ACLU FOUNDATION
AMERICAN CIVIL LIBERTIES UNION
NATIONAL PRISON PROJECT
JOURNAL

Vol. 18, No.1, Summer/Fall 2004 • ISSN 1076-769X

Appeals Court Says Texas Prison Officials Can Be Sued for Discrimination Based on Sexual Orientation

In a legal first, a unanimous federal appeals court has ruled that seven ranking Texas prison officials can be sued for damages due to discrimination based on sexual orientation. The September ruling by the Fifth Circuit Court of Appeals came in a lawsuit filed by the American Civil Liberties Union on behalf of a gay man who was repeatedly raped by prison gangs and whose pleas for help were ignored by officials.

Margaret Winter, Associate Director of the ACLU's National Prison Project and lead attorney for the former prisoner, Roderick Keith Johnson, applauded the decision. The ruling also upheld the right to proceed in the case under the Eighth Amendment's protection against cruel and unusual punishment.

"I could not be more pleased that we are one step closer to Roderick Johnson having his day in court," said Winter. "Once heard, Mr. Johnson's testimony about the horrifying abuse he endured and the prison staff's deliberate indifference to that abuse will shock Texas citizens and hopefully bring about improvements for all prisoners in similar circumstances."

For 18 months, Johnson was housed at the James A. Allred Unit in Iowa Park, Texas where prison gangs bought and sold him as a sexual slave, raping, abusing, and degrading him nearly every day, the ACLU said in legal papers. Johnson filed numerous grievances, letters, and complaints with prison officials and appeared before the unit's classification committee seven separate times asking to be transferred to safe-keeping, protective custody, or another prison, but each time they refused, telling him that he must "fight or fuck." Prison officials moved Johnson out of the Allred Unit and into a wing designated for vulnerable prisoners only after the ACLU intervened on his behalf.

In its brief to the appeals court, the ACLU showed that Johnson had produced ample evidence that Texas prison officials "were well aware of the significant risk that ...[he] would be raped and that they consciously disregarded the risk, arbitrarily denying him protection." Indeed, direct evidence provided by Johnson includes statements by prison officers announcing that they were denying him protection because it was up to Johnson to fight off predators if he did not choose to sexually submit to them and that he should "choose someone to be with" if he wanted protection from rape.

Roderick Johnson, a Navy veteran, was raped and abused by Texas prison gangs.

In its unanimous ruling, the appeals court noted the U.S. Supreme Court's 1994 ruling that officials have a duty to protect prisoners from violence at the hands of other prisoners. "[H]aving stripped them of virtually every means to self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course," wrote Justice David H. Souter in *Farmer v. Brennan*. "Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society."

Attorneys Winter and Craig Cowie of the National Prison Project represented Johnson in his lawsuit, *Johnson v. Johnson*, before the U.S. Court of Appeals for the 5th Circuit. The case has now been remanded to the U.S. District Court for the Northern District of Texas. A trial date is set for September 2005.

Threat of Illness Prompts Appeals Court to Affirm Order to Cool Supermax Prison

The American Civil Liberties Union in July welcomed a ruling from the U.S. Court of Appeals for the Seventh Circuit that prison officials must cool prisoners' cells at a super-maximum facility where the heat index is known to have reached 125 degrees.

"Doctors have found the extreme heat at Wisconsin's Secure Program Facility jeopardizes the lives and safety of the men confined in isolation there," said David C. Fathi of the ACLU's National Prison Project. "Providing mechanical cooling is not a luxury, it is a medical necessity."

Today's decision upholds a U.S. District Court order issued in November 2003 by Judge Barbara Crabb in a lawsuit brought by the National Prison Project and the Madison law firm Garvey & Stoddard regarding inhumane conditions at Wisconsin's super-maximum prison in Boscobel.

"Defendants constructed a facility in which inmates are subjected to temperatures that can pose a serious risk to their well-being, particularly if they are taking medications or have health conditions that prevent their bodies from adjusting to high heat," wrote Judge Crabb in her ruling. "If air conditioning is the only means of avoiding that risk, that is a function of defendants' decision to build the facility as they did. Leaving inmates vulnerable to serious health consequences or death is not a reasonable alternative."

Prior to an agreement reached in *Jones-El v. Berge* in January 2002, prisoners at Wisconsin's supermax lived in isolation cells where lights burned 24 hours a day and mentally ill prisoners suffered from inadequate mental health care.

NATIONAL PRISON PROJECT **JOURNAL**

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The National Prison Project is a special project of the ACLU Foundation. It seeks to strengthen and protect the rights of adult and juvenile prisoners, improve overall conditions in correctional facilities, and develop alternatives to incarceration.

The Journal is published biannually by the ACLU's National Prison Project, located at 915 15th St., NW, 7th Floor, Washington, DC 20005. Contact us by phone at (202) 393-4930, by fax at (202) 393-4931 or through email at kgotsch@npp-aclu.org for more information. **(NO COLLECT CALLS PLEASE)**

The reprinting of Journal material is encouraged with the stipulation that the Journal is credited as the source of the material, and a copy of the reprint is sent to the editor. Subscriptions to the Journal are $30 per year ($2 for prisoners), prepaid by check or money order.

Officials Seek to End Consent Decree Despite Violations at Baltimore Jail

At a hearing in August before U.S. District Court Judge Frederick Motz, the American Civil Liberties Union and Public Justice Center countered Maryland officials' attempt to end a federal consent decree governing conditions at the Baltimore City Detention Center, where constitutional violations persist.

"Dangerous inadequacies in the provision of medical services and maintenance at the jail pose grave risks to the health and safety of detainees confined there," said Elizabeth Alexander, Director of the ACLU's National Prison Project. "Maryland officials' move to terminate federal oversight of the detention center is exceedingly premature."

The ACLU and Public Justice Center highlighted at the hearing numerous complaints from jail detainees who have encountered long delays in receiving medical evaluations and treatment. For example, many detainees entering the jail already taking medications for HIV wait months to receive the drugs they need and risk developing HIV that is resistant to drug therapy. Detainees with diabetes, hypertension and mental illness suffer similar neglect because proper medical evaluations when entering the jail are not conducted and necessary treatments are delayed. The ACLU and PJC found that detainees with mental health problems deteriorate because of the excessive delay in seeing a psychiatrist and lack of access to their medications.

Arguments on behalf of detainees also pointed to problems with sanitation, plumbing and rodent and insect infestations at the jail that pose a serious threat to public health. Sewage has repeatedly flooded dormitories and inadequate laundry facilities cause detainees to resort to washing their clothes in toilets, increasing the risk of dangerous drug-resistant staph infections. Furthermore, public health authorities have noted that if food services at the jail were a

private operation, they would seek to close it.

"The dilapidated cellblocks at BCDC, in combination with the constitutionally inadequate medical care provided to detainees, create hazardous living conditions," said Sally Dworak-Fisher, an attorney with the Public Justice Center. "The only way to protect the safety of the men and women housed at BCDC is to continue the independent oversight the court system now has in place."

In December 2003, the ACLU and PJC filed a motion to enforce the medical and physical plant provisions in a decade-old consent decree that is now being challenged by Maryland officials. The terms of the order in *Duvall v. Glendening* require BCDC to maintain suitable health and safety standards but, according to detainees, jail officials have not fulfilled their obligations.

In August 2002, the U.S. Department of Justice issued a damning report on the BCDC after an investigation found unconstitutional conditions there. The report concluded that "persons confined suffer harm or the risk of harm from deficiencies in the facility's fire safety protections, medical care, mental health care, sanitation, opportunity to exercise and protections of juveniles."

New Report Documents Harsh Conditions Faced by Women on Death Row

A new report released in November by the American Civil Liberties Union -- the first-ever national survey of women currently on Death Row -- found that women who have been sentenced to death are often subjected to harsh living conditions, including being forced to live in virtual isolation, and many are sentenced for crimes that do not result in a death sentence for men.

"For the first time, we have a snapshot of the experience of women on Death Row - and the picture is grim," said Rachel King, a staff attorney with the ACLU Capital Punishment Project and one of the authors of the report. "Women who have been condemned to death are put into isolation and forced to endure abusive and degrading conditions that simply have no place in our criminal justice system."

The report, *The Forgotten Population: A Look at Death Row in the United States Through the Experiences of Women*, details the experiences of 56 women living on death row, and also reviews the case files of 10 women who have been executed since 1976. The report found that women on Death Row face similar problems as men, such as inadequate defense counsel and struggles with drug and alcohol addictions, but that women are subjected to harsher living conditions because of their small numbers.

The report was released as Texas prepared to execute Frances Newton, despite serious doubts about the evidence in her case. The state's case against Newton, who has maintained her innocence from the beginning, was based almost entirely on ballistics evidence processed at Houston's now-discredited crime lab, which has been under widespread investigation since August when police found 280 boxes of mislabeled and improperly stored evidence from 8,000 cases dating back more than a decade. Newton's court-appointed attorney also failed to interview any witnesses in preparation for the trial. Her story, along with the personal stories of seven other women on Death Row, is detailed in an appendix to the report.

Rev. Jesse Jackson comforts Oklahoma Death Row prisoner Wanda Jean Allen, shortly before her execution.

The report makes 13 recommendations to improve conditions for women on Death Row as well as ensure that women receive fair and adequate defense counsel when charged with capital offenses. The recommendations include: establishing training programs for defense lawyers to investigate abuse and raise the issue at trial; integrating women on Death Row into regular prison units and providing them with opportunities to work; adopting prison staffing policies to prevent abuse; and amending the Prison Litigation Reform Act to provide women who are sexually abused in prison with access to the court.

Among the key findings of the report:

- Women on Death Row often had

ineffective legal counsel and were victims of misconduct by prosecutors or law enforcement.

- More than half of the women have suffered regular, ongoing physical abuse by family members or spouses.
- Half of the women on Death Row acted with at least one other person, but in most of those cases, the co-defendant received a sentence other than death-even in cases where they appeared to be equally culpable.
- Many women on Death Row live in almost complete isolation, which puts them at a serious risk of developing mental illness, or exacerbating existing mental illness.
- A third of the women surveyed said that corrections officers watch them when they use the toilet, shower or change clothes.

