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Recent Supreme Court Rulings Impact Prisoners

The U.S. Supreme Court completed its 2004 term in June and the Justices handed down three important decisions affecting prisoners during the first half of 2005. In February, the use of racial segregation as a routine method of prison administration was rejected. In May, an unusual unanimous vote upheld the constitutionality of a federal law that requires states to allow prisoners to practice their religious beliefs. Finally, in June, the extreme deprivation and punishment found in "supermax" prisons was found to warrant protections for prisoners' due process rights. Unfortunately, the Court rejected arguments for more extensive due process protections against transfer to Ohio's "supermax."

Johnson v. California

The Supreme Court first held that racially segregated prisons were unconstitutional in a 1968 case brought by the ACLU. At issue in *Johnson v. California* was the California Department of Corrections' longstanding policy of racially segregating its prisoners during an initial classification period when they first arrived in the system or were transferred to a new facility. Although no other state adopted a similar policy, the lower courts in this case held that California's decision to segregate prisoners by race was entitled to deference rather than the strict judicial scrutiny that would normally apply to racial classifications in other settings.

"Protecting prisoners from racial discrimination is critical to maintaining public confidence in a criminal justice system that is often criticized for its mistreatment of racial minorities, " said Elizabeth Alexander, director of the ACLU's National Prison Project, which filed a friend-of-the-court brief in the case. "The ruling upholding prisoners' protection from racial discrimination is a triumph for prisoners and the disproportionate number of minority men and women that this country chooses to incarcerate."

"We rejected the notion that separate can ever be equal. . .50 years ago in *Brown v. Board of Education*, and we refuse to resurrect it today," said the Court in a 5-3 majority decision authored by Justice Sandra Day O'Connor (Chief Justice Rehnquist did not participate). "Compliance with the Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system."

In its amicus brief filed on behalf of California prisoner Garrison Johnson, the ACLU cited a 1997 Gallup poll finding that 72 percent of black respondents believe blacks are treated more harshly

HIV-Positive Prisoners in Mississippi Aided By Litigation

The American Civil Liberties Union applauded the dramatic improvements in medical treatment and living conditions for hundreds of HIV- positive Mississippi prisoners as a result of litigation that concluded in April.

"In 1999, Mississippi prisoners with HIV/AIDS were denied life-saving drugs and were barred from the rehabilitation programs available to other Mississippi prisoners," said Margaret Winter, Associate Director of the ACLU's National Prison Project and lead attorney for the prisoners. "Their lawsuit has accomplished its purpose of saving lives and ending discriminatory policies against prisoners with HIV/AIDS." Continued on page 4

than whites in the criminal justice system. Among white respondents, nearly half believed that blacks are treated more harshly.

"There is no area of our national life in which the perception of continuing racial discrimination is more widespread," the ACLU said in its brief. "Racial segregation is not the solution to the problem of prison violence," added Steven R. Shapiro, the ACLU's Legal Director.

Cutter v. Wilkinson

In the *Cutter v. Wilkinson* ruling in May, the Justices unanimously sided with Ohio prisoners who had been denied access to religious items, literature and time for worship. The prisoners filed a legal challenge against Reginald Wilkinson, Director of the Ohio Department of Rehabilitation and Correction, stating that the department was in violation of federal law.

"Prison officials often place unjustified burdens on prisoners who wish to practice their religion," said Alexander, who also joined a friend-of-the-court brief in this case. "This important law allows prisoners to challenge such arbitrary burdens, and we welcome this decision upholding its constitutionality."

The federal law at issue, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), requires in part that states that receive federal money must accommodate prisoners' religious beliefs unless prison officials can show that such accommodation would be disruptive. The decision struck down a ruling by the Sixth Circuit Court of Appeals that RLUIPA violated the separation of church and state. However, as the ACLU argued in its brief, the federal law mandates nothing more than the removal of substantial government-imposed burdens on religious exercise. RLUIPA avoids constitutional scrutiny by not giving prisoners and other institutionalized persons incentives to become religious or to change their religious beliefs.

"It is wrong to punish prisoners by denying them their religious liberty," said Alexander. "We urge the states to fully implement RLUIPA's requirements."

Wilkinson v. Austin

Finally, the June decision in *Wilkinson v. Austin* stems from a lawsuit brought by the ACLU of Ohio and the Center for Constitutional Rights. At issue were the guidelines that governed prisoner placement at the Ohio State Penitentiary (OSP), the state's notorious supermax prison.

Justice Kennedy wrote in the Court's unanimous decision that "incarceration at OSP is synonymous with extreme isolation," and that "OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact."

"Prisoners confined in supermax facilities endure 23- or 24-hour isolation, limited access to rehabilitative programming, and few opportunities for visits with family," said Jeff Gamso, Legal Director of the ACLU of Ohio. "The Supreme Court recognizes the unique severity of supermax conditions and so will require officials to uphold basic due process protections for prisoners."

In 2002, a federal district judge held that confinement at the Ohio State Penitentiary creates an "atypical and significant hardship." Prisoners housed in the high maximum-security unit are subject to extreme isolation in tiny cells that fail to meet national standards established by the American Correctional Association. When the institution was first built, officials sent 100 prisoners to the prison without notice or hearing, and before the state had

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written guidelines for the classification of high maximum-security prisoners. The Court upheld the new procedures adopted to prevent arbitrary placements in the facility.

"Prior to the current policy, transfers to Ohio's supermax had been so haphazard that prisoners who did not pose major security issues nonetheless ended up there," said Staughton Lynd, an ACLU of Ohio cooperating attorney. "For that reason, the Supreme Court carefully noted that, if such practices occur under the current policy, prisoners can bring a new legal challenge."

For its next term, the Supreme Court has already accepted at least one prisoner rights lawsuit for argument, *Goodman v. Georgia*. In this case, the Court will review whether state prisons that discriminate against prisoners with disabilities can be sued under the Americans with Disabilities Act.

ACLU Returns to Challenge Inhumane Conditions at "Supermax" Unit in MS

Seeking to improve the 'supermax' prison conditions for nearly 1000 men confined in a unit once ruled unconstitutional for death row prisoners in 2003, the American Civil Liberties Union and the law firm Holland & Knight LLP filed a lawsuit in June against Mississippi corrections officials.

