At 175: The experts agree "that a rigid blanket policy prohibiting the initiation of hormones in every case is not appropriate. This court concurs."

At 183: "Generally, decisions concerning medical care for an inmate must be based upon 'sound medical judgment.'" . . . Since the Supreme Court's decision in *Estelle*, many other courts have held that consciously choosing 'an easier and less efficacious' course of treatment plan may constitute deliberate indifference, if the choice was made for non-medical reasons not rooted in a legitimate penological purpose." The defendants' claim that they have offered "some treatment" and that is all the law requires is rejected, since the care the plaintiff has received (counseling) is clearly inadequate; "no informed medical judgment has been made by the DOC concerning what treatment is necessary to treat adequately Kosilek's severe gender identity disorder." (186) The "Guidelines" adopted by the Commissioner precluded the possibility that the plaintiff will ever be offered forms of treatment that may be necessary for his disorder.

Gender identity disorder is not necessarily a serious medical need; it has degrees of severity; but the plaintiff's case is serious, having prompted him to attempt suicide twice and self-castration once.

AIDS/Pre-Trial Detainees/Crowding/PLRA--Prospective Relief Provisions--Entry of Relief Injunctive Relief/Monitoring and Reporting

Foster v. Fulton County, Georgia, 223 F.Supp.2d 1292 (N.D.Ga. 2002). HIV-positive jail prisoners brought suit over conditions of confinement and inadequate medical care. They obtained a settlement in 2000. Based on the report of Robert Griefinger, the court-appointed monitor, and subsequent proceedings, the court concludes that "much remains to be done to achieve full compliance." To relieve overcrowding, it orders defendants to start providing counsel within 72 hours of arrest for minor offenders who are denied bail; to expand the authority of pre-trial services to reduce the number of persons denied pre-trial release or denied reasonable bond; to develop mental health diversion and discharge planning; to increase compensation for appointed counsel in misdemeanors; and other interventions in the criminal justice system. It directs development of a staffing plan adequate to meet HIV-positive prisoners' health care needs, including distribution of medications and transportation to medical appointments. It directs a system for timely access to specialty care and timely delivery of medication. It requires evaluation of the food service and steps to see that inmates get prescribed medical diets. It directs development of a plan to repair or replace

existing plumbing and HVAC systems. At 1300: "If the jail cannot be renovated to cure these problems, defendants should so advise the Court so that construction of a new jail can be considered." *Id.* at n.9: "The Court notes that in the past it has ordered the construction of new jails in Cobb, Fayette, and Douglas Counties after the county commissioners acknowledged that a new facility was needed."

Publications/Injunctive Relief/PLRA--Prospective Relief Provisions--Entry of Relief/Deference

Ashker v. California Dept. of Corrections, 224 F.Supp.2d 1253 (N.D.Cal. 2002), *aff'd*, 350 F.3d 917 (9th Cir. 2003). The court strikes down a rule that prisoners could only receive books in the mail (sources already restricted to "approved mail order vendors") if a pre-printed label signed by the prisoner, along with a vendor stamp, is placed on the package.

The policy fails the *Turner v. Safley* standard because it is not rationally related to legitimate penological objectives. The concern to make sure books come directly from an approved vendor can be satisfied by checking the vendor's address label and invoice to make sure the package wasn't sent to a third party and then re-shipped; while address and invoice could be forged, so could the prison's labels. Also, *all* personal property received by inmates in the mail, including books and magazines, is searched before delivery to the prisoner. A claim that on a single occasion drugs escaped detection by a fluoroscope, without any detail about the incident, even whether it involved books, proves nothing, especially since all packages are searched anyway. The fact that the label policy applies only to books further undermines any common-sense relationship to controlling contraband.

As to efficiency of mail processing, defendants argued that packages not properly labelled can be immediately returned to sender; but in fact they are opened and searched anyway. Defendants' assertion that only three people are responsible for a "huge volume of mail property" does not support their case absent evidence of how much of the mail consists of book packages, how long it takes to search each package, and whether the label policy has in fact made operations more efficient.