Since 1973, 148 women have been sentenced to death in the United States. There are currently 50 women on Death Row, according to the Death Penalty Information Center.

The report is online at www.aclu.org. A Spanish language version will be available soon.

Discrimination Against HIV+ Prisoners Ends

The American Civil Liberties Union in June applauded a federal court order that finally ends all sanctioned discrimination against prisoners with HIV/AIDS who are banned from participation in community work programs because of their illness.

"After 14 years of battling Mississippi's policy of segregating HIV-positive prisoners, these men and women will no longer be denied access to community corrections programs that help to rehabilitate them and speed their return home," said Margaret Winter, Associate Director of the ACLU's National Prison Project and lead-counsel for the prisoners.

"Now, with only Alabama continuing to exclude all prisoners with HIV/AIDS from community corrections programs, we hope to soon see the end of the era of officially sanctioned HIV discrimination in American prisons," Winter added.

U.S. Magistrate Judge Jerry A. Davis issued his decision ordering the Mississippi Department of Corrections to "allow HIV-positive prisoners who otherwise meet the criteria for Community Work Centers to participate in Community Work Centers, on the same basis as prisoners who do not have HIV."

Lifting the ban on prisoners with HIV/AIDS remedies the last discriminatory component of Mississippi's decades-old segregation policy. In 2000, then-Commissioner Robert L. Johnson appointed a task force to study the issue of access to in-prison programs for HIV-positive prisoners. The Task Force, which included staff from the ACLU's National Prison Project and the Mississippi ACLU, recommended the integration of prisoners with HIV into educational and vocational programs. Shortly thereafter, the commissioner announced that he had decided to adopt the recommendations of the Task Force. In September 2001, Mississippi began allowing people with HIV to participate in all in-prison vocational, rehabilitation and educational programs. HIV-positive prisoners were still excluded from community corrections programs, but a huge step forward had been taken.

"I am proud to say that Mississippi has closed the door on sanctioned HIV discrimination within its prisons," said Nsombi Lambright, Executive Director of the ACLU of Mississippi. "This new change protects prisoners and the public because providing employment opportunities to more prisoners eases their reentry into the community and lessens the likelihood of recidivism."

As of March 2004, there were 238 prisoners with HIV in Mississippi prisons. In 1985, 38 state prison systems segregated all prisoners with HIV, and another eight segregated prisoners with asymptomatic HIV. Today, only Alabama continues a segregation policy that blocks all prisoners with HIV from participating in community corrections programs. There is no valid evidence that segregating prisoners with HIV reduces the transmission of HIV within prisons.

Winter of the ACLU's National Prison Project and Jackson attorney Elizabeth Jane Hicks represent the prisoners in the lawsuit, *Gates v. Collier, consolidated with Moore v. Fordice.*

Man Raped by Guard Receives Damages

A 25-year-old Texas prisoner, who was

repeatedly raped by a prison guard with a history of sexual assault, accepted a settlement in which his rapist and the assistant warden who failed to protect him agreed to pay money damages, the American Civil Liberties Union announced in December.

"This settlement victory provides hope for the untold men and women raped in prison by officers and staff," said Margaret Winter, Associate Director of the ACLU's National Prison Project and the prisoner's attorney. "Victims of sexual assault in prison often feel powerless in opposing their attackers and must overcome tremendous intimidation and fear of retaliation before they can even report abuse. Nathan Essary's success in fighting back provides a powerful reminder that abuse of prisoners will not go unpunished."

According to an ACLU lawsuit, Nathan Essary was ordered to masturbate and perform oral sex on Officer Michael Chaney at the Luther Unit in Navasota, Texas on multiple occasions in October 2001. Essary reported the abuse to Luther Unit Assistant Warden Jerry Barratt, who promised him protection. However, that same day Essary was forced to return to work at the prison laundry where Chaney supervised him and sexually assaulted him again.

During two separate attacks, Essary secretly collected Chaney's ejaculate on a handkerchief and mailed a sample to the United States Attorney in Houston. After DNA testing on the sample linked Chaney to the sexual assaults, Prison Prosecutor Kelly Weeks issued an affidavit for Chaney's arrest in January 2002.

When the ACLU filed its lawsuit against Chaney and Barratt on Essary's behalf in October 2002, information emerged that Chaney had sexually harassed and abused other prisoners at the Luther Unit, but complaints from prisoners to prison staff were repeatedly ignored. In a statement filed in federal court, former prisoner Garrett Cunningham said he was anally raped in the same laundry area one year prior to Essary's assault. After reporting the rape to prison staff, Cunningham was transferred from his job in the laundry to a position in the room next door. Chaney continued to harass Cunningham but complaints against the officer were never investigated.

"Victims of prison rape suffer at the hands of both their attackers and the administrators who choose to ignore their pleas for protection," said Meredith Martin Rountree, Director of the ACLU of Texas' Prison and Jail Accountability Project and co-counsel in the lawsuit. "The Texas Department of Criminal Justice's inaction is intolerable and unconstitutional."

Case Law Report: Highlights of the Most Important Prison Cases

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

United States Court of Appeals Cases

Use of Force--Weapons/Qualified Immunity

Marquez v. Gutierrez, 322 F.3d 689 (9th Cir. 2003). The defendant officer shot the plaintiff in the leg during a prisoner melee. The plaintiff and others alleged he was not involved in the fight, though he was close to it. Under *Whitley v. Albers*, plaintiff's version of the facts states a claim, and the relevant law was clearly established by *Whitley*.

The court rejects the argument that a defendant "cannot act maliciously and sadistically while, at the same time, believing his actions conform to clearly established law." (693) This is the same argument the Supreme Court rejected in *Saucier v. Katz*. The qualified immunity inquiry is separate. A reasonable official standing in a tower 360 feet away from the disturbance could have perceived the plaintiff as involved and as threatening the victim's safety. Since a reasonable officer could believe that it was legal to shoot one inmate in the leg to stop an assault that might injure or kill another inmate, the defendant is entitled to qualified immunity.

PLRA--Exhaustion of Administrative Remedies

Days v. Johnson, 322 F.3d 863 (5th Cir. 2003). The plaintiff's grievances were dismissed as untimely. He said that he couldn't file a timely grievance because his hand was broken.

At 866: "Since the amendment of § 1997e, this Court has taken a strict approach to the exhaustion requirement." The court acknowledges that it has implicitly held that "one's personal inability to access the grievance system could render the system unavailable." (867) Here, the facts as alleged by plaintiff indicated that his injury prevented his timely filing a grievance and his untimely grievance was returned unprocessed (meaning he couldn't appeal). He has sufficiently exhausted. At 867-68:

> We, of course, do not hold that an untimely grievance in and of itself would render the system unavailable, thus excusing the exhaustion requirement. Such a holding would allow inmates to file suit in federal court despite intentionally evading the PLRA's exhaustion requirement by failing to comply with the prison grievance system. . . . We emphasize that our holding is limited to the narrow facts of this case. More specifically, administrative remedies are deemed unavailable when (1) an inmate's untimely filing of a grievance is because of a physical injury and (2) the grievance system rejects the inmate's subsequent attempt to exhaust his remedies based on the untimely filing of the grievance.

Protection from Inmate Assault/Judicial and Prosecutorial Immunity

Hamilton v. Leavy, 322 F.3d 776 (3d Cir. 2003). The plaintiff, who has been repeatedly attacked by other prisoners for cooperating with law enforcement, was transferred to another state; he was returned to Delaware so he could prosecute those actions effectively. While he was there, a guard accused him of being a snitch, and officials confirmed this event. Although the "Multi-Disciplinary Team" recommended protective custody, the Central Institutional Classification Committee did nothing. A month later a new cellmate seriously injured the plaintiff.

At 782-83: "The defendants are correct that action taken pursuant to a facially valid court order receives absolute immunity from § 1983 lawsuits for damages." The district court, however, said the state court order in question did not prohibit the defendants from transferring the plaintiff to put him in protective custody or from protecting him where he was held. The question presented is one of law, not fact, so the court has appellate jurisdiction over their immunity appeal. The court agrees with the district court's view of the order.

The district court rejected the defendants' claim of quasi-judicial immunity as to the Central Institutional Classification Committee, citing *Cleavinger v. Saxner's* similar conclusion about prison disciplinary officials. However, *Cleavinger* "did not hold *per se* that prison officials can never receive quasi-judicial immunity" (786); it analyzed the degree of independence of the officials involved and the procedural protections in the process, and the district court failed to do so here.

Mootness/Publications/Administrative Segregation--High Security/Religion/Deference/ Qualified Immunity

Sutton v. Rasheed, 323 F.3d 236 (3d Cir. 2003) (per curiam). In maximum security segregation units, prisoners were forbidden any books except legal materials and "a personal Bible, a Holy Koran, or equivalent publication," or in some cases other religious materials. The Nation of Islam plaintiffs were denied materials by Fard Muhammad, Elijah Muhammad and Louis Farrakhan by Imam Rasheed, the Muslim Chaplain, as allegedly not religious in nature. A Reverend Smith agreed, stating *inter alia* "Religion, by definition, begins and ends with a search for and discovery of God." The policy was later changed, but prisoners were still denied NOI materials, in part because "religious" was poorly defined. After more policy changes the district court held the controversy moot.

The case is moot, since it was not certified as a class action, the plaintiffs are released or transferred, the defendants have changed their policy and have represented to the court that it would not be rescinded, and there are "strong administrative incentives making it unlikely that the new policy will be reversed" (i.e., they'd have to waste more time determining what is "religious" or not). (249)

Before commencing a *Turner* analysis for plaintiffs' damage actions, the court must determine

whether plaintiffs' request for NOI materials "stemmed from a constitutionally protected interest"--i.e., whether their beliefs were sincerely held and religious in nature. (Why their desire to read *any* book, religious or not, isn't constitutionally protected is not explained.) The court reiterates its prior definition of religion, based on "indicia" including "(1) an attempt to address 'fundamental and ultimate questions' involving 'deep and imponderable matters'; (2) a comprehensive belief system; and (3) the presence of formal and external signs like clergy and observance of holidays." (251 n.9). It adds that the Supreme Court "has provided some guidance" in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, which said that religious beliefs "need not be acceptable, logical, consistent, or comprehensible to others," and that given the "historical association between animal sacrifice and religious worship," plaintiffs' claim that animal sacrifice is religious must be accepted. The court then visits the Nation of Islam Web site and concludes that its tenets meet those "definitions." (252)

The defendants lose under the *Turner* standard on the policy as applied, because they improperly denied access to Nation of Islam materials as not religious, so there is no valid, rational connection to a legitimate purpose. (The purpose cited was to maintain a secure environment with respect to searches and fire safety and to encourage "recalcitrant" prisoners "to engage in more responsible and acceptable behavior.")