"The disgusting conditions that tormented Mississippi's death row prisoners until recently still exist for the other men living in Unit 32 of the Parchman prison," said Nsombi Lambright, Executive Director of the ACLU of Mississippi.

Unit 32 of the State Penitentiary in Parchman is a supermaximum prison housing about 1000 men, almost all of them in segregation cells where they are locked down 23 to 24 hours a day in total isolation. According to the complaint, the same filth, stifling heat and poor treatment first described in litigation on behalf of death row prisoners housed in the same unit continue to harm non-death row prisoners today.

"The conditions of confinement in Unit 32 are so barbaric, the deprivation of medical and mental health care so extreme, and the defects in security so severe, that the lives and health of the men confined there -- and the correctional staff who work there -- are at great and imminent risk," charges the complaint.

In one incident, a disturbed, deaf-mute prisoner was left for months in his cell on the special needs psychiatric tier of Unit 32, without a mental health evaluation or any attempt to communicate with him. His cell became filthy and he was allowed to remain unwashed for weeks. Correctional staff threw things at him to get his attention, and when he threw things back, he was cited for rule violations.

"Defenseless mentally ill prisoners are warehoused in Unit 32, left alone without appropriate medication and counseling," said Stephen F. Hanlon, a partner with Holland & Knight LLP and co-counsel in the case. "The result of locking these troubled men away is a continued deterioration of their health and well-being."

The June filing builds upon the successful litigation, *Russell v. Johnson*, brought by the ACLU's National Prison Project and Holland & Knight in 2002. In that case, U.S. Magistrate Judge Jerry A. Davis issued a strongly worded decision in 2003 finding the deplorable conditions in Unit 32 inflicted cruel and unusual punishment on death row prisoners and required correction.

"No matter how heinous the crime committed, there is no excuse for such living conditions," wrote Davis. The decision was affirmed by the Court of Appeals for the Fifth Circuit in 2004.

While conditions for death row prisoners on Unit 32 have improved because of the litigation, men housed in the same unit, not awaiting a death sentence, endure conditions equivalent to those condemned by Judge Davis.

"The isolation and sensory deprivation of a 'supermax' prison, combined with lethal heat, pervasive filth, grossly inadequate medical care, and the barbaric treatment of prisoners who are severely mentally ill -- it all adds up to torture," said Margaret Winter, Associate Director of the ACLU's National Prison Project and counsel for the prisoners. "In our system of justice, torture cannot be part of the penalty that criminal offenders pay for their offenses against

society."

The lawsuit, *Presley v. Epps*, was filed in U.S. District Court for the Northern District of Mississippi by attorneys Winter and Gouri Bhat of the ACLU's National Prison Project, Hanlon and Cecily Baskir of Holland & Knight LLP, Mississippi civil rights attorney Robert McDuff and Ranie Thompson of the ACLU of Mississippi.

Continued from cover

HIV-Positive Prisoners

An order issued by U.S. Magistrate Judge Jerry Davis in *Moore v. Fordice* concludes litigation in which the ACLU's National Prison Project became involved seven years ago. The judge's order celebrated the litigation's achievements.

"The court appreciates the commitment of both sides in reaching the conclusion of this litigation," wrote Davis. "Great strides were made in the treatment of HIV-positive inmates, not only through the perseverance of plaintiff's counsel, but also through the recognition of the problem and desire to correct it shown by the defendants."

In court documents, Dr. Robert L. Cohen, a former jail medical director in New York, described the conditions for HIV-infected prisoners at the Mississippi State Prison in Parchman before changes were made to improve care. "In 1999, it is appalling to discover men with HIV infection being treated with callous disregard for their medical problems," wrote Cohen. Prisoners' "lives are being shortened and they are enduring preventable pain and suffering because the basic medical needs are being ignored."

In June 2004, a federal court order in this case also ended sanctioned discrimination against prisoners with HIV/AIDS who were banned from participation in community work programs because of their illness. For 14 years, Mississippi's prison policy segregated HIV positive prisoners from the general population, barring them from educational and vocational opportunities available to other prisoners. Today, only Alabama continues a segregation policy that blocks all prisoners with HIV from participating in community corrections programs, although there is no valid evidence that segregating prisoners reduces the transmission of HIV within prisons.

"Seven years ago, HIV- positive prisoners in Mississippi were being warehoused and were rapidly dying from lack of medical care," said Winter. "The struggle they undertook all those years ago has made an enormous difference. We are very hopeful that the Mississippi Department of Corrections will work hard to preserve the gains accomplished through this litigation."

Indiana's "Supermax" Confinement Worsens Mental Illness in Prisoners

The extreme isolation and sensory deprivation found in Indiana's Secured Housing Unit spurred four suicides and numerous self-mutilations by mentally ill prisoners, said the American Civil Liberties Union in February in a lawsuit filed against state prison officials.

"Locking up prisoners with mental illness in small windowless cells is psychological torture," said Ken Falk, Legal Director of the Indiana Civil Liberties Union. "Confinement for lengthy periods of time in 24-hour isolation would compromise even a healthy person's sanity."

At issue in the February complaint, filed by the ACLU's National Prison Project and Indiana Civil Liberties Union, are the brutal conditions faced by mentally ill prisoners confined in the Secured Housing Unit (SHU) at the Wabash Valley Correctional Facility in Carlisle, Indiana, a "supermax" facility. The ACLU charges that the prisoners' mental illness is exacerbated by the unbearable conditions in the SHU, which have caused prisoners to hallucinate, rip chunks of flesh from their bodies, rub feces on themselves and attempt suicide.

"A disproportionately high number of mentally ill prisoners are transferred to the SHU because they are often misidentified as trouble-makers in prison," said David C. Fathi, an attorney with the ACLU's National Prison Project. "If mentally ill

prisoners receive inadequate mental health care or their disease worsens because of the extreme deprivation within the SHU, it is likely they will find it difficult to obey prison rules and will remain stuck at the facility indefinitely."