At 1263: Under the PLRA narrow tailoring requirement, the proper relief is to enjoin the challenged policy generally, not just for the plaintiff, since it is a prison-wide policy.

Medical Care--Standards of Liability--Deliberate Indifference, Serious Medical Needs/Correspondence--Non-Legal/Deference/Attorney Consultation

Rodriguez v. Ames, 224 F.Supp.2d 555 (W.D.N.Y. 2002). The plaintiff was denied the right to receive information from the "Penn-Pals Prison-Inmate Services Network," which places prisoners' information onto an Internet site so people can write to the prisoner. The action is upheld under the *Turner* standard.

The plaintiff complained that a corrections counselor stood three feet away from him during a legal call. The call was only to a paralegal employed by an attorney that plaintiff hoped would represent him, and at the end of it the paralegal said he would not take the plaintiff's case. There was no Sixth Amendment violation because no criminal or quasi-criminal proceeding was involved. At 566: "Moreover, plaintiff was not communicating with an attorney (or a member of his or her staff) who had agreed to represent plaintiff in any capacity." There is no violation of the right of access to courts because the plaintiff was seeking counsel for this very case, and he's brought it himself and prosecuted it vigorously, so "plaintiff's access to the courts has in no way been impinged upon." (566)

The foregoing holding illustrates why much of what we used to think of under the broad rubric of access to courts needs to be re-thought, e.g., as claims under the First or Fourth Amendment.

Correspondence--Non-Legal/Deference

Hall v. Johnson, 224 F.Supp.2d 1058 (E.D.Va. 2002). A policy limiting items of incoming mail (not including legal, "special purpose," educational, vendor, or governmental mail, or to packages) to one ounce each did not violate the First Amendment. The court first characterizes the restriction as *de minimis*, since

anybody with more than a one-ounce letter can send it in two envelopes, but then upholds it under the *Turner* standard anyway. The policy has a rational relationship to limiting contraband because it makes scanning the mail easier. It doesn't attempt to limit the amount of mail; that would present a more serious issue. (The court does not explain how opening more envelopes to go through the same number of pages advances any interest. "Given the deference afforded prison officials in light of their expertise in such matters. . .," etc.) There are plenty of alternative ways to exercise First Amendment rights, since the regulation is content neutral and does not impact the amount of mail prisoners can receive. There is a potential "ripple effect" of abrogating the regulation because prison officials have said (again, "in their expert opinion") that it's necessary in order to give mail room staff enough time to screen mail effectively. The plaintiff has not suggested any alternatives with *de minimis* impact on security; additional screening personnel would deplete the "severely limited" prison system budget.

PLRA--Exhaustion of Administrative Remedies/Grievances and Complaints about Prison/Access to Courts--Punishment and Retaliation/Medication/Medical Care--Standards of Liability--Deliberate Indifference, Serious Medical Needs

Baskervile v. Blot, 224 F.Supp.2d 723 (S.D.N.Y. 2002). This decision construes the PLRA exhaustion requirement in light of the statement in *Porter v. Nussle* that its purpose is to give prison officials an *opportunity* to resolve problems. At 730: Although the plaintiff's grievance was narrower in scope than his lawsuit, prison officials addressed his claims, so he is allowed to go forward with all of them.

At 731: "A prisoner's filing of a grievance against a corrections officer is protected by the First Amendment and retaliation in response to such a grievance is an actionable claim." The same goes for lawsuits. To plead a retaliation claim, the plaintiff must allege subjection to conduct that would deter a person of ordinary firmness from exercising rights. Allegations of physical assault, issuance of a false misbehavior report, and a restraint order requiring physical restraints and the denial of other privileges, all met that standard. The plaintiff sufficiently alleged a causal connection. Despite the three-year gap between the lawsuit and the alleged retaliation, and the failure to set out any time frame or other details for his grievances, the fact that the disciplinary charges were dismissed and the restraint order was later found unwarranted weigh in plaintiff's favor, as does the allegation that officers made statements supporting a retaliatory motive. A "colorable suspicion" suffices.