The plaintiffs did not have alternative means of religious exercise. The court distinguishes its prior case saying a Buddhist denied his religious diet had alternative means of practice; here the plaintiffs "were deprived of texts which provide critical religious instruction and without which they could not practice their religion generally." (255) The court emphasizes that these works are viewed as divinely inspired. It attempts to distinguish deprivations that mean a person cannot "practice his religion generally" from mere "single aspect[s] of religious worship," and suggests that a complete prohibition on the Catholic Mass would also fall into the former category.

The consequences of accommodating the plaintiffs' rights are not serious, since the defendants now accommodate the plaintiffs' rights. There is an "obvious, easy alternative"--let them have the books--which the defendants now do.

The defendants are entitled to qualified immunity. It has not always been clear that the Nation of Islam is a religion, nor is it always clear what restrictions on religious rights pass muster.

Procedural Due Process--Disciplinary Proceedings/Habeas Corpus

Gomez v. Graves, 323 F.3d 610 (8th Cir. 2003). The petitioner challenged his disciplinary conviction, arguing that he should have been convicted only of fighting, not of assault. He proceeded via petition for habeas corpus after exhausting state remedies, since he lost good time.

In habeas, review is limited to whether the state courts' ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." This conviction was reasonable in light of the "some evidence" standard. Evidence that the petitioner struck another prisoner repeatedly in the face, which is consistent with an intent to injure, brought the charge within the assault rule. The allegation that the incident involved mutual combat between two individuals does not require classification as fighting; it could fit either offense's definition, and the evidence could be understood as showing "more than just a fight."

PLRA--Exhaustion of Administrative Remedies/ Procedural Due Process--Disciplinary Proceedings

Ortiz v. McBride, 323 F.3d 191 (2d Cir. 2003) (per curiam) (Calabresi, Sack, and Pauley, D.J.). The plaintiff's allegation that he was subject to "unusually harsh" conditions in SHU for 90 days means that his due process claim is not frivolous. At 195: ". . . [D]uration is not the only relevant factor. The conditions of confinement are a distinct and equally important consideration in determining whether a confinement in SHU rises to the level of 'atypical and severe hardship' as required by *Sandin*." For that matter, this circuit's prior decisions don't necessarily establish a *per se* rule that 101 days of ordinary SHU confinement don't involve a liberty interest.

Use of Force/Summary Judgment

Martinez v. Stanford, 323 F.3d 1178 (9th Cir. 2003). The plaintiff's failure to comply with a local rule requiring timely opposition to a summary judgment motion did not justify the grant of summary judgment; the moving party must demonstrate its entitlement to judgment.

In this use of force case, the officers' claims about the incident were contradicted by the plaintiff's deposition, which was in the record and which was referred to in the officers' papers even though he did not file an opposition to their motion. Moreover, the district court, reviewing that evidence, had found a triable issue of fact on the officers' prior summary judgment motion.

Establishment of Religion

Freedom From Religion Foundation, Inc. v. McCallum, 24 F.3d 880 (7th Cir. 2003). State funding of a halfway house that incorporates Christianity into its treatment program did not violate the Establishment Clause. Parole officers who recommend the program explain that the recommendation is non-binding and offer a secular alternative (though the secular alternatives are all much shorter programs). This practice is similar to the school vouchers upheld by the Supreme Court in *Zelman v. Simmons-Harris* in that the choice is left up to the individual. The fact that the religious program is a better program than the others doesn't make it coercive.

Pre-Trial Detainees/Protection from Inmate Assault/Municipalities/Personal Involvement and Supervisory Liability/Summary Judgment

Palmer v. Marion County, 327 F.3d 588 (7th Cir. 2003). The plaintiff was attacked by members of the Gangster Disciples. He identified his assailants after being assured he would be moved elsewhere in the jail for safety, but was placed in a unit with other gang members, where he was attacked again and not found until the next day; another prisoner who was beaten was not found for two days. The plaintiff sued the City, the County, and the Sheriff, but not the officers he dealt with.

The Sheriff could not be held liable because there was no showing that he "acquiesced in some demonstrable way in the alleged constitutional violation." That means the plaintiff must show that the Sheriff "actually knew that Palmer was assigned to Cell Block 2T and that the Sheriff inferred from that assignment that there was a substantial risk of serious harm" to him. (This appears contrary to *Farmer v. Brennan*, which states explicitly that a defendant need not be shown to have known of the particular risk to the particular prisoner to be held liable if there was actual knowledge of a risk to some or all prisoners.)

The municipality could not be held liable because the plaintiff submitted no evidence to support his allegation of a jail policy of placing black prisoners in "gladiator" blocks and failing to respond to overt acts of violence in them. The plaintiff's affidavit stating his own observations over a short period of time of assaults he observed (i.e., two in a year's time) fail to demonstrate a pattern indicating an unconstitutional custom or practice. At 596: "When a plaintiff chooses to challenge a municipality's unconstitutional policy by establishing a widespread practice, proof of isolated acts of misconduct will not suffice; a series of violations must be presented to lay the premise of deliberate indifference." His assertion of racial segregation is supported only by his own affidavit. At 596: "This Court, on numerous occasions, has made it clear that self-serving affidavits, without any factual support in the record, are insufficient to defeat a motion for summary judgment." He could have asked the criteria for cell assignment in discovery or could have obtained raw data about cell assignments and the frequency of inmate-inmate assaults.

Federal Officials and Prisons/Protection from Inmate Assault

Verdecia v. Adams, 327 F.3d 1171 (10th Cir. 2003). The plaintiff alleged that he was placed in a cell with gang members who assaulted him because he was Cuban. The defendants were entitled to qualified immunity. The fact that there had been two recent incidents of violence between Latin King and Cuban inmates, one in the same prison, was insufficient to show that the defendants were subjectively aware of a substantial risk of serious harm or that they were deliberately indifferent. (An investigation had shown that the incident in the same prison was an "isolated incident." Exactly what that has to do with the prospect of future retaliation for

that same incident is not explained.) Failure to alleviate "a potential risk that should have been perceived, but was not, does not satisfy the deliberate indifference standard . . . ."

Evidentiary Questions/Use of Force

Parker v. Reda, 327 F.3d 211 (2d Cir. 2003) (per curiam) (Jacobs, Straub, Wood, JJ.). The plaintiff lost his excessive force claim before a jury. The district court did not abuse its discretion in allowing a defendant correctional sergeant who said he remembered nothing about the incident to read his contemporaneous memorandum into evidence. The evidence was admissible under Rule 803(5), Fed.R.Ev., as past recollection recorded. That holding is not inconsistent with the trial court's prior ruling that the memorandum lacked sufficient indicia of reliability to be admitted as a business record, since the business records hearsay exception is based on a different rationale than the past regulation recorded rule.

It would have been "the better practice" to exclude the memo's conclusion ("The amount of force used was minimal and only that much necessary to gain control of the inmate"), but the error was harmless because the sergeant was available for cross-examination (e.g., had he ever concluded that there had been undue use of force?) and because the record included "opposing accounts of the use of force that were sufficiently detailed to permit the jurors to draw their own conclusions as to whether the force used was proper." (215)

Juveniles/Heating and Ventilation/Work Assignments/Qualified Immunity/Cruel and Unusual Punishment/Medical Care--Access to Medical Personnel/State Law Immunities

Austin v. Johnson, 328 F.3d 204 (5th Cir. 2003). The minor plaintiff was caught stealing a candy bar and was sent to a one-day boot camp, the "Strength through Academics and Respect" program, where after a day of exercise he suffered heat stroke and was hospitalized for two weeks, suffering acute renal failure, hepatitis, and pancreatitis. (He recovered.)

Commitment to a one-day boot camp program is subject to Eighth Amendment scrutiny, notwithstanding that the offender could choose the date and location of his punishment, since he was not free to leave and jail time was the sanction for failing to perform the exercise regimen. The court reserves whether non-prison punishment such as community service or drug rehabilitation is reviewable under the Eighth Amendment.

The boot camp program did not violate the Eighth Amendment proportionality principle. At 209: "Requiring youthful offenders to perform military-styled exercises for one day is neither cruel nor unusual; it is a deliberate policy choice to instill much-needed discipline." The court disagrees that it the punishment was disproportionate to the crime, "emphasizing the reasonable flexibility that should be accorded local authorities to deal with wayward youths."

Defendants were not entitled to qualified immunity for failing to call for an ambulance until the plaintiff had been unconscious almost two hours. The lack of a case in point does not matter under the "fair warning" principle of *Hope v. Pelzer*. At 210: "Given the serious medical consequences of dehydration, a reasonable person would not have waited nearly two hours to call an ambulance once John E became unconscious."

Defendants were not entitled to official immunity from state law negligence and gross negligence claims, since the immunity depends on a good faith element substantially similar to qualified immunity. One defendant is immune from state law claims for breach of fiduciary duty and fraud, since he made sufficient disclosure of the program's conditions.

False Imprisonment/Municipalities

Brass v. County of Los Angeles, 328 F.3d 1192 (9th Cir. 2003). The plaintiff was arrested, proved to be the wrong guy, but was detained for 39 hours after a court ordered him released.

The County's alleged policy and custom of not processing court-ordered releases until all other releases have been processed (e.g., those finishing their sentences) does not violate the Constitution. At 1200: "The order in which the Sheriff's Department handles prisoner releases is an administrative matter primarily within the Department's discretion."