For prisoners at the SHU, little has changed since 1997 when Human Rights Watch detailed many of the abuses faced by mentally ill prisoners in the report *Cold Storage: Super-Maximum Security Confinement in Indiana.* "Warehousing severely ill and psychotic individuals under conditions that increase their suffering by exacerbating their symptoms, and in facilities that lack adequate mental health services, can only be characterized as cruel," the report stated.

Prisoners only leave their cells at the SHU to shower or for solitary recreation in a small walled compound, but recreation is often canceled because of bad weather. The cells remain illuminated at night and the unit is extremely noisy, as the prisoners, who cannot see each other, shout in order to communicate. Prisoners are also restricted in their ability to keep books, letters, family photographs or other personal items in their cells. There is no limit on how long a prisoner can spend in the SHU, and many remain there for years on end.

The lawsuit, *Mast v. Donahue*, was filed in U.S. District Court in the Southern District of Indiana by Falk and Fathi and seeks a ban on placing mentally ill prisoners in the Secured Housing Unit. No money damages are sought.

ACLU Urges Maryland to Reject Contract with Correctional Medical Services

Citing Correctional Medical Services' poor record for dispensing medical care to prisoners, the American Civil Liberties Union and Public Justice Center in June urged Maryland's Board of Public Works to reject a proposed contract with the for-profit company.

"Correctional Medical Services' history of cutting corners to maintain profits jeopardizes the lives of thousands of incarcerated people across the country," said Elizabeth Alexander, Director of the ACLU's National Prison Project. "Many states have already learned a painful lesson from their dealings with Correctional Medical Services. Maryland must avoid handing over the care of its prisoners and jail detainees to a company with a disastrous reputation."

Correctional Medical Services (CMS) currently holds contracts in 27 states. In Michigan, where the company provides care to prisoners statewide, CMS has come under heavy scrutiny for its attempts to save money by limiting prisoners' referrals to outside medical specialists. A federal court found that excessive delays in providing prisoners with referrals contributed to three deaths during an 18-month period. Five other prisoners who died during the same time period also experienced significant delays in treatment.

In May, the Maryland Board of Public Works announced that it would review a two-year statewide medical services contract between the state's Department of Public Safety and Correctional Services and CMS. The board awarded a new contract to CMS which was scheduled to begin July 1, 2005.

Under the new contract, CMS will provide care to more than 4,000 detainees confined at the Baltimore City Detention Center, which has come under fire in recent years for providing deficient medical care. In August 2002, the U.S. Department of Justice cited the jail for 107 violations of health and safety standards. Since 2002, the ACLU and Public Justice Center have been involved in litigation about the medical care provided at the Baltimore Jail by the current for-profit medical and mental health care provider, Prison Health Services.

Even with the significant rise in spending for the new contract, according to the state's estimates, health services are still underfunded by several million dollars. The ACLU and Public Justice Center expressed concern that simply switching for-profit providers without increasing resources to fund

treatment and maintaining close contract oversight will leave detainees with the same poor care they received under Prison Health Services.

"There is little point in changing company names if the continuation of inadequate funding and indifference from the state regarding detainee health remains the same," said Sally Dworak-Fisher, an attorney with the Public Justice Center. "In an environment without consistent outside oversight and inspection, the motivations of for-profit companies like CMS and Prison Health Services become dangerous. Cutting corners to preserve profits but risk the health and lives of detainees is inexcusable, and Maryland officials are responsible when the care is constitutionally inadequate."

MN Officials End Censorship of NPP Journal After Threat of Lawsuit

The American Civil Liberties Union in May applauded prison officials' policy revision allowing Minnesota prisoners in segregation to receive publications containing legal material. The policy change came on the eve of the ACLU's filing that would have challenged the censorship of the organization's legal journal for prisoners.

"Access to legal information is the most fundamental tool that prisoners have to protect their rights," said Teresa Nelson, an attorney for the ACLU of Minnesota. "Minnesotans value constitutional rights and the Department of Corrections' move to lift this ban on legal information should be congratulated."

Peter J. Orput of the Minnesota Department of Corrections officially notified the ACLU about the policy change. "I believe that this change in our segregation policy will assuage your concerns regarding the constitutional rights of segregation inmates to possess legal material," wrote Orput.

At issue was a Minnesota Department of Corrections directive that "[o]ffenders on disciplinary segregation are not allowed subscription magazines/newspapers and publications." The policy made no exception for legal publications. As a result, officials censored the ACLU's *National Prison Project Journal* and *Prison Legal News*.

Since the censorship policy was announced in April, the ACLU and other organizations had received complaints from subscribers about the ban. Until this year, Minnesota prisoners who subscribed to legal publications received their copies without incident. The newsletters teach prisoners about their rights to adequate medical and mental health care, protection from abuse, and many other criminal justice related issues. Nationally, several thousand prisoners purchase subscriptions to these publications.

"Minnesota's decision to reform its publication ban is the right one," said David C. Fathi, an attorney with the ACLU's National Prison Project. "Individuals confined in our nation's prisons and jails have limited access to legal information and materials. Censoring the little information available about the Constitution and the protections it provides against abuse and mistreatment stops prisoners from protecting themselves against unlawful treatment and conditions."

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

U.S. Court of Appeals Cases

Procedural Due Process--Disciplinary Proceedings/Qualified Immunity

Hanrahan v. Doling, 331 F.3d 93 (2d Cir. 2003) (per curiam). A disciplinary hearing officer can be held liable for an unconstitutionally imposed disciplinary sentence even after it has been administratively affirmed. (97 n. 4). The qualified immunity of the hearing officer is determined by the length of the sentence the hearing officer imposed and not by a reduced sentence imposed on administrative appeal, so if it was not clearly established that the

reduced sentence was atypical and significant, that doesn't give the hearing officer who imposed a longer sentence qualified immunity. Qualified immunity cannot be based on "unpredictable subsequent events" (99).