The plaintiff's allegations that a nurse failed properly to evaluate his injuries though she was aware of prior injuries, and failed to treat him despite knowing that he could sustain further injury without treatment, sufficiently stated a claim of serious medical needs and of deliberate indifference (a conclusion bolstered by evidence that once he got to another prison, he was x-rayed, given medication, and referred to a doctor for the injuries).

A prescription for high blood pressure medication arguably indicates a serious medical condition, but the plaintiff failed to allege deliberate indifference based on a delay of only a few days in refilling that medication.

PLRA--Exhaustion of Administrative Remedies/Pre-Trial Detainees/Access to Courts/Use of Force--Restraints/Procedural Due Process--Disciplinary Proceedings/Publications/ Correspondence/Damages--Access to Courts

Davis v. Milwaukee County, 225 F.Supp.2d 967 (E.D.Wis. 2002). The plaintiff alleged that he had no access to legal materials during 13 months in jail, during which he tried to defend himself and also to pursue five civil cases.

The plaintiff does not have a court access claim as to his criminal case, since he had a court-appointed lawyer and/or stand-by counsel. Exercising one's right to proceed *pro se* does not give rise to alternative rights such as access to a law library.

The plaintiff's right of court access was violated by defendants' interference with his ability to exhaust. The absence of legal materials meant he did not know about the exhaustion requirement; if he had known, he would not have had access to the

jail's grievance policy. He was advised by staff that the matter he sought to grieve was not grievable.

Res Judicata and Collateral Estoppel/Procedural Due Process--Property/Medication/Confiscation and Destruction of Legal Materials/Food/Dental Care

Livingston v. Goord, 225 F.Supp.2d 321 (W.D.N.Y. 2002) (Larimer, J.). The plaintiff's allegation that his pain medication (ibuprofen) was discarded by an officer does not state an Eighth Amendment claim. Although denial of pain medication could sometimes be considered sufficiently serious, the plaintiff was not suffering "debilitating or intense pain" and the medication only reduced, not eliminated, it anyway. At 329: "An assertion of pain sensation alone, unaccompanied by any large medical complications, does not amount to a serious medical need under the Eighth Amendment." (Citation omitted)

Hygiene/Protection from Inmate Assault/Crowding

Liles v. Camden County Dept. of Corrections, 225 F.Supp.2d 450 (D.N.J. 2002). An allegation that fighting broke out when prisoners got splashed with urine as they slept on the floor near the toilets stated an Eighth Amendment claim, since protection from physical harm is a basic need under the Eighth Amendment. Special masters' reports that the Warden said he read raised a material issue of fact as to supervisory officials' actual knowledge of the problem.

Pre-Trial Detainees/Use of Force/Municipalities

Jordan v. Cobb County, Ga., 227 F.Supp.2d 1322 (N.D.Ga. 2001). The plaintiff was arrested for DWI; while in a police holding cell, an officer shot him in the abdomen under disputed circumstances.

The Fourteenth Amendment use of force standard is governed by the factors set out in *Johnson v. Glick*. It "prohibits conduct that is wanton, arbitrary, or intended to punish and . . . *may* require a showing of malicious or sadistic intent by the officer." The Fourth Amendment provides a more advantageous standard to plaintiffs (there's an extensive discussion of why it's better), but it is not applicable because the plaintiff was a pre-trial detainee. The court doesn't explain where the line between arrestee and detainee is or why the plaintiff is on the detainee side of the line.

PLRA--Three Strikes Provision/In Forma Pauperis/PLRA--Screening and Dismissal/Medical Care--Standards of Liability--Deliberate Indifference

Bond v. Aguinaldo, 228 F.Supp.2d 918 (N.D.Ill. 2002). The plaintiff's allegation that he has medical problems that are "serious and ongoing and causing him severe pain" meets, for pleading purposes, the exception to the "three strikes" provision for "imminent danger of serious physical injury." He is not limited to suing only those defendants directly responsible for the danger. Since all his claims address the same condition for which he is presently being denied care, he is allowed to proceed against those responsible for his past treatment at prisons where he no longer resides.