Publications/Qualified Immunity/Injunctive Relief

Krug v. Lutz, 329 F.3d 692 (9th Cir. 2003). The plaintiff complained of censorship of a magazine. The plaintiff has a "liberty interest in the receipt of his subscription mailings sufficient to trigger procedural due process guarantees." *Procunier v. Martinez* recognized a liberty interest grounded in the First Amendment in uncensored communication by letter, and it extends to "receipt of subscription publications" as well as letters (696-97). At 697 n.4: Defendants' claim that there is no liberty interest in obscene material misses the point; the plaintiff "has a right to receive his nonobscene subscription materials and a corresponding right to fair procedures governing the withholding of allegedly obscene materials." This circuit has repeated said the procedural protections of *Procunier* are applicable to publications, and two-level review is one of those protections (and it has said this after *Thornburgh v. Abbott*, so it rejects the notion that the procedural aspects of *Procunier* are now limited to outgoing mail).

The defendants are entitled to qualified immunity. Even though the right to two-level review was over 20 years old at the relevant time, defendants could have believed their conduct legal because of the existence of a consent decree about censorship that didn't mention two-level review.

Searches--Person/Prison Records

Velasquez v. Woods, 329 F.3d 420 (5th Cir. 2003) (per curiam). The compelled collection of DNA samples from prisoners under state statute does not violate the Fourth Amendment. The refusal to expunge false information from the plaintiff's prison record does not violate a constitutional right.

Pre-Trial Detainees/Religion--Practices--Diet

Kind v. Frank, 329 F.3d 979 (8th Cir. 2003). The Muslim plaintiff asked for a vegetarian diet but was given only a pork-free diet absent any documentation that Islam requires a vegetarian diet. After the Minnesota Department of Human Rights found probable cause to support the plaintiff's complaints, the jail changed its policy, but the plaintiff was out of the jail by then.

The defendants are entitled to qualified immunity, since it is not well established that Muslims must be offered a meat-free diet, and the relevant official "educated himself about Muslim practices" before determining that a vegetarian diet was unnecessary. Apparently no argument was presented that the plaintiff's own beliefs and not some orthodoxy are the measure of his rights.

Qualified Immunity/Procedural Due Process--Classification, Disciplinary Proceedings

Wilkerson v. Stalder, 329 F.3d 431 (5th Cir. 2003). The three plaintiffs alleged that their confinement in Angola State Penitentiary in extended lockdown (23-hour cell confinement) for about 30 *years* violated the Eighth Amendment and that the reviews they receive every 90 days are shams and deny due process. (The prisoners alleged that the review board members discussed subjects like hunting and fishing, and when they tried to discuss the merits of their cases, were told that the review board was "not the place to litigate.") Two of them had apparently been convicted of murdering a guard; the third was convicted of murdering an inmate (his conviction was overturned after 29 years).

At 435-36:

> Generally, courts are not concerned with a prisoner's initial classification level based on his criminal history before his incarceration. This circuit has continued to hold post-*Sandin* that an inmate has no protectable liberty interest in his classification.
>
> Thus, if the inmates' confinement in extended lockdown is not the result of their initial classification, the *Sandin* test would be triggered.

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

De'Lonta v. Angelone, 330 F.3d 630 (4th Cir. 2003). The plaintiff, consistently diagnosed with gender identity disorder, was receiving estrogen therapy until it was terminated pursuant to a policy that "neither medical nor surgical interventions related to gender or sex change" will be provided. The policy said hormone treatment should be tapered off, but the plaintiff's treatment was stopped abruptly, resulting in an uncontrollable urge to mutilate her

genitals.

The plaintiff did not dispute the district court's ruling that the abruptness of termination of hormone therapy did not violate the Eighth Amendment. However, the failure to address her urge to self-mutilation did state an Eighth Amendment claim, in light of the uncontradicted allegation that defendants knew that her compulsive self-mutilation began after the discontinuation of hormone therapy, and the lack of justification in the record either for the policy requiring termination of hormone treatment or for the denial of any other treatment to prevent her continuing self-mutilation.

This is not a case of disagreement with medical judgment; the record supports the inference that the denial of hormone treatment "was based solely on the Policy rather than on a medical judgment concerning De'lonta's specific circumstances." (635) Besides, the appropriateness of denial of hormone treatment did not refute the allegation of denial of treatment to suppress the compulsion to self-mutilate. The fact that she was placed in a mental health facility and received some treatment that may have alleviated her compulsion does not show that the treatment was provided for that purpose or was deemed to be a reasonable method of preventing further mutilation. The court says it is not addressing issues not yet addressed by the district court, including the type of treatment to which the plaintiff is entitled. The need for protection against continued self-mutilation constitutes a serious medical need.

Rehabilitation

United States v. T.M., 330 F.3d 1253 (9th Cir. 2003). Requiring a defendant convicted of a drug offense and sentenced to supervised release to participate in sex offender treatment, avoid children and pornography, refrain from possessing a camera or recording device, etc., based on incidents in 1981 and 1961 and his association with a person who unbeknownst to him had been convicted of sex offenses, is not reasonably related to protecting the public and preventing recidivism.

Juveniles/Government Benefits/State Officials and Agencies/Personal Property/Exhaustion of Remedies/Disabled

Gean v. Hattaway, 330 F.3d 758 (6th Cir. 2003). Persons adjudicated as juvenile delinquents alleged that their social security benefits were used by the state to offset the cost of their placement in live-in treatment center.

The state officials in their official capacities are not "persons" under § 1983. The state officials in their individual capacities are entitled to qualified immunity from the claims under the social security statute, the Takings Clause of the Fifth Amendment and the due process clauses. The Supreme Court's decision in *Washington State Dep't of Soc. & Health Servs. v. Keffeler* obliterates these claims anyway, along with the claim of breach of fiduciary duty.

The plaintiffs' equal protection claim (that persons who received social security benefits had to contribute to their maintenance costs while others did not) is rejected under the rational basis test. The plaintiffs' Individuals with Disabilities Education Act is dismissed for non-exhaustion.

The plaintiffs may proceed directly under the Rehabilitation Act against the defendants in their official capacities, but their § 1983 claim against defendants in their individual capacities based on the Rehabilitation Act (assuming they have one, which this court has not determined) is barred by qualified immunity.

False Imprisonment/Municipalities

Alkire v. Irving, 330 F.3d 802 (6th Cir. 2003). The plaintiff was arrested and held for 72 hours before a probable cause hearing. The policy of not holding court over weekends was a municipal policy, and the Sheriff's policy of not releasing accused persons who had not had such a hearing by the weekend was attributable to the municipality. The court remands to determine whether the detention was really for the new charge or because of a warrant from another jurisdiction.

Communication and Expression

United States v. Cabot, 325 F.3d 384 (2d Cir. 2003). The defendant, convicted of a child pornography offense, was sentenced to imprisonment with three years of supervised release to follow. Conditions of supervised release that prohibited him from possessing "pornographic" matter were not unconstitutionally vague, since the statute under

which he was convicted contained a definition of pornography. However, prohibitions on possessing matter that "depicts or alludes to sexual activity" or that "depicts minors under the age of eighteen," and on any internet usage, were excessively broad, as the government conceded.

Use of Force--Restraints/Attorney Consultation

Lumley v. City of Dade City, Florida, 327 F.3d 1186 (11th Cir. 2003). The plaintiff committed a robbery, shot it out with Wells Fargo in the parking lot, and escaped with a bullet in his jaw. A week later he was arrested and taken to a hospital, where Sheriff's deputies strapped him to his bed, guarded him around the clock, and prohibited all visitors including his family and lawyers. The plaintiff consented to the bullet's removal at a doctor's recommendation; the Sheriff's office took the bullet.

The refusal to let the plaintiff see a lawyer did not violate the Sixth Amendment because the prosecution had not formally commenced. The fact that he was under arrest and was the sole suspect did not matter. *Escobedo* is irrelevant, since here there was no interrogation.

The plaintiff's restraint claim is governed by the Due Process Clause, which as a general rule imports the "shock the conscience" standard. (*Bell v. Wolfish* is not cited even though the court states the principle as applying to "arrestees or pretrial detainees.") The court's conscience is not shocked, since the plaintiff was a dangerous criminal with a violent record who presented a significant risk of flight, having escaped from prison twice.

Removal of the bullet did not violate the plaintiff's expectation of privacy since it was done solely by the doctor against whom the plaintiff had dropped his claim.

United States District Court Cases

Medical Care/Refusal of Treatment/Mental Health Care/Privacy/Deference

Iseley v. Dragovich, 236 F.Supp.2d 472 (E.D.Pa. 2002). Prison officials' requirement that prisoners undergo a psychological evaluation before they can receive treatment for Hepatitis C and that they consent to the release of the results is upheld. The purpose of the evaluation is to enable medical personnel to assess the risk that the patient will suffer certain psychological side effects from the medication (which is apparently contraindicated for persons with depression).

Prisoners' right to refuse medical treatment is subject to the *Turner* reasonable relationship standard. The policy serves the legitimate end of protecting prisoners from the psychological side effects of Hepatitis C medication. The *Turner* factor regarding alternative means to exercise the right "is not applicable to these facts." Accommodating the plaintiff would impose significant costs on prison resources, since if he developed psychological side effects, the defendants would have to treat him for them. There are no alternative means of serving the defendants' interests that would not substantially affect the relevant penological interests.

The court rejects the plaintiff's argument that he is being forced to submit to unwanted medical treatment to get treatment he needs, since the *Turner* standard is met, and since the psychological evaluation is "part and parcel of the treatment the plaintiff is requesting."

The defendants' release requires disclosure of medical information "if it is believed that the plaintiff poses a threat to his own health and safety, the health and safety of others or the orderly operation of the prison facility." Such a requirement has been approved by prison case law "as a proper basis for infringing upon a prisoner's right to privacy in his medical information."

Disclosure is also required to the extent necessary "to prepare reports or recommendations, or to make decisions," about current or future custody, including housing, work or program status, pre-release or parole. This requirement is upheld under the *Turner* standard. At 479: "First, in order for prison officials to provide safe and appropriate conditions of confinement, they have a legitimate need to gather and evaluate information that is relevant to an inmate's psychological condition." The court will not "second guess prison authorities and devise alternatives to prison regulations. . . ."

Religion--Practices/Religion--Practices--Beards, Hair, Dress/Religion--Practices--Diet/Equal Protection

Adams v. Stanley, 237 F.Supp.2d 136 (D.N.H.