Rehabilitation/Theories--Due Process/Mental Health Treatment/Pendent and Supplemental Claims; State Law in Federal Courts/Pre-Trial Detainees/State, Local and Professional Standards

Allison v. Snyder, 332 F.3d 1076 (7th Cir. 2003). The plaintiffs, civilly committed under the state Sexually Dangerous Persons Act *before* trial, complained that they were held in a wing of a state prison, that their treatment includes self-accusatory features, and that it is conducted on a group rather than an individual basis.

The plaintiffs didn't argue that it is unconstitutional to hold them in a prison, but that the Constitution requires compliance with the least restrictive alternative principle of the state law and that they must be entirely segregated from the general prison population as state law requires. However, the Constitution does not require states to follow their own laws, and federal courts cannot enforce state laws directly. The relevant federal standard is the no punishment/professional judgment/reasonable relationship standard of *Youngberg v. Romeo* and *Seling v. Young*. Under *Wolfish*, placement in a prison subject to prison rules is not punishment. At 1079: "Our plaintiffs were not assigned to high-security institutions, solitary, lockdown, or otherwise onerous confinement." Also they are pre-trial detainees, so *Wolfish* authorizes the ordinary conditions of confinement.

The self-incrimination features of the treatment program are not unconstitutional, since their participation is voluntary. No one has ever been criminally prosecuted for acts admitted to during the program, but nothing in the state's rules prevents such information from being used in criminal proceedings. That is not a ground for recovery of damages. *Chavez v. Martinez* (US 2003) says (counting votes in the separate opinions) that damages may not be awarded for wrongfully eliciting information.

Detainees are entitled to non-punitive programs designed using professional judgment. Many professionals think that self-accusatory features are therapeutically essential and polygraphs are appropriate parts of treatment, and the fact that the Association for Treatment of Sexual Abusers recommends different programs from what defendants provide is neither here nor there. At 1081: "The Constitution does not command state officials to follow the majority view of a given professional association."

Treatment may be in groups and not individually tailored; the one contrary decision (*Ohlinger v. Watson*) presents no rationale and precedes *Youngberg*.

PLRA--Exhaustion of Administrative Remedies

Kozohorsky v. Harmon, 332 F.3d 1141 (8th Cir. 2003). The plaintiff sued officers for abusing him and a supervisor, Harmon, for refusing to take action against the officers, failing to train officers, and retaliating for his complaints. At 1143: "Because Kozohorsky did not exhaust his administrative remedies on his failure-to-supervise claim against Harmon, he failed to exhaust all available administrative remedies as to all of his claims."

The court reiterates its total exhaustion rule but says that the plaintiff has the option to amend his complaint to omit unexhausted claims. *Rose v. Lundy* allows such amendments to "mixed petitions" in habeas proceedings, the court thinks the rule is applicable here, and in fact such amendments have been permitted in prison conditions cases.

Federal Officials and Prisons/PLRA--Exhaustion of Administrative Remedies

Cox v. Mayer, 332 F.3d 422 (6th Cir. 2003). A case filed without exhausting is subject to dismissal even if the prisoner has been released by the time exhaustion becomes an issue. At 425: Plaintiff argued that dismissal would be inconsistent with the statute's policies because the case would just be refiled, resulting in "waste of judicial time and resources." "Stated differently and more plainly, plaintiff argues that to apply the statute as written in

this instance would be to contravene legislative intent. In this regard, plaintiff's argument is not without intuitive appeal." However, the statute is free of ambiguity and therefore should be applied as written without resort to legislative purpose.

Failure to exhaust cannot be cured by filing a supplemental complaint under Rule 15(d) recounting post-filing exhaustion.

At 425 n.2: The plaintiff filed a grievance, got no response; he didn't exhaust because he could have appealed to the next level even without a response.

Rehabilitation/Mental Health Treatment/Theories--Due Process

West v. Schwebke, 333 F.3d 745 (7th Cir. 2003). Persons civilly committed as "sexually violent persons" after the end of their prison sentences challenged the use of "therapeutic seclusion" (placement in a cell with only a concrete platform to sleep on, a toilet, and sink, sometimes without clothing; placement in shackles during the one hour a day out of cell on weekdays) for periods of time up to 82 consecutive days.

Under *Youngberg v. Romeo*, detainees are entitled to the exercise of professional judgment; "if professional judgment leads to the conclusion that restraints are necessary for the well-being of the detainee (or others), then the Constitution permits those devices. *Cf. Bell v. Wolfish* . . . (similar conclusion with respect to pretrial detainees, who like civil detainees are held for reasons other than punishment)." Defendants said this was fine for normal detainees but not for "'nontraditional' detainees who may be handled more roughly. The word 'nontraditional' is a mantra in defendants' briefs." But *Seling v. Young* quoted *Youngberg*, and it's about persons detained as sexually dangerous predators; so did *Foucha v. Louisiana*, about persons acquitted by reason of insanity. At 748:

> To the extent that plaintiffs are uncontrollably violent, and thus pose a danger to others, Wisconsin is entitled to hold them in segregation for that reason alone; preserving the safety of the staff and other detainees takes precedence over medical goals. . . . Just as a pretrial detainee may be put in isolation--indeed, may be *punished* for violating institutional rules, provided that the jailers furnish notice and an opportunity for a hearing . . .--so a civil detainee may be isolated to protect other detainees from aggression. Institutions may employ both incapacitation and deterrence to reduce violence within their walls--though if mental limitations render a detainee insensible to punishment, the only appropriate goal would be incapacitation. Either way, if at trial defendants can establish that their use of seclusion was justified on security grounds, they will prevail without regard to the question whether extended seclusion is justified as a treatment. There is nothing that invocation of [qualified] immunity can do for them, however, as long as the evidence is in conflict on the question *whether* a reasonable person could have thought the use of seclusion appropriate from a security perspective.

It was clearly established by *Foucha* that *Youngberg* applies to civil detainees who have committed criminal acts. The question is whether defendants' use of seclusion could be justified on either security or treatment grounds. Plaintiffs' expert affidavits say that the seclusion periods far exceeded what could be justified for security or treatment, and that is sufficient to require a trial. At 749: "To get anywhere on this appeal, defendants would have to establish that no decision by a person with an advanced degree is open to question in litigation. . . . What sets this case apart from others in which the defendants received immunity . . . is that respected experts have opined, on plaintiffs' behalf, that the defendants' choices exceed the scope of honest professional disagreement."