Pre-Trial Detainees/Protection from Inmate Assault/Municipalities/Medical Care--Statutes of Limitations--Deliberate Indifference/State Law Immunities

Gullett v. Haines, 229 F.Supp.2d 806 (S.D.Ohio 2002). The plaintiff, in a segregation unit, was beaten during his one hour out of cell by another prisoner. The officer is not entitled to summary judgment, since plaintiff submitted evidence showing that (at 821)

> it appears that he was in a cellblock where physical contact with other inmates was forbidden, that inmates in that cellblock were afforded a single hour of *solitary* free time each day, that the controls to the individual cell doors were in the exclusive control of the corrections officers, and that Officer Jolly was the corrections officer in charge of said controls. . . . Furthermore, on that day, while enjoying his one free hour on the range, the plaintiff was brutally beaten by an inmate. . . .

These facts could support liability, since the

conditions were objectively unsafe (the officer acknowledged that inmates are placed in the unit because they are assaultive and combative). At 821-22: "If the policy of segregation is ignored, such that inmates in that sort of environment are permitted to interact, an objective threat to the safety of the affected inmates would be posed." The plaintiff could also show deliberate indifference by showing that the officer knew that the plaintiff's attacker harbored animus toward him and that he would act on that animus, and that he allowed a confrontation to take place. (A paragraph later: it is reasonable to infer that the officer "knew that other inmates . . . were likely to assault the plaintiff" given the opportunity, and that he "was responsible for not preventing such other inmate or inmates from actually doing so." (823) So it is unclear whether the court requires plaintiff to show that the officer had knowledge about his assailant.)

PLRA--Exhaustion of Administrative Remedies/Religion--Practices

Ford v. McGinnis, 230 F.Supp.2d 338 (S.D.N.Y. 2002) (Scheindlin, J.). The Muslim plaintiff missed the Eid ul Fitr observances (i.e., end of Ramadan feast) at his prison because he was placed in SHU and transferred.

The plaintiff filed a grievance at the sending prison, which was dismissed because he had been transferred; he wrote to the Central Office Review Committee complaining of no response; he was told to seek review of the dismissal from the sending prison before appealing; he did so, but did not subsequently appeal to CORC, after failing to receive any response from the sending prison. The court declines to dismiss for non-exhaustion. At 343 n.5: "Under these circumstances, Ford was not obligated to pursue an appeal before hearing from Downstate. Although all of the administrative remedies may not have been fully exhausted technically, Ford made a substantial effort to obtain administrative remedy."

Defendants argued that their actions didn't violate the First Amendment because the feast "was devoid of religious significance under the tenets of Islam." Plaintiff responded that protected beliefs "include any individualized, subjective practice whether grounded in an authentic religion or not. Such an interpretation would extend First Amendment protection to the idiosyncratic practices of all inmates, no matter how unreasonable." (347) The court cites a hypothetical belief that Holy Communion requires drinking real blood. While the plaintiff's claim in this case is not so bizarre, "plaintiff points to no limiting principle, nor can this Court find one, that would prevent plaintiff's interpretation of *Jackson* from overwhelming prisons with 'sincerely held' religious beliefs." The Second Circuit's decision in *Jackson v. Mann*, 196 F.3d 316 (2d Cir. 1999), which plaintiff cites in support of his argument, really only stands for the proposition that "an inmate's belief that he is a member of an established religion is entitled to First Amendment protection, so long as that belief is sincerely held." (346)

This decision appears contrary to the Supreme Court's holding that First Amendment protection "is not limited to beliefs which are shared by all of the members of a religious sect." *Thomas v. Review Board*, 450 U.S. 707, 715-16 (1981); *see Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) ("[I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *DeHart v. Horn*, 227 F.3d 47, 56 (3d Cir. 2000) (en banc); *Love v. Reed*, 216 F.3d 682, 688-89 (8th Cir. 2000); *Martinelli v. Dugger*, 817 F.2d 1499, 1504 (11th Cir. 1987) ("[T]he Supreme Court has admonished federal courts not to sit as arbiters of religious orthodoxy.")