2003). The plaintiff sought a preliminary injunction, alleging that he was denied a long list of items he said he need for his practice of Taoism, and that these and other restrictions were more onerous than those imposed on other religions.

The prison requires that inmates be able to "substantiate a claim that a particular religious practice or article is essential to his religion through a verifiable outside source." (141) The plaintiff refused to answer 11 questions posed by the prison chaplain, such as the location of Taoism's national headquarters, its basic teachings, whether there are religious holidays, etc. The plaintiff contended that completing the questionnaire "would violate the very nature of Taoism since the practice of Tao is specific to the individual." (The chaplain asked nine Taoist organizations what was necessary for Taoist practice; only three responded, and gave three different answers.)

The court says that the questionnaire is a reasonable attempt to "substantiate his claim that the practices he seeks to engage in are essential to the practice of his religion." (142) At 143: ". . . [P]rison officials unfamiliar with the practices of a particular religion must be given some latitude to determine its legitimacy." (*But see Thomas v. Review Board*, 450 U.S. 707, 715-16 (1981) (holding religious freedom "is not limited to beliefs which are shared by all of the members of a religious sect").)

The plaintiff is receiving opportunities to practice his religion. Taoist inmates have been scheduled for two to four hours of meeting time a week. This is comparable to time permitted to other religious groups; Christians get more time overall, but that's because there are more different Christian sects.

The prison reasonably required that the practice of Tai Chi be conducted without any face-to-face confrontation between inmates.

The number of religious articles permitted the Taoists (five) is comparable to that allowed other religious groups with the exception of the Neo-Pagans, who were allowed 13 because the pagan group has been around for eight or nine years and its leader has substantiated the need for the items. The chaplain has said he will consider additional items based on outside verification. The court finds no violation.

The plaintiff's dietary complaint is rejected because the prison is providing him a no-meat, no-egg diet.

The plaintiff's complaint about not being able to grow a beard is rejected, since the Chaplain said he did not show that facial hair is required or central to religious Taoism.

PLRA--Exhaustion of Administrative Remedies

Abney v. County of Nassau, 237 F.Supp.2d 278 (E.D.N.Y. 2002). The plaintiff said he couldn't get grievance forms from the officers on his housing unit, so he sent a handwritten letter to the Grievance Coordinator asking for a form and setting out the details of the incident he was complaining about. He never got a response. The court concludes he exhausted. Decisions holding that the prisoner must appeal even in the absence of a response are not applicable, since the Nassau County procedure does not provide for appeals in the absence of a response.

The defendants failed to raise exhaustion in their answer, but the court has the discretion to treat their motion to dismiss for non-exhaustion as including a threshold motion to amend the answer, which motion should be freely granted. The circumstances support relief from waiver. At 281: "Although a trial date has been set, consideration of the exhaustion issue requires no further discovery or other pretrial proceedings." Also, defendants weren't dilatory because under Second Circuit law, when they filed their complaint excessive force wasn't subject to exhaustion.

Protection from Inmate Assault/Color of Law and Liability of Private Entities

Figalora v. Smith, 238 F.Supp.2d 658 (D.Del. 2002). A prisoner who assaulted the plaintiff did not act under color of state law and the plaintiff's § 1983 claim was therefore frivolous.

Use of Force/Res Judicata and Collateral Estoppel/Personal Involvement and Supervisory Liability/Pendent and Supplement Claims; State Law in Federal Courts

Pizzuto v. County of Nassau, 239 F.Supp.2d 301 (E.D.N.Y. 2003) (Garaufis, J.). The plaintiffs sued over the murder of their son by officers in the

Nassau County Correctional Center, and move for summary judgment against certain defendants, which the court grants as to liability.

The officer defendants' pleas of guilty or jury convictions of conspiring to violate the decedent's Eighth Amendment rights, or of actually violating them, collaterally estop them from contesting liability for plaintiffs' civil claim of conspiracy and of actual violation of those rights. The court mostly relies on the elements of the crimes but relies on the defendant's testimony as to one defendant.

PLRA--Exhaustion of Administrative Remedies

Clemons v. Young, 240 F.Supp.2d 639 (E.D.Mich. 2003). The plaintiff argued that a previous case should not be counted as a strike because some claims were dismissed as frivolous but others were dismissed for failure to exhaust. The court holds (at 641) "that an action dismissed *entirely* without prejudice is not a 'strike' for the purpose of § 1915(g) . . . . Likewise, if any of the claims were found to have merit, the presence of frivolous claims would not by themselves draw the action into the circle traced by § 1915(g)." But where as here some claims were frivolous and there was no finding any of the others had merit, the case should be treated as a strike. Otherwise prisoners could just append unexhausted claims and thereby protect themselves against three strikes determinations.

Use of Force/Damages--Assault and Injury, Punitive/Evidentiary Questions/Pendent and Supplemental Claims; State Law in Federal Courts/Personal Involvement and Supervisory Liability

Jackson v. Austin, 241 F.Supp.2d 1313 (D.Kan. 2003). The plaintiff, who had a knee injury, was sitting in the clinic rather than standing in the medication line. An officer told him to stand up and refused to look at his medical excuse, and then called for additional staff. He was taken to the floor and his injured leg re-injured; he was then dragged by his arms about 50 yards. He was handcuffed so tightly that his hands swelled. His injuries were painful for several months and he was given an excuse from work for a month.

The court finds excessive force after a bench trial. There was no need for assistance or to use force against the plaintiff, a 60-year-old man, significantly smaller than two of the defendants, who was only explaining why he was sitting. The officers knew of the plaintiff's injury and of the practice of letting injured prisoners sit in the clinic. At 1319: "The Court recognizes that plaintiff refused a direct order. He attempted to show Johnson and Austin his written medical excuse, however, to explain his noncompliance, and officers do not have *carte blanche* authority to punish inmates for refusing to obey orders." *Id.*: "If defendants perceived any threat to institutional security, it had to be one which they themselves created, with their aggressive attitudes and absolute refusal to honor (or even look at) a valid KDOC medical restriction."

The court awards $15,000 in compensatory damages jointly and severally against all three officers, and awards $10,000 in punitive damages against each.

Use of Force

Bafford v. Nelson, 241 F.Supp.2d 1192 (D.Kan. 2002). The plaintiff engaged in various disruptive behavior and was forced to the floor. He alleged that after he was on the floor, a sergeant punched him in the face and grabbed his nostrils while he was lying flat on his back. He was then placed in leg irons and he spit blood in an officer's face. The officers forced him to the floor and put a spit net on his face. The plaintiff alleged that the sergeant then punched him in the head several times.

The initial encounter with the sergeant did not violate the Eighth Amendment; the plaintiff's "conclusory allegations" that it wasn't necessary to punch him in the face and grab his nostrils, absent evidence that the sergeant acted with malice or evil motive, did not raise a factual issue precluding summary judgment. Since the plaintiff had threatened them, staff had to make an immediate decision to restore discipline.

The second encounter, during which the plaintiff alleged that he was beaten while restrained, was not explained or justified by the defendants, and the plaintiff's allegations raise an issue of material fact. At 1203 n. 9: The plaintiff's injuries, swelling and lumps to the back of his head, are sufficient to support his claim, especially given the evidence of "unnecessary and wanton infliction of pain."

The defendants are not entitled to qualified immunity on these alleged facts.

Medical Care--Standards of Liability--Serious Medical Needs, Deliberate Indifference/ Grievances and Complaints about Prison/ Personal Involvement and Supervisory Liability/ Medication/Disabled

Lavender v. Lampert, 242 F.Supp.2d 821 (D.Or. 2002). This is the best decision I have ever seen on prison pain management.

The plaintiff complained of inadequate medical treatment for partial spastic paralysis, caused by a gunshot wound, which causes his right foot to flex and curl his toes into a claw. He complained of protracted failure to provide him with sufficient (sometimes, any) pain medication and protracted delay (21 months) in providing orthopedic footwear.

The Superintendent is not entitled to summary judgment on lack of personal responsibility because the plaintiff alleges that the Superintendent was notified repeatedly of his medical needs and the failure to meet them and did nothing about them. The same is true of the health services manager.

At 842:

> . . . [A] "serious" medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain." . . . Examples of instances where a prisoner has a "serious" need for medical attention include the existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain. . . .

The plaintiff's medical condition is clearly serious. At 845: "'the existence of chronic and substantial pain' itself demonstrates a 'serious' medical need."

The plaintiff's allegation of deliberate indifference is not refuted by the fact that he regularly utilized medical services. At 843:

> Nevertheless, the record also reveals that plaintiff consistently complained of pain, and frequently complained that such pain was debilitating, and that although he was examined regularly by medical staff, there is an ongoing pattern of ignoring, and failing to timely respond to or effectively manage, plaintiff's chronic pain. In addition, the record reveals that the nature of defendants' responses demonstrates deliberate indifference to the pain and damage to plaintiff's right foot caused by delays in plaintiff's receipt of appropriate, properly fitted, orthopedic footwear. [Footnote omitted.]

The plaintiff was also allegedly denied the use of a wheelchair when he needed it. At 849: "To unnecessarily deny the use of a wheelchair to someone who obviously has an injury, and who lacks mobility without it, would constitute deliberate indifference to a serious medical need."

The plaintiff was assigned to a housing area in hilly terrain that increased his orthopedic problems; there are factual issues as to whether this housing assignment exacerbated his medical problems and violated the Eighth Amendment.

The defendants are not entitled to qualified immunity. At 845: "Any reasonable official would understand that to deny or delay treatment for such pain, or to ignore it, would constitute deliberate indifference to a serious medical condition. . . ." The defendants have not shown that their conduct was reasonable. At 845:

> The record on summary judgment indicates that there is a repeated pattern in SCRI health services of failing to respond to plaintiff's frequent requests for effective treatment of his pain; allowing plaintiff's prescriptions for pain medication to lapse; and arbitrarily cancelling or reducing the level of pain medications provided to plaintiff, particularly while he was housed in disciplinary segregation. . . .
>
> Regarding the delay in providing properly fitting orthopedic footwear, a prisoner cannot make a

> claim for deliberate indifference to a serious medical condition based merely on delay of treatment, unless the denial of medical attention was harmful. . . . In this case plaintiff has alleged, and the record supports, that the delays in receiving properly fitted, and medically necessary, orthopedic footwear forced plaintiff to have to walk on the clawed toes of his right foot [for 11 months], causing pain and lesions on the toes from friction against his shoes or the ground.