PLRA--Prospective Relief Provisions--Judgment Termination

The Para-Professional Law Clinic at SCI-Graterford, 334 F.3d 301 (3d Cir. 2003). Prison officials moved to terminate an injunction requiring a prisoner-run law clinic. Plaintiffs conceded that there was no current and ongoing constitutional violation, but said if the judgment is terminated there will be because the defendants will shut down the clinic. The court says that argument does not meet the PLRA's requirements. The court "encourages" the defendants in the "strongest terms" not to terminate the clinic.

Access to Courts--Law Libraries and Law Books/Habeas Corpus

Egerton v. Cockrell, 334 F.3d 433 (5th Cir. 2003). The absence of a copy of the Anti-Terrorism and Effective Death Penalty Act from the prison law library was a state-created impediment that tolled the AEDPA limitations period. At 438: "The absence of all federal materials from a prison library (without making some alternative arrangements to apprise prisoners of their rights) violates the First Amendment right, through the Fourteenth Amendment, to access to the courts."

Procedural Due Process

Biggs v. Terhune, 334 F.3d 910 (9th Cir. 2003). The California parole statute, which requires the parole board to set a release date for a prisoner unless it determines that the gravity of the convicted offense or past offenses mandate deferral of release, gives rise to a liberty interest in parole release. *Sandin* is inapplicable; it addresses internal prison discipline and has nothing to do with parole. The fact that this prisoner never got a release date does not mean that he never had a liberty interest. Due process is satisfied if some evidence supports the parole board's decision and the evidence underlying the decision has some indicia of reliability. State law permits the board to consider "a myriad of factors"; consideration of materials from a proceeding in another tribunal was an appropriate exercise of judicial notice. This petitioner was denied due process in that the parole board's finding of an escalating pattern of abuse was not supported by the record (he had been crime and discipline free for 13 months), nor was its finding of lack of remorse supported in light of numerous psychological reports and the prisoner's testimony to the contrary. However, the finding that the gravity of the offense and conduct before imprisonment precluded release did not deny due process. "Over time, however," if the petitioner continues his exemplary behavior, continued denial of a parole date based only on the nature of the crime and prior conduct would raise serious questions.

Ex Post Facto Laws/Good Time

Hunter v. Ayers, 336 F.3d 1007 (9th Cir. 2003). State law provided for prisoners who lost good time to get it back if they met objective criteria for avoiding discipline. Before the plaintiff's disciplinary offense, the statute was changed to allow the prison system to change the governing regulations. After his offense, the regulation was changed so good time could not be restored for serious disciplinary offenses.

Application of the new regulation to the prior disciplinary offense violated the Ex Post Facto Clause, since restoration of good time was not discretionary under prior law and therefore not a "speculative and attenuated possibility" in Ex Post Facto-speak.

Ex Post Facto Laws

Himes v. Thompson, 336 F.3d 848 (9th Cir. 2003). Application of a parole regulation that postdated the petitioner's offense and created a "significant risk of a more onerous sentence" violates the Ex Post Facto Clause. It need not be certain that the particular petitioner would serve more time. Here, a regulation that permitted the parole board to deny rerelease after parole revocation based on a finding of "aggravation" and allowed a range of intermediate sanctions was changed to require denial of rerelease and confinement until the expiration of sentenced based on that finding.

Procedural Due Process

Noel v. Norris, 336 F.3d 648 (8th Cir. 2003) (per curiam). At 649:

> Because clemency is extended mainly as a matter of grace, and the power to grant it is vested in the executive prerogative, it is a rare case that presents a successful due process challenge to clemency procedures themselves. *See Ohio Adult Parole Auth. v. Woodard*. . . . On the other hand, if the state actively interferes with a prisoner's access to the very system that it has itself established for considering clemency petitions, due process is violated. *See Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000).

The state's refusal to give the plaintiff more time to prepare for his clemency hearing and to allow him to undergo a brain-scan procedure to prove he had brain damage did not deny due process; he submitted a 400-page record including some evidence of brain damage.

PLRA--Exhaustion of Administrative Remedies

Thomas v. Woolum, 337 F.3d 720 (6th Cir. 2003). The plaintiff's grievance was filed after five months when the deadline was 30 days. He appealed all the way up. The incident he complained of had been investigated promptly and the officer who beat him was eventually fired. The plaintiff was awarded $70,000 in damages.

The court declines to reverse for failure to exhaust. Failure to comply with a prison grievance system's time limits does not constitute failure to exhaust. Exhaustion is not the same as procedural default. (725) The court thinks that civil rights statutes like Title VII are a better analogy to PLRA exhaustion than habeas corpus, and under Title VII, noncompliance with state procedural rules in the administrative process does not bar a subsequent federal action. (727 n.2) The danger that prisoners will purposefullly make procedural errors in prison grievance systems is not large, since it is not in prisoners' interest to do so–they might get a favorable decision in the grievance process if they do it right.

The court affirms the district court's denial of relief with respect to bystanding officers who were not named or mentioned in the grievance, even though they he did name them in the use of force investigation carried out shortly after the incident. At 733: ". . . [A] grievance that does not give officials notice of the nature of the inmate's grievance does not afford the officials the opportunity the PLRA requires." At 734: "Although an inmate need not identify each officer by name when the identities of the particular officers are unknown, Thomas here knew one on-looking officer's identity and knew that others had watched the beating as well. Accordingly, his grievance form should have noted either the other officers' names or the fact that other officers had seen the beating."

The plaintiff's cooperation in the use of force investigation, though it may have given notice to prison officials, doesn't exhaust under this circuit's law. At 734: "In determining whether the inmate has exhausted his or her remedies, we thus look to the inmate's grievance, not to other information compiled in other investigations."

Plaintiff argues that grievances need not be filed "against" particular defendants but are filed "regarding certain problems; accordingly, a grievance should be understood to exhaust remedies so long as it alerts prison officials to a problem to be investigated, whether or not it identifies specific individuals." *Sims v. Apfel* seems to support this position, the court explains at some length, but Sixth Circuit case law is to the contrary and this panel is stuck with it.