Further, the "limiting principle" in this constitutional case is quite obvious: the *Turner* standard itself, which requires only a reasonable relationship between restrictions on religious practice and legitimate penological interests, and would suffice to protect prison officials from the Communion blood example the court cites--as would, for that matter, the compelling interest/least restrictive alternative standard reinstated by the Religious Land Use and Institutionalized Persons Act.

Religion--Services Within Institution/Religion--

Practices/PLRA--Exhaustion of Administrative Remedies/Class Actions--Settlement, Effect of Judgments and Pending Litigation/Summary Judgment/Deference

Gonzalez v. Litscher, 230 F.Supp.2d 950 (W.D.Wis. 2002). The Native American plaintiff, housed in the state Supermax facility, complained of deprivation of a sweat lodge, medicine bag, ceremonial drums, feathers and smoking pipes, and confiscation of a religious book from his cell.

Even though the defendants presented no facts, "no reasonable person" could find that denial of a sweat lodge violates the First Amendment as applied to a prisoner in the most restrictive status at the state's highest security prison. The court engages in no *Turner/O'Lone* standard analysis, just cites some case law.

The court denies summary judgment on the claims of denial of medicine bag, ceremonial drums, feathers and a smoking pipe, since the parties have offered no argument or evidence for a *Turner/O'Lone* analysis. However, defendants are entitled to qualified immunity on these claims.

PLRA--Exhaustion of Administrative Remedies

Carter v. Robinson, 211 F.R.D. 549 (E.D.Mich. 2003). A plaintiff who had filed a complaint after exhausting administrative remedies could file an amended complaint adding new claims as long as he had exhausted the new claims before filing the amendment. The court rejects the defendants' argument that new claims must be filed in a separate complaint.

PLRA--Exhaustion of Administrative Remedies

Jeanes v. U.S. Dep't of Justice, 231 F.Supp.2d 48 (D.D.C. 2002). Plaintiff failed to exhaust because he did not try to resolve his claims informally and did not file a remedy request with the warden. Though the regulations permit bypassing these steps if the inmate reasonably believes the issues are too "sensitive," the Regional Office said they were not too sensitive and he should go back and follow the procedures. The agency, not the court, has discretion to decide what is "sensitive."

The plaintiff's objection to bringing his complaint to the same people who perpetrated the offenses against him amounted to a claim that the administrative remedy was futile. However, as long as it is there, it is available for purposes of the PLRA.

Procedural Due Process--Disciplinary Proceedings

Rivera v. Wohlrab, 232 F.Supp.2d 17 (S.D.N.Y. 2002). The plaintiff was disciplined for a positive urine test and placed in keeplock for 90 days. Defendants said keeplock is like general population, since keeplocked prisoners are allowed to leave their cells for showers, visits, and legal visits; get three showers a week; and are kept in their own cells. The plaintiff, however, said he was actually moved to an SHU with worse conditions. These allegations create an issue of material fact as to the conditions and duration of his confinement.

The plaintiff's disciplinary hearing did not deny due process. Allegations of violation of the state regulations concerning a corroborating test by a different testing officer and concerning chain of custody and handling of the urine sample did not state a constitutional violation. As long as there was "some evidence" of guilt (which the test results constituted), due process was satisfied.

Pre-Trial Detainees/Transfer and Admission to Mental Health Facilities/Negligence, Deliberate Indifference and Intent/Financial Resources

Terry v. Hill, 232 F.Supp.2d 934 (E.D.Ark. 2002). Delays in transferring detainees to a forensic psychiatric hospital, which sometimes exceeded a year and on the average exceeded eight months for inpatient evaluations and six months for treatment, amounted to punishment under *Wolfish*. At 943-44:

> The lack of inpatient mental health treatment, combined with the prolonged wait in confinement, transgresses the constitution. The lengthy and indefinite periods of incarceration, without any legal adjudication of the crime charged, caused by the lack of space at [the hospital], is not related to any legitimate goal, is purposeless and