At 848:

> Chronic pain is long-term, unrelenting pain, and yet defendants, knowing that plaintiff suffers from such pain, still failed to provide continuous and effective pain-relieving medication. On at least two occasions, plaintiff's pain medication was discontinued or reduced when he was placed in disciplinary segregation, so that he suffered from increased pain. These actions cannot be other than "unnecessary and wanton infliction of pain," the very touchstone of an Eighth Amendment violation.

False Imprisonment/Grievances and Complaints

McCurry v. Moore, 242 F.Supp.2d 1167 (N.D.Fla. 2002). The plaintiff's release date was miscalculated and he spent five more months in prison than he was supposed to.

The plaintiff's allegations support a violation of a clearly established constitutional right not to be held beyond the end of a lawfully imposed sentence. Whether that right is secured by the Eighth Amendment or by the Due Process Clauses does not matter, since both are governed by the subjective deliberate indifference standard.

If the plaintiff's allegation was correct that the information necessary to demonstrate his entitlement to release was attached to his grievance, the defendant who denied his grievance could be found deliberately indifferent. At 1180 n.8: "The responsibility for a failure of communication between the courts and the jailhouse cannot justifiably be placed on the head of a man immured in a lockup room when the action of the court has become a matter of public record. Ignorance and alibis by a jailer should not vitiate the rights of a man entitled to his freedom." (Quoting *Whirl v. Kern*, 407 F.2d 781, 785 (5th Cir. 1979).

The assistant warden for operations, who signed the denial of the plaintiff's grievance because it "appeared to be a reasoned response," without knowing anything about sentence calculation, could be held deliberately indifferent if the information showing entitlement to release were shown to him.

It has long been clearly established that a prisoner can't be held in prison beyond the end of his sentence.

Rehabilitation/Transfer and Admission to Mental Health Facilities/Ex Post Facto Laws/ Procedural Due Process/Mental Health Care

Woodard v. Mayberg, 242 F.Supp.2d 695 (N.D.Cal. 2003). The petitioner sex offender was civilly committed after a jury trial under the state Sexually Violent Predator Act on completion of his sentence.

Proceedings under the statute are civil, not penal, and therefore are not subject to Ex Post Facto Clause and double jeopardy principles, even though its applicability is generally triggered by criminal convictions, since it does not affix culpability or seek retribution for criminal conduct.

The fact that the plaintiff was not notified of the proceedings under the statute until 14 hours before he was to meet with the first "evaluator" did not justify habeas relief, since "it is not clearly established that the Due Process Clause requires such notification. The screening and evaluation process does not appear to amount to the sort of dispositive hearing for which a prisoner needs advance notice to marshal the facts and prepare a defense." (704) Subsequent proceedings met that criterion and the plaintiff had plenty of due process in them.

The alleged failure of the Director of Corrections to provide treatment for the petitioner's alleged disorder before seeking civil commitment for it does not justify habeas relief.

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

Remedies

Seehausen v. van Buren, 243 F.Supp.2d 1165 (D.Or. 2002). The petitioner challenged a disciplinary proceeding via habeas corpus on the ground that his offense, telephoning a prisoner at his home who was nominally in a halfway house, was not against the rules. The government conceded it wasn't in the rule book, but said that the petitioner should have figured it out based on a meeting in which rules governing telephone use were discussed, an article in the prison newsletter discussing telephone activities that would subject a prisoner to discipline, and rules limiting correspondence between inmates.

Due process requires fair notice of what conduct is prohibited before a sanction can be imposed. The meeting, the article, and the correspondence rule cited by the government did not provide fair notice. (The meeting provided fair notice that you can't call somebody at a halfway house, but the petitioner placed his call to a private residence.) The disciplinary proceedings are ordered expunged.

Federal Officials and Prisons/Drug Dependency Treatment

Bohner v. Daniels, 243 F.Supp.2d 1171 (D.Or. 2003). A federal statute authorizes one-year sentence reductions for nonviolent offenders who complete a substance abuse treatment program. The Bureau of Prisons defined "nonviolent offender" to exclude those who possessed firearms, precisely the opposite of Congress's definition. On being told to stop, the BOP changed the definition of nonviolent offender, but then exercised its discretion by rule to exclude exactly the same people from the program. The court holds that the BOP violated the Administrative Procedures Act by not complying with the notice and comment requirements and not giving any reason at the time for not doing so (i.e., not invoking the "good cause exception"). It doesn't matter what explanation they provide now. An internal program statement based on the invalid rule is itself invalid (though there is actually a conflict of authority on this point).

False Imprisonment/Municipalities/Negligence, Deliberate Indifference and Intent/Pendent and Supplemental Claims; State Law in Federal Courts/State Law Immunities/Damages--Intangible Injuries

Biberdorf v. Oregon, 243 F.Supp.2d 1145 (D.Or. 2002). The plaintiff was denied credit for time served through a record-keeping error arising from the existence of two indictments for the same criminal act. A county policy allegedly prohibited staff from counting days for the same charge under two different court case numbers for jail time credit.

Municipal liability may be established either by showing a policy of omission, which requires a showing of deliberate difference under *Canton*, or by showing that an affirmative policy caused the violation, which does not require proof of deliberate indifference. The plaintiff's claim is of the second type so no deliberate indifference showing is necessary for his Fourteenth Amendment due process claim. However, his Eighth Amendment claim requires a showing of deliberate indifference under the actual knowledge standard of *Farmer v. Brennan*, since that is part of the substantive cause of action. The evidence does not support that claim, since there was only one prior incident of similar nature in the preceding 10 years, and no county employee knew that the plaintiff's two cases involved the same incident early enough to do anything about it.

The plaintiff had "a well-settled Fourteenth Amendment liberty interest in credit for time served in County custody," but there are factual issues whether the county policy was the moving force in the violation.

If the plaintiff's over-detention resulted from county policy, his state law false imprisonment claim is barred by discretionary immunity; if it resulted from employees' errors in applying policy, it is not.

The false imprisonment claim does not require a showing of deliberate indifference, just intent to confine.

The plaintiff can recover damages for non-economic injury on his state law claims notwithstanding limitations on recovery for emotional injury. His claim for non-economic damages "is for loss of his liberty over several weeks and, therefore, is broader than 'mere' emotional distress." (1164) This is entirely a state law holding with no mention of the PLRA.

Federal Officials and Prisons/Protection from Inmate Assault/Staffing--Surveillance/Medical

Care/Personal Involvement and Supervisory Liability

Robinson v. United States Bureau of Prisons, 244 F.Supp.2d 57 (S.D.N.Y. 2003) (Hurd, J.). The plaintiff was stabbed to death in an altercation over a chess game and died awaiting surgery.

The defendants were not deliberately indifferent. At 64: "The mere allegation that having one corrections officer supervise 219 inmates with violent proclivities, without more, is an insufficient basis upon which a fair minded trier of fact could reasonably conclude that defendants were aware of an excessive risk to Miller's safety or the FCI Ray Brook prison population in general."

The court rejects the plaintiff's Federal Tort Claims Act negligence claim because there is no evidence or law "from which a fair minded trier of fact could reasonably conclude that it is a departure from the ordinary standard of care to have one corrections officer supervise 219 inmates." The court distinguishes *Sanchez v. State* (N.Y. 2002), where there was much evidence pertaining to the foreseeability of the assault. There is also no evidence of negligence in rendering medical assistance.

Hygiene/Injunctive Relief/Cruel and Unusual Punishment--Proof of Harm/Negligence, Deliberate Indifference, and Intent/PLRA--Mental or Emotional Injury

Mitchell v. Newryder, 245 F.Supp.2d 200 (D.Me. 2003). The plaintiff alleged that he was arrested and kept in a cell without a toilet. He asked to use a toilet before he was locked in, asked again several hours later, asked a third time after four and a half hours, and was ignored. He soiled himself and then told staff he needed to use the bathroom to clean up. He was insulted and told he would have to "sit in it and suffer," and did so for five more hours.

Defendants' argument that there is no Eighth Amendment claim because there was no serious risk of harm "ignores that there are different sub-classifications of deliberate indifference claims under the Eighth Amendment." The plaintiff isn't claiming failure to protect, he is claiming that he was "purposefully subjected to dehumanizing prison conditions." The facts alleged amount to "an omission that resulted in the denial of a minimal civilized measure of life's necessities."

The hostility and insulting and offensive language and expressions of the officer satisfy the requirement of a culpable state of mind at the pleading stage.

PLRA--Exhaustion of Administrative Remedies

Arnold v. Goetz, 245 F.Supp.2d 527 (S.D.N.Y. 2003) (Knapp, J.). Plaintiff wrote on the complaint form, where it asked whether he had filed a grievance, that he had not because "I did not know what to do." He never responded to defendants' motion to dismiss.

The PLRA exhaustion requirement is not jurisdictional but is an affirmative defense (532) (extensive string cites for this). The court then cites all the cases to the contrary in New York and musters all the arguments in response, relying on *Handberry* among others and citing the Second Circuit's characterization of PLRA exhaustion as an affirmative defense.

Dismissal under Rule 12(b)(6) is not available because exhaustion is an affirmative defense, but since the *plaintiff* pleads that he didn't exhaust (because he didn't know what to do), the court goes on with it. At 536: "Under certain circumstances, a correctional institution's failure to provide an inmate with sufficient information about the available grievance procedures may excuse his failure to exhaust administrative remedies." The court cites *Hall v. Sheahan's* holding that officials can't keep inmates in ignorance and then fault them for not using the procedure. At 537:

> This is a common sense approach to a situation where correctional authorities obstruct an inmate's ability to comply with the exhaustion requirement when they provide him with a grievance procedure but fail to supply him with the materials by which he can secure information about how to avail himself of that process. The approach is derivative of the general principle that an inmate's technical failure to exhaust administrative remedies before commencing a § 1983 action may be excused where officials

> prevented him from utilizing a grievance procedure. [Good string cite here]

At 537: Defendants win "as long as the institution has made a reasonable, good faith effort to make the grievance procedure available to inmates; an inmate may not close his eyes to what he reasonably should have known." (Quoting *Hall.*) At 538: a claim of ignorance of the grievance system presents a question of fact whether the grievance procedure was available.