Pro Se Litigation

United States v. Fiorelli, 337 F.3d 282 (3d Cir. 2003). Delays in the delivery of an appealable order through a prison's mail system should be excluded from the time for filing a motion for reconsideration. The court has already so held in connection with notices of appeal, analogizing to the *Houston v. Lack* mailbox rule applicable to outgoing mail. There must be some allegation of actual delay or interference by the prison (as opposed to slow

mail), but the burden of establishing the relevant dates is on the prison, which is the party most likely to have access to the relevant evidence.

Marriage/Qualified Immunity/Attorneys' Fees/Consent Judgments

Toms v. Taft, 338 F.3d 519 (6th Cir. 2003). A prisoner and his fiancee sought to get married, but could not get a marriage license because state law requires both applicants to appear personally before the probate court; prison officials were unwilling to be designated as deputy clerks, as the probate court offered; and the probate court was unwilling to send a clerk to the prison. Eventually the injunctive claim was settled (an Assistant Attorney General was deputized as clerk), the plaintiffs married, and the injunctive claim was dismissed as moot with plaintiffs' consent.

At 527: "Although it was not previously clearly established, we now hold that the distinction between actively prohibiting an inmate's exercise of his right to marry and failing to assist is untenable in a case in which the inmate's right will be completely frustrated without officials' involvement. Therefore, when an inmate will be unable to marry without prison officials' affirmative assistance, *Turner*'s strictures apply."

Punitive Segregation/Punishment/Procedural Due Process--Disciplinary Proceedings/Cruel and Unusual Punishment/Hygiene/Clothing/ Furnishings/Heating and Ventilation/Negligence, Deliberate Indifference and Intent

Trammell v. Keane, 338 F.3d 155 (2d Cir. 2003). The plaintiff, held in SHU for disciplinary convictions, piled up more disciplinary violations in SHU (many for throwing various items and substances), and the sanctions imposed did not cure his behavior. Prison officials issued an order depriving him of all property except one pair of shorts, recreation, showers, hot water, and cell bucket; he was either deprived of toilet paper or ran out. His "nutriloaf" diet was also extended for abut 95 days. The other deprivations went on for about two weeks. A state court determined that the deprivation order "went too far" under state regulations by using deprivations as punishment and not for security reasons.

The plaintiff's Eighth Amendment claim is governed by the deliberate indifference standard. At 162:

> In *Farmer*, the Court made clear that the use of the "malicious or sadistic" standard was appropriate in excessive force cases in part because the decision to use force is generally "made in haste, under pressure, and frequently without the luxury of a second chance." *Farmer*. . . . We believe that standard to be inappropriate in the instant case where the disciplinary measures taken were preplanned and monitored.

However, the disciplinary measures at issue "plainly implicate prison safety and discipline. . . . Accordingly, the deliberate indifference standard must be applied in a way that accounts for the precise circumstances of the alleged misconduct and the competing institutional concerns." (163) The court notes that *Hope v. Pelzer* "took into account--as one would do in an excessive force case---whether the punishment was justified by 'any safety concern' in the prison." Therefore this case is no exception to the principle of "wide-ranging deference" in matters of order and discipline. At 163:

> Consequently, we ask not simply whether the [relevant] Order was imposed with "deliberate indifference" to Trammell's health and safety, for it is indisputable that the Order was intended to make Trammell uncomfortable in an effort to alter his behavior. Rather, we consider whether the Order was reasonably calculated to restore prison discipline and security and, in that purposive context, whether the officials were deliberately indifferent to Trammell's health and safety.

The court concludes that the deprivation order, "while

indeed onerous, even harsh, was reasonably calculated to correct Trammell's outrageous behavior." It notes that "Trammell held the keys to his own cell door, figuratively speaking, and could have rid himself of the harshest aspects of the Order by simply reforming his behavior." (164)

The defendants were also not deliberately indifferent to the plaintiff's health and safety; a nurse regularly observed him. The plaintiff said he was kept virtually naked for a "prolonged period in bitter cold," but he does not allege conditions or temperatures of the sort the court has cited in prior cases where prisoners alleged that they were "directly exposed for lengthy periods in winter weather." (165) He was certainly uncomfortable but there is no health or safety issue.

At 165: ". . . [d]eprivation of toiletries, and especially toilet paper, can rise to the level of unconstitutional conditions of confinement. . . ." However, it appears that the deprivation of toilet paper was inadvertent, and the two-week deprivation of other toiletries does not pose a risk to health or safety so obvious as to suggest defendants' deliberate indifference.

At 166:

> Unlike the defendants in *Hope [v. Pelzer]*, who implemented a particularly harsh disciplinary measure with no regard for the inmate's health, the less severe disciplinary measure here was regularly monitored by a nurse in order to ensure that his health was not jeopardized by the various deprivations imposed in response to his misconduct. Under such circumstances, the risk of harm to Trammell was not "obvious," as was the case in *Hope*.

Here, unlike *Hope*, the measures had a penological purpose because they were an attempt to control ongoing misconduct.

Searches--Person--Arrestees/Qualified Immunity

Savard v. State of Rhode Island, 338 F.3d 23 (1st Cir. 2003) (en banc). The lower court's judgment is affirmed by an equally divided court.

The plaintiffs were arrested for non-violent, non-drug-related misdemeanors, and strip searched incident to their detention at the Adult Correctional Institution (in Rhode Island the penitentiary and pre-trial detention functions are integrated). After their arrests, another decision struck down the practice of blanket strip searches.

The defendants were entitled to qualified immunity. Prior law striking down blanket strip searches in local jails or police stations did not address detention in a maximum security prison.

Sexual Abuse/Temporary Release/Qualified Immunity/Cruel and Unusual Punishment/Color of Law and Liability of Private Entities

Smith v. Cochran, 339 F.3d 1205 (10th Cir. 2003). The plaintiff alleged that she was raped by a state drivers' license examiner while on work release and working at a license examination center.