> cannot be constitutionally inflicted upon the members of the class. While the Court will await the remedy phase of this litigation to attempt to determine what length of wait is constitutionally permissible, the length of wait experienced by inmates today is far beyond any constitutional boundary.
>
> If the Court applied the standard of deliberate indifference . . ., the Court would find, looking at the entire state of Arkansas, including the executive and legislative branches, that the State has been deliberately indifferent to the needs of pretrial detainees ordered to receive mental health evaluations or treatment. In his official capacity, [the defendant] is merely a representative of DHS, DMHS and the State of Arkansas in the system of mental health treatment. He is only able to operate the system under the financial structure allocated to his office from the Arkansas Legislature. Under the existing structure and financial system, DMHS has known for at least five years of the serious mental health needs of class members and has been aware that the failure to provide inpatient care to class members violated state circuit court orders. DMHS has known that the failure to provide inpatient care amounts to punishment of members of the class and increases the risk that they will harm themselves or others or suffer harm from other inmates.

This is about as explicit a statement I've seen of the proposition that in an official capacity case, deliberate indifference is to be assessed with respect to the knowledge of the governing entity as a whole.

The court notes that reform legislation was passed but the legislature removed the language requiring funding. Limited resources do not excuse constitutional violations.

Procedural Due Process--Disciplinary Proceedings/Grievances and Complaints about Prison/Inmate Legal Assistance/Qualified Immunity/Deference/PLRA--Mental or Emotional Injury

Auleta v. LaFrance, 233 F.Supp.2d 396 (N.D.N.Y. 2002) (Kahn, J.). The plaintiff alleged that he was placed in keeplock for seven and a half days without a hearing in retaliation for helping another prisoner with a grievance in his capacity as inmate legal assistant.

The plaintiff has no due process claim because seven and a half days locked up is not atypical and significant under *Sandin*.

The court rejects the defendants' argument that *Shaw v. Murphy* says there is no First Amendment right to provide legal assistance to another prisoner. Rather, *Shaw* says there is no *special* right to do so, and the *Turner* standard governs. The defendants put forth no interest that was advanced by keeplocking the plaintiff. At 400: "While in future cases the Government may be able to identify government interests that are supported by punishing inmates for conducting authorized activities that were part of their assigned prison job, this Court finds it difficult to conceive of such interests."

The plaintiff had no alternative means of providing authorized legal assistance to the other prisoner. Prohibiting officials from keeplocking prisoners for providing authorized legal assistance as part of the prisoners' job assignments is not likely to have a significant "ripple effect" on other prisoners or staff. The question of alternative means of satisfying the legitimate governmental interest at stake is of limited relevance when no legitimate interest has been advanced.

The plaintiff has standing to argue that defendants' placement of him in keeplock was unconstitutional because it interfered with the other prisoner's right to petition for the redress of grievances. He will be permitted to amend his complaint to "allege that by placing Plaintiff in keeplock, Defendant interfered with Rivera's right

to file a grievance." (402) By implication, the court holds that he doesn't have a First Amendment right of his own to protest someone else's treatment.

Placement in keeplock for seven and a half days is sufficient adverse action to support a retaliation claim under the "individual of ordinary firmness" standard. The fact that it happened two days after he identified himself as the person who helped the grievant sufficiently supported a causal connection.

At 403: "Plaintiff has not brought a § 1983 claim 'for mental or emotional injury.' Rather, he has brought a claim for violations of his First Amendment rights. The physical injury requirement in 42 U.S.C. § 1997e(e) therefore does not apply to the instant action. *See, e.g., Cancel v. Mazzuca*, 205 F.Supp.2d 128, 138 (S.D.N.Y.2002). . . ."

The defendants are not entitled to qualified immunity. Though the court is not familiar with a case in point, the *Turner* standard has been established for many years.

Protection from Inmate Assault/Mootness/Staffing--Training/PLRA--Prospective Relief Provisions--Entry of Relief/Remedial Principles

Skinner v. Uphoff, 234 F.Supp.2d 1208 (D.Wyo. 2002). The court finds liability on summary judgment on plaintiffs' claim of failure to protect from inmate assault, based on defendants' failure to carry out their own policy of investigating inmate assaults to learn why they happened and to prevent future occurrences, which they knew was important and conceded would have prevented some of the violent incidents at issue. At 1215: "The Court agrees with Plaintiff that this 'code of silence' adopted by the administration . . . is unconstitutional. It prevents supervisors from discovering and abating dangerous prison conditions." It will undermine any procedural improvements. The code of silence amounts to deliberate indifference.