This plaintiff said he knew there was a procedure but did not know how to follow it, but the court can't tell from the complaint whether this was because he didn't try to find out or because prison officials failed to provide access to the information. If the latter, he wins. "An institution keeps an inmate ignorant of the grievance procedure when correctional officials either fail to inform him of the procedure altogether or fail to provide him with access to materials which could otherwise educate him about the use of that process." (538)

Plaintiff's failure to explain the situation doesn't require mechanical dismissal. The court must construe the complaint to raise the strongest arguments a *pro se* litigant could be raising. His pleading is sufficient under that standard; this conclusion is consistent both with principles for dealing with *pro se* cases and with defendants' burden of proof. Defendants' alleged provision of an "inmate behavior book" and their claims about other information made available about the grievance system don't suffice absent corroboration by affidavit, and they're outside the pleadings anyway, so dismissal is inappropriate. Besides, it's unclear whether this was the "inmate behavior book" the plaintiff got when he was admitted in 1994 before the PLRA, and plaintiff was in SHU and didn't have access to the prison law library. The court converts the motion to one for summary judgment and gives plaintiff the appropriate notice.

Federal Officials and Prisons/Pre-Trial Detainees/Color of Law and Liability of Private Entities

Sarro v. Cornell Corrections, Inc., 248 F.Supp.2d 52 (D.R.I. 2003). The plaintiff, a federal pre-trial detainee, alleged that he was assaulted by another prisoner while in a private detention facility that contracted with the U.S. Marshals Service to house prisoners.

Employees of a private correctional facility act under color of federal law. "Under the public function test, a private party may be deemed a government actor if that party exercises 'powers traditionally exclusively reserved to the government.'" (60, citation omitted) Incarceration of individuals accused of committing crimes has been exclusively a government function; the fact that it has sometimes been delegated to and performed by private parties doesn't make it any less governmental. This conclusion is consistent with the weight of authority holding private prison staff to be state actors for purposes of § 1983.

There are no other "special factors counseling hesitation" in allowing *Bivens* suits against private prison personnel. Congress has expressed no intent to preclude them and has not provided a comprehensive scheme for redress or any alternative remedy (in fact, the Bureau of Prisons administrative remedy scheme doesn't apply to them). No governmental policy or program would be undermined. *Malesko* is not to the contrary, since it dealt only with liability of private corporations themselves, and acknowledged that the core purpose of *Bivens* actions is individual deterrence. It also indicated a desire "to maintain parity between the remedies afforded to prisoners at privately-operated facilities and those at government-operated facilities." (63)

The jail staff did not act under color of state law, since holding federal prisoners is not a state law power or one traditionally exclusively reserved to the state. In reaching this conclusion the court does not discuss the fact that the jail was established pursuant to a state law that authorizes municipalities to create public corporations to own and operate jails, and it doesn't discuss whether the jail contains state or local prisoners as well as federal prisoners.

Disabled/Mental Health Care/Pendent and Supplemental Claims; State Law in Federal Courts/Class Actions--Effect of Judgments and Pending Litigation

Atkins v. County of Orange, 251 F.Supp.2d 1225 (S.D.N.Y. 2003) (Conner, J.). Several plaintiffs

alleged that they were subjected to over-medication with psychotropic drugs and denial of timely psychiatric care, timely prescription drug administration, adequate staffing of observation holding cells, adequate therapeutic psychiatric care, and discharge planning and treatment plans.

The plaintiffs do not state a claim under the disability statutes. They do not allege that they were denied the benefit of a program, service, or activity. Nor, in alleging that violent and self-destructive mentally ill prisoners were placed in keeplock isolation, did they allege that they were treated any differently from non-mentally ill violent and self-destructive prisoners. Plaintiffs' complaints about the quality of their mental health services are "already covered under their § 1983 claims." (1232-33)

Federal Officials and Prisons/Transfers

Jacaboni v. United States, 251 F.Supp.2d 1015 (D.Mass. 2003). The three petitioners moved to vacate their sentences on the ground that they had been imposed on the understanding that the petitioners would serve their short sentences of imprisonment in community correction centers, but the Department of Justice had subsequently decided that serving a prison sentence in such facilities was illegal and proposed to transfer them to prisons.

The court concludes that the Justice Department's reinterpretation of the statute is wrong under the controlling statute and therefore invalid; the Bureau of Prisons' abrupt action, without notice or opportunity for comment, violated the Administrative Procedure Act; and the retroactive application of the change denies due process. The court enjoins the transfers of two petitioners and orders the Bureau of Prisons to place the third under the old standards.

The court describes the Department of Justice's rationale as "transparently specious" and the manner in which the new policy was communicated to the courts as "highly offensive and gratuitous."

This change of policy by the Bureau of Prisons has yielded a large amount of litigation on various legal theories. Granting relief: *Ashkenazi v. Attorney General of the United States*, 246 F.Supp.2d 1 (D.D.C.), *vacated as moot*, 346 F.3d 191 (D.C.Cir. 2003); *Howard v. Ashcroft*, 248 F.Supp.2d 518 (M.D.La. 2003); *Ferguson v. Ashcroft*, 248 F.Supp.2d 547 (M.D.La. 2003); *Culter v. United States*, 241 F.Supp.2d 19 (D.D.C. 2003); *United States v. Serpa*, 251 F.Supp.2d 988 (D.Mass. 2003); *Byrd v. Moore*, 252 F.Supp.2d 293 (W.D.N.C. 2003). Denying relief: *United States v. James*, 244 F.Supp.2d 817 (E.D.Mich. 2003). There are many other more recent decisions on this issue.

Grievances and Complaints about Prison

Hale v. Scott, 252 F.Supp.2d 728 (C.D.Ill. 2003), *aff'd*, 371 F.3d 917 (7th Cir. 2004). The plaintiff filed a grievance against an Officer Drone for various misdeeds including having sex with officers and supervisors on the midnight shift. He was found guilty of insolence for that suggestion, which he admitted was based on rumors. At 732: "It is settled that prison officials may discipline inmates for insolent and disrespectful behavior, for obvious legitimate penological concerns of security and order." First Amendment objections to such discipline are governed by the *Turner* standard. The court rejects *Bradley v. Hall's* holding that discipline merely for using hostile, sexual, abusive, or threatening language in a grievance, stating that it was "implicitly disapproved" in *Shaw v. Murphy*. Here, the *Turner* determination "turns in large part on whether the plaintiff had any basis for making the allegation," which he did not.

Federal Officials and Prisons/Procedural Due Process--Disciplinary Proceedings/Procedural Due Process--Administrative Segregation/Habeas Corpus/Magistrates

Sinde v. Gerlinski, 252 F.Supp.2d 144 (M.D.Pa. 2003). The petitioner was disciplined for allegedly using a contraband cellphone based on evidence that the number called from that telephone was only on the petitioner's approved list.

Habeas corpus is not the proper vehicle for challenging the frequency of segregation review hearings or the number of telephone calls a prisoner is permitted. Matters that do not challenge the fact or duration of custody are not properly raised via habeas.

The disciplinary hearing met due process standards. An eight-month delay in giving notice of the charges did not violate federal regulations, since those regulations required deferring the proceeding while a criminal investigation was pending, and did

not deny due process since the petitioner got the notice more than 24 hours before the hearing.

The written statement of the reporting officer indicating that a cellular telephone had been found on prison property that had been used to call a number on the petitioner's, but no other prisoner's, approved calling list, plus testimony that the petitioner had made calls on the phone, met the "some evidence" standard. The fact that some testimony was later recanted did not matter, since the hearing officer found the recantation not credible.

Injunctive Relief--Preliminary/Medical Care--Isolation/Religion/Deference

Selah v. Goord, 255 F.Supp.2d 42 (N.D.N.Y. 2003) (McAvoy, J.). The plaintiff refused a tuberculosis test and was placed in TB hold (23-hour lock-in, no telephone calls or personal visits) for a year. The court grants a preliminary injunction.

The plaintiff demonstrated irreparable harm in that his religious beliefs were sincere and the loss of First Amendment freedoms even for limited time is irreparable. He displays a likelihood of success under the *Turner* standard.

The question of the burden of proof under *Turner* is not settled. At 53:

> As a practical matter, the Court finds that defendants must come forward with some rational basis for the policy at issue. . . . Plaintiff cannot be expected to "guess" what rationale DOCS provide. Further, if DOCS fails to articulate a rational connection between the policy at issue and legitimate penological interests, the Court need go no further. . . . Where, however, DOCS has articulated a reasonable connection between the policy and legitimate penological interests, it then falls to Plaintiff to show the availability of other alternatives that are less burdensome to his religion and, yet, equally effective for DOCS purposes. . . . Thus, the burden is ultimately on the Plaintiff.

Coercion to take the PPD test is not reasonably related to keeping people in TB hold for a year. At 54: "The conditions of tuberculin hold are such that a reasonable prisoner would quickly consent to the PPD test absent a matter of conscience. Selah has consented to a shorter stay on TB hold, one that would allow the results of a sputum test to come back prior to release." Monitoring of persons who refuse a PPD test is not legitimately connected with the TB hold practice; defendants' medical director testified that it was no harder to monitor them in general population, and they are kept in their own cells rather than a central location. Limiting the exposure of other prisoners to a potentially contagious person is the most persuasive argument, especially after a contact trace or on initial entry to DOCS. However, it makes no sense as to prisoners who have had their status determined in some way and subsequently object on religious grounds. There is no more reason to limit the contacts of a person who has tested negative than someone who has left TB hold, and they can be subjected to x-rays or sputum testing if a test is needed. The latter proposal is unlikely to have any effect on prison resources. People with latent tuberculosis (i.e., those not identified through x-rays or sputum testing) are no threat to the prison population. Prison officials' fears of a "flood" of religious objectors is unsupported by the record; DOCS has no data on the number of religious objectors, and the Second Circuit's *Jolly* decision did not provoke a "flood."

PLRA--Exhaustion of Administrative Remedies

McCoy v. Goord, 255 F.Supp.2d 233 (S.D.N.Y. 2003). Exhaustion questions should be resolved as early as possible, both for judicial economy and consistently with the policy underlying PLRA to "reduce the quantity and improve the quality" of prisoner litigation."