At 1212: "Sexual abuse is repugnant to contemporary standards of decency and allegations of sexual abuse can satisfy the objective component of an Eighth Amendment excessive force claim. . . . The right to be secure in one's bodily integrity includes the right to be free from sexual abuse." The plaintiff's allegations that the defendant forced her to expose herself and that he raped her on several occasions meet the objective requirement of the Eighth Amendment. They also meet the subjective prong. Sexual abuse or rape in itself is "sufficient evidence that force was used 'maliciously and sadistically for the very purpose of causing harm.' . . . Because there can be no legitimate purpose" for sexual abuse and rape, those allegations satisfy the malicious and sadistic standard. (1212-13)

The fact that the defendant license examiner was not a prison guard does not make the Eighth Amendment inapplicable. While "only prison officials and those to whom they delegate penological responsibilities for prisoners have Eighth Amendment duties and attendant liabilities" (1213), the plaintiff's placement at the Department of Public Safety encompassed a delegation of the prison system's penological function of supervising her behavior. At

1214: "In fact, the contract invoked a state law that extends, as a legal matter, the boundaries of the prisoner's place of confinement to the site of the plaintiff's public works project."

Procedural Due Process--Property/Personal Property

McIntyre v. Bayer, 339 F.3d 1097 (9th Cir. 2003). Nevada prisoners are required to keep their money in a personal property trust fund run by the state; it is pooled for interest purposes and the interest credited to a fund for the benefit of all prisoners. The relevant statute says that it does not create a right of prisoners to interest or income from the money. The district court initially found that the statute's retroactive application had unconstitutionally deprived the plaintiff of $3.93, but upheld the statute in its prospective application. After remand based on *Phillips v. Washington Legal Foundation* and a Ninth Circuit decision, the district court adhered to its finding of constitutionality.

Interest income is a property interest sufficiently fundamental that it can't be appropriated without implicating the Takings Clause. This statute, which takes the interest and spends it for the benefit of the prison population, takes it for public use. The question is whether any "just compensation" is due. The court must determine whether the interest accrued exceeds the costs of administering the fund. Here, it does not in the aggregate (the costs of administration were almost $400,000, while the interest transferred was slightly over $100,000, in the most recent fiscal year). But the question is whether the interest earned by *plaintiff's* principal exceeds *his share* of the fund's administrative costs, and the court vacates and remands for that determination.

PLRA--Special Masters/Cruel and Unusual Punishment/Class Actions/Use of Force

Webb v. Goord, 340 F.3d 105 (2d Cir. 2003) (Pooler, J., with Sack and B.D. Parker concurring). Thirty prisoners sued 14 superintendents, 50 officers, and 100 officer John Does, plus the administrators of the system, for various instances of excessive force, assault by other prisoners attributed to staff failures, and denial of medical care, extending over a period of 10 years.

The case was not pled as a class action, but the plaintiffs rely on class action law, so the court explains to them that in such a case you have to have a policy or practice through the system, or at least in a facility, so as to make a "sustainable lawsuit" with "manageable discovery" or a "reasonable trial." (109) Same here. At 110: "The sheer diffuseness of the plaintiffs' allegations completely subverts their federal law claims." You can't find a prison system unconstitutional based on "a series of discrete incidents . . . over a long period of time."

The plaintiffs haven't shown that 40 unrelated incidents over 10 years at 13 prisons can establish an Eighth Amendment claim. At 110: "Specifically, the necessary foundation of a finding that a prison *system* has violated the Eighth Amendment is evidence of a concerted intent among prison officials, one expressed through discernable regulations, policies or practices. . It is impossible for us to be more precise here without resorting to the vocabulary of metaphysics, but we hope we are not misunderstood when we assert that an accumulation of incidents--we do not say 'a *mere* accumulation'--does not necessarily amount to a qualitative violation of the Eighth Amendment."

PLRA--Exhaustion of Administrative Remedies

Johnson v. Jones, 340 F.3d 624 (8th Cir. 2003). Dismissal is required if the plaintiff did not complete exhaustion before filing his complaint.

Federal Officials and Agencies/PLRA--Exhaustion of Administrative Remedies

Perkins v. Hedricks, 340 F.3d 582 (8th Cir. 2003). A claim by a civilly committed person at the Federal Medical Center in Springfield was not required to be exhausted because he was not a prisoner under the PLRA.

Good Time/Habeas Corpus

Hadley v. Holmes, 341 F.3d 661 (7th Cir. 2003). The petitioner challenged a change in state good time law that restricted his ability to earn

discretionary good time in the future. That claim should have been brought under § 1983 rather than habeas corpus. It is analogous to disputes about parole release procedures, which the Supreme Court has analyzed under § 1983.

Procedural Due Process

Paige v. Hudson, 341 F.3d 642 (7th Cir. 2003). The plaintiff was sentenced to spend six months in a "home detention" program as a condition of probation; he was arrested on probation revocation charges, jailed for three days, and then reinstated on probation.

Removal from home detention to jail is a "sufficiently large incremental reduction in freedom to be classified as a deprivation of liberty under the *Sandin* doctrine." (643)

Procedural Due Process--Disciplinary Proceedings/Habeas Corpus

Piggie v. Cotton, 342 F.3d 660 (7th Cir. 2003) (per curiam). At 666: "Although prison disciplinary committees may deny witness requests that threaten institutional goals or are irrelevant, repetitive, or unnecessary, they may not exclude witnesses requested by an offender with no explanation at all. . . . Nor may staff members simply refuse to appear based on a blanket institutional policy." However, the failure to call the witness or provide a reason was harmless error in the absence of any showing of prejudice by the plaintiff.

The fact that the disciplinary board charged the plaintiff as a habitual rule violator after four violations, while others were not charged until after more violations, did not show the board was not impartial. At 667: "Due process does forbid officials who are directly or substantially involved in the factual events underlying the disciplinary charges, or the investigation thereof, from serving on the board hearing the charge." However, disqualifying anyone who was involved with an earlier disciplinary proceeding from adjudicating a subsequent habitual violator charge would be "infeasible" (dictum).