No officer has ever been disciplined for violating any prison policy involving inmate assaults, even in cases where such violations have been identified. At 1216: "Failure to discipline subordinates whose behavior violates the constitutional rights of inmates can amount to deliberate indifference if the supervisors knew of the violations."

Allegations of changed policies do not refute plaintiffs' case. At 1215: "New and improved policies are meaningless if they are not followed. Up to this point, there is simply no evidence that such good-faith supervision, training, and enforcement efforts are underway." The court notes that defendants "claim repentance and show evidence of reform in order to avoid a judgment against them . . . so often that an entire body of law has been developed to address the problem." (1216) Mootness may not be found unless the defendants show that the unconstitutional practices have been discontinued and there is no reasonable expectation they will recur.

The court directs the parties to submit plans "that, when implemented, will promptly and effectively abate the Eighth Amendment violations noted in this decision and reasonably protect against a repetition of those violations," and "set forth the remedies that will be implemented, the manner of implementation, and a schedule of implementation." It notes officials' testimony about a "culture" at the prison that may make it difficult for senior administrators to properly supervise and discipline staff, and directs that the remedy address this "culture."

Medical Care--Standards of Liability--Deliberate Indifference/Medical Care--Standards of Liability--Serious Medical Needs/Denial of Ordered Care/Personal Involvement and Supervisory Liability/Class Actions--Effect of Judgments and Pending Litigation

Johnson v. Wright, 234 F.Supp.2d 352 (S.D.N.Y. 2002) (Gorenstein, M.J.). The plaintiff's Hepatitis C was being treated with Interferon and he had a relapse. His doctor recommended that he be treated with "Rebetron Therapy" (Interferon plus Ribivarin) "as soon as approval can be obtained"; another doctor, to whom he had been referred, made the same recommendation, as did a third doctor. He was refused that treatment because he had had a positive urine test for cannabinoids a year previously. The consulting doctor reiterated the

recommendation. The next year (after the plaintiff had grieved and otherwise complained) a nurse and doctor at another prison asked that the plaintiff receive Rebetron Therapy, and he did.

The plaintiff's allegation that his Interferon treatment was inadequate and amounted to "no treatment at all" and the failure to provide Rebetron Therapy stated a deliberate indifference claim. At 360: "The fact that a plaintiff received regular medical care does not preclude a finding of deliberate indifference where the 'course of treatment was largely ineffective and [the defendant] declined to do anything more to attempt to improve [the plaintiff's] situation.'" (Citation omitted)

The allegation of a relapse in Hepatitis C treatment sufficiently alleges a serious medical need, since he alleges that the disease, if not treated properly, would cause "severe internal organic damage, e.g., chronic liver disease, cirrhosis, liver cancer and inevitably death."

Differences of opinion over medical treatment generally don't raise a constitutional issue. However, here all the treating doctors agreed, and treatment was denied by the prison administration and a doctor who never examined or treated the plaintiff, but who applied a policy barring treatment where there has been a positive test for illegal drugs. This is important. This is the most explicit statement I have ever seen that meddling by persons other than the treating doctors doesn't reduce the controversy to a difference of opinion over proper treatment.

Women/Crowding/Injunctive Relief--Preliminary

Laube v. Haley, 234 F.Supp.2d 1227 (M.D.Ala. 2002). The plaintiffs sued over crowding and other conditions in the women's prisons and seek a preliminary injunction. One of the three prisons, Tutwiler, was designed for 364 prisoners and holds 1017. The record shows that overcrowding has grossly overtaxed facilities and services such as medical care, that most prisoners spend most of their time on their beds, that visibility is limited in the dorms because of stacked bunk beds, the facility is severely understaffed (92 security staff for 1017 inmates) and dorms are regularly left unattended (e.g., with roving officers that alternate between dorms), some prisoners are overclassified and mentally ill prisoners are often placed in general population, weapons are widely available, there are many fights (because inmates can't retreat from conflicts, resources are scarce, and tension is increased by crowding), there isn't enough segregation space (2% rather than the 10% called for by the American Correctional Association), and inadequate ventilation and excessive heat. Repeated requests for budget increases have been refused.