At 251:

> --If nonexhaustion is clear from the face of the complaint (and incorporated documents), a motion to dismiss pursuant to Rule 12(b)(6) for failure to exhaust should be granted.
> --If nonexhaustion is not clear from the face of the complaint, a defendant's motion to dismiss should be converted, pursuant to Rule 12(b), to one for summary judgment limited to

> the narrow issue of exhaustion and the relatively straightforward questions about the plaintiff's efforts to exhaust, whether remedies were available, or whether exhaustion might be, in very limited circumstances, excused. . . .

Rule 12(b)(1), which addresses dismissal for lack of jurisdiction, is inappropriate because exhaustion is not jurisdictional, even though some courts treat it that way.

Conversion of a motion to dismiss for non-exhaustion to a summary judgment motion is appropriate if extrinsic material is to be considered, though in practice courts routinely consider extrinsic material on motions to dismiss without conversion. At 250: "Even without conversion, the court may consider documents annexed to the movant's papers--although not annexed to the complaint--in limited circumstances, such as when a plaintiff relies upon or has knowledge of certain documents in bringing suit." Courts also routinely consider some extrinsic material when examining a *pro se* complaint, but that is in keeping with the liberality afforded to the pleadings of *pro se* plaintiffs and is usually done for a *pro se* plaintiff's benefit; it is not clear that such incorporated materials may be used to support the dismissal of a *pro se* complaint.

The court rejects the "middle ground, where limited extrinsic materials may be considered to settle the exhaustion defense," proposed by the Ninth Circuit, which treated failure to exhaust remedies as "a matter in abatement, which is subject to an unenumerated Rule 12(b) motion, rather than a motion for summary judgment," in light of the general principle that "summary judgment is on the merits, whereas dismissal for failure to exhaust" is not.

A court may consider unexhausted claims on the merits only to dismiss them as frivolous or malicious or for failure to state a claim. Dismissal for non-exhaustion is generally without prejudice, though it may be with prejudice "where a plaintiff is effectively barred from administrative exhaustion," such as when the time for administrative exhaustion has expired and the inmate has been denied a waiver to file a late grievance.

The proper course is less clear when a plaintiff may be barred from refiling by the statute of limitations. At 252: ". . . [A] dismissal without prejudice is tantamount to a dismissal with prejudice if the statute of limitations has expired, or is likely to expire before re-filing. In practice, tolling may ameliorate this result." Under New York law, it may be that the time spent exhausting is tolled, which would give the inmate up to 11 weeks of additional time. At 253: "In addition, traditional defenses to the bar of the statute of limitations may apply, including waiver, estoppel, or equitable tolling. Courts may combine a dismissal without prejudice with equitable tolling (when a judicial stay is not available) to extend the statute of limitations "as a matter of fairness where a plaintiff has . . . asserted his rights in the wrong forum." (Citation omitted)

The court has no option to stay a case rather than dismissing even to save a case from being time-barred, since the amendment of the statute eliminated the courts' authority to do so.

Pest Control, Food, Hygiene (260): ". . . [T]he mere presence of vermin in a prisoner's housing area does not constitute 'punishment' under the Eighth Amendment. . . . The denial of warm food is not, by itself, a deprivation of the 'minimal civilized measure of nutrition.' . . . [A] two-week suspension of shower privileges does not suffice as a denial of 'basic hygiene needs,' . . . nor does failure to provide razors for shaving rise to the level of constitutional concern."

Access to Courts (260-61): Delayed filing of court papers does not deny access to court where there is no evidence that it actually interfered with the litigation.

Use of Force (261-62): Allegations that officers tried to make the plaintiff fall on the stairs, which he prevented by grabbing hot water pipes that burned him, stated an Eighth Amendment excessive force claim, as did allegations that officers forced him to the ground, handcuffed him, cleared the area of witnesses, and beat him.

Searches--Person--Arrestees/Res Judicata and Collateral Estoppel

Maneely v. City of Newburgh, 256 F.Supp.2d 204 (S.D.N.Y. 2003) (McMahon, J.). The plaintiff challenged an alleged municipal policy of strip searching all arrestees. A state court decision holding the policy unconstitutional in an individual's case was

not preclusive in this § 1983 class action, since there was no claim in that case about strip searches, and the issue only came up during the trial. Defendants did not have a full and fair opportunity to litigate the issue, since there was no discovery or time for preparation.

At 213 (citations omitted):

> Under Second Circuit precedent, blanket policies subjecting all newly-arrested misdemeanor detainees in a local correctional facility to visual body cavity searches are unconstitutional. . . . In order for a visual body cavity search to be found reasonable under the circumstances, there must be some "'particularized suspicion,' arising either from the nature of the charge or specific circumstances relating to the arrestee and/or the arrest," that the arrestee is concealing weapons or other contraband. . . . In addition, as this Court recently concluded, the law of this Circuit requires that the "individualized reasonable suspicion" rule apply to accused felons as well as misdemeanants upon arrival at a local correctional facility.

The challenged policy provides for strip searches when the arresting officer "reasonably believes that the prisoner may have concealed weapons or contraband." That policy is not unconstitutional on its face, i.e., plaintiff doesn't show that it could never be applied constitutionally. Whether it was applied constitutionally is a jury question.

Grievances and Complaints about Prison/Medical Care/Work Assignments

Pate v. Peel, 256 F.Supp.2d 1326 (N.D.Fla. 2003). The plaintiff, who has HIV and Hepatitis C, alleged that after he filed a grievance about his medical care he was assigned to field labor, with serious medical consequences.

The court adopts the *Mt. Healthy* burden-shifting approach to retaliation claims after a pretty thorough examination of the case law. In the prison context, the question is whether the prisoner was "engaged in constitutionally protected activity; whether he suffered adverse action; and whether his exercise of the protected right was a substantial or motivating factor in the defendant's alleged retaliatory conduct." (1340)

At 1336: "It is well established that a prisoner's constitutional rights are violated if adverse action is taken against him in retaliation for the exercise of his First Amendment rights."

At 1340: "An inmate has a First Amendment right to file grievances against prison officials, but only if the grievances are not frivolous. *See Lewis v. Casey*, . . ." (That appears mistaken. *Lewis* applies to the right of access to courts, not to internal prison complaints.)

The plaintiff's retaliation claim is rejected for lack of factual support, and the defendants showed they would have taken the same action without a retaliatory motive.

The plaintiff's Eighth Amendment claim is rejected on the ground that there was a medical basis to support defendants' claim that they were not aware of any risk to him.

Procedural Due Process

Sonntag v. Papparozzi, 256 F.Supp.2d 320 (D.N.J. 2003). Participation in parole decisions of temporary Parole Board members, appointed by the Governor without Senate confirmation allegedly in violation of state law, did not deny due process. At 325: "As Defendants have conceded, New Jersey prisoners have a state-created liberty interest in parole decisions. . . ." The plaintiffs appear to be complaining about both release hearings and revocation hearings (i.e., they complain of "continued or renewed incarceration").

Color of Law and Liability of Private Entities/ Dental Care

Wall v. Dion, 257 F.Supp.2d 316 (D.Me. 2003). The plaintiff alleged that the jail dentist refused to treat the plaintiff's infected tooth because the plaintiff had Hepatitis C, resulting in gangrene and damage to his jaw.

The court adopts the "majority view" that "when a private entity contracts with a county to provide jail inmates with medical services that entity is performing a function that is traditionally reserved

to the state; because they provide services that are municipal in nature the entity is functionally equivalent to a municipality for purposes of 42 U.S.C. § 1983 suits." (319) The plaintiff's allegations that he was denied adequate medical care and that he filed several complaints sufficiently pled that the private medical contractor had a policy and custom that denied him his rights. Even if there was no blanket policy or custom concerning prisoners with Hepatitis C, he may be able to show that a final policymaker decided not to treat his condition pursuant to a custom or policy.

Access to Courts--Punishment and Retaliation/ Habeas Corpus/Procedural Due Process

Burhman v. Wilkinson, 257 F.Supp.2d 1110 (S.D.Ohio 2003). The plaintiff alleged that prosecutors reneged on a plea bargain by failing to submit favorable letters to the parole board and instead submitting unfavorable letters, and that the parole board retaliated against him for having filed federal court litigation.

The plaintiff's claim for breach of a plea agreement must be raised via habeas under the *Preiser/Heck* rule.

At 1120: "It should go without saying that if a parole board acts against a prisoner because he exercised his right to file a civil complaint, such conduct is actionable as a violation of the First Amendment." The court rejects the retaliation claim on the facts.

The plaintiff cannot challenge his parole eligibility determination in federal court, both because of the *Heck/Preiser* rule and because there is no liberty interest in parole in Ohio. However, his allegation that neither he nor his lawyer received notice of his hearing may state a due process claim, since state law does create a right to be represented by counsel at such hearing.

Searches--Person/Pre-Trial Detainees

Bynum v. District of Columbia, 257 F.Supp.2d 1 (D.D.C. 2002). The plaintiff alleged that jail officers strip search inmates who return to the jail after receiving release orders, before they are "returned to the general prison population to await the results of a search for additional criminal charges against them." (1) This allegation states a Fourth Amendment claim; the court notes earlier authority holding that jail officials can keep persons in such status in a separate area from the jail general population, obviating any need for the strip search. The question why people who are entitled to be released must be returned to jail at all does not seem to have been asked.

Use of Force--Restraints/Qualified Immunity

Aceto v. Kachajian, 240 F.Supp.2d 121 (D.Mass. 2003). The plaintiff alleged that she was arrested for a thirteen-year-old traffic violation. On the way to court, a police officer insisted on handcuffing her behind her back even though she told him she was recovering from a separated shoulder. She sustained a herniated disc in her neck as a result. The police procedures manual says that prisoners are to be handcuffed behind their backs "unless there are extenuating circumstances such as injury."

The plaintiff's allegations state a claim for excessive force, since there was no evidence that she posed a flight risk or a safety risk, and since she provided the officers with the information necessary to verify her injury. It was clearly established that police must take known injuries into account when handcuffing a non-threatening individual. The police regulation provided additional warning to defendants on that point.

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