The court declines injunctive relief on heating and ventilation in the absence of technical information and expert testimony, and declines crowding relief absent information about the amount of space each inmate has and the amount of time each inmate spends in it.

Protection from Inmate Assault, Classification, Staffing---Surveillance, Totality of Conditions (1244-46): The allegations concerning crowding, supervision, classification, violence, weapons, and segregation cells do not violate the Constitution considered in isolation, but "the combination of substantial overcrowding and significantly inadequate supervision in open dorms" violates the Eighth Amendment right to protection from violence, chiefly because of the lack of adequate supervision by staff. At 1246: "The evidence shows that Tutwiler's rate of assault is extremely high, beyond levels considered normal in the harsh environment of a prison." (The court doesn't say what the respective rates are.) The overcrowding-caused breakdown in the classification system, where inmates are placed in any available bed, also contributes, as does the prevalence of weapons and contraband.

Deliberate Indifference, Negligence, and Intent; Financial Resources (1248-1251): Defendants' actual knowledge of the risks to prisoner safety related to crowding and staffing is demonstrated by the Warden's and Commissioner's own statements in affidavits and public forums. At 1248: "When prison officials are sued solely in their official capacities, the lack of funds available to them is not an adequate defense to a finding of a constitution [sic] violation on their part." Official

capacity suits are the equivalent of suits against the governmental entity. At 1249: From the state's perspective, budgetary concerns are not an adequate defense either. Defendants' responses to crowding--increased community corrections programs, increased programs in the prison, staff overtime, inmate counseling, and staffing requests--are commendable but do not go far enough; they have had "negligible impact on the massive danger posed to inmates. . . . The defendants' measures are superficial and only address some of the factors creating Tutwiler's dangerous environment." At Tutwiler's present capacity, "nothing short of additional staffing is a reasonable response to the facility's dire need for officers." (1251) The court finds deliberate indifference.

Injunctive Relief--Preliminary (1251): Plaintiffs are entitled to a preliminary injunction; defendants are ordered to submit a plan within four weeks that "redresses immediately and fully the unconstitutionally unsafe conditions caused by overcrowding and understaffing in open dorms at Tutwiler." The finding of deliberate indifference establishes probability of success. A continuing constitutional violation is proof of irreparable harm for injunctive purposes, and here the plaintiffs have shown a failure to protect from risks of serious physical harm, and actual harm in some cases. The balance of hardship favors the plaintiffs; the defendants will not be harmed by providing sufficient staff and adequate facilities. At 1252: "The threat of harm to the plaintiffs cannot be outweighed by the risk of financial burden or administrative inconvenience to the defendants." The public interest is in no way served by current conditions. At 1252: "Rather, there is a strong public interest in requiring that the plaintiffs' constitutional rights no longer be violated, as well as in prevention of the foreseeable violence that will occur if present conditions persist."

Subsequent developments have been less favorable to the plaintiffs. *See* 242 F.Supp.2d 1150 (M.D.Ala., Jan 29, 2003) and 255 F.Supp.2d 1301 (M.D.Ala., Mar 28, 2003).

NON-PRISON CASES

Habeas Corpus

Fritz v. Colorado, 223 F.Supp.2d 1197 (D.Colo. 2002). The plaintiff probationer challenged application of a quarterly, lifetime sex offender registration law. Probation is "custody" for purposes of habeas corpus jurisdiction. However, *Heck v. Humphrey* does not require the plaintiff to proceed via habeas after exhaustion of state remedies because he is not challenging the fact or length of his probation and his challenge to the registration requirement does not necessarily imply the invalidity of his conviction or sentence. The court rejects defendants' argument that the plaintiff is challenging the "scope" of his probation and is therefore bound by the *Heck* rule.

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