Religion--Practices--Diet/Equal Protection/Evidentiary Questions/Deference/Summary Judgment

Williams v. Morton, 343 F.3d 212 (3d Cir. 2003). The plaintiffs sued for failure to serve Halal food to Muslims; instead, the prison served a vegetarian diet for persons who couldn't eat the regular diet for religious reasons (except for the four Jews, who got kosher food with meat). The plaintiffs alleged a religious belief that they had to eat Halal meat.

The practice does not violate the Free Exercise Clause. (Apparently no statutory claims were pled.) It is connected to the legitimate penological interests of simplified food service, prison security, and budgetary constraints, since to serve Halal meat, prison officials would have to "coordinate a new program for food service that would require more kitchen help and could potentially cause problems between prisoners," and there was no evidence that Halal meat could be provided "in a cost efficient manner or within the prison's budget." (217) One witness's concession that it "would be no great problem" to serve Halal meat doesn't create a material issue of fact in light of an official's testimony that it would cause a "considerable disruption" and that each Halal meat meal would have to pass individually through an x-ray machine, and they would create "additional security concerns." (218) The fact that providing Jewish inmates with kosher food costs $3650 a year *apiece* does not make it unreasonable to refuse to spend $280 a year per person on Muslims, since there are 225 Muslims. The court says that under the relevant standard (218), "Prisoners have the burden of disproving the validity of of the regulation. It is not enough to show there are different views as to the relevant issues and underlying facts." (This on a motion for *summary judgment*.)

The prisoners have an alternative way of following their dietary laws, and they are permitted various other forms of religious practice; in fact, they showed no other way in which their religious expression was not being accommodated.

The impact of accommodation on guards and other inmates weighs in prison officials' favor, since even if some food is not x-ray scanned, it would all

have to be searched coming into the prison. The district court concluded that providing Halal food to everybody, which would simplify things, could be viewed as "imposing Islam on the whole prison community." The court distinguishes its prior *DeHart* decision on the ground that the Buddhist plaintiff in that case was asking only for a cup of soy milk to be added to existing meals, and there was only one of him. There are no ready alternatives at *de minimis* cost.

The *Turner* standard does not require prisoners to establish that a challenged policy "substantially burdens" their beliefs; if the belief is sincere, the court determines only if the challenged practice is reasonable under *Turner* (217).

The differential treatment of Jews and Muslims did not deny equal protection, since Jews did not receive meat; a statement to the contrary was retracted by the person who made it.

The district court was not required to exclude the late-identified testimony of the Deputy Commissioner because he did not take the position during the discovery period and the plaintiffs were given adequate opportunity to depose him and supplement the record.

Pre-Trial Detainees/PLRA--Prospective Relief Provisions--Termination of Judgments

Benjamin v. Fraser, 343 F.3d 35 (2d Cir. 2003). Pretrial detainees challenging environmental conditions of jails must show deliberate indifference, but it may generally be presumed from an absence of reasonable care. (49) The district court's finding of deliberate indifference "was primarily based on the City's failure to remedy serious violations to which it had long been alerted. . . ." (51) Detainees need not show "wantonness or, more specifically, that officials knew of and disregarded an excessive risk to inmate health or safety." That requirement "is unique to Eighth Amendment claims, stemming from that amendment's prohibition of cruel and unusual *punishments* as opposed to cruel and unusual *conditions*. . . . [I]n a challenge by pretrial detainees asserting a *protracted* failure to provide safe prison conditions, the deliberate indifference standard does not require the detainees to show anything more than actual or imminent substantial harm." At *id.* n. 18: "In other types of challenges--for example, when pretrial detainees challenge discrete judgments of state officials--meeting the deliberate indifference standard may require a further showing."

The defendants' compliance efforts do not protect them from liability; the district court found that the violations "were, for the most part, 'continuations of deficiencies that have been known, obvious, and commented upon . . . for years,' and that the City's remedial efforts were largely ineffective." (51-52)

Heating and Ventilation (52): The court's finding of constitutionally inadequate ventilation was adequately supported by "the presence of large numbers of inoperable windows, clogged or dirty ventilation registers and exhaust vents in showers and cells, and poor air quality" and "specific findings concerning the threatened and actual health hazards resulting from these conditions." The finding of inadequate heat and extreme temperatures was adequately supported by "the evidence of extreme temperatures, including no heat at all at times during the winter, [that] was essentially uncontroverted."

Lighting (52): "In finding constitutionally inadequate lighting at nine facilities, the district court found, among other things, that inmates on occasion were left with inoperable lights in their cells for days on end, . . . and that in some cells where the lighting fixtures did work, the light emitted was barely discernible. . . ." The court affirms the finding of unconstitutionality based on the lower court's findings of: "(1) non-working light fixtures; (2) inadequate light-bulb wattage; and (3) obstructed luminary covers." However, it remands the question of how many foot-candles of light are required to ensure that the court imposes a remedy based on actual lighting conditions.

Crowding, Heating and Ventilation (53): The court rejects on PLRA grounds the requirement, as an element of ventilation remedy, that beds be spaced so that detainees' heads are six feet apart, because the record contains no showing of "actual or imminent substantial harm."

Heating and Ventilation (53-54): The court affirms the district court's finding that it is less intrusive to require all windows to be made operational rather than considering the utility of each window individually, since "a comprehensive repair program would be more effective and less intrusive than an individual review of each window at the various facilities."

Pest Control, Injunctive Relief--Changed Circumstances (57): The district court's finding of no constitutional violation with respect to vermin infestation in living areas, which was premised on the very recent introduction of an "Integrated Pest Management" program, is affirmed. Though under the PLRA the courts should assess a record made as of the time termination is sought, the record may include "bona fide steps that prison officials are taking to alleviate poor prison conditions." (57)

Correspondence--Legal and Official/Damages--Intangible Injuries

Sallier v. Brooks, 343 F.3d 868 (6th Cir. 2003). The Sixth Circuit rules comprehensively on legal mail confidentiality. At 873-74:

> A prisoner's right to receive mail is protected by the First Amendment, but prison officials may impose restrictions that are reasonably related to security or other legitimate penological objectives. . . . As we have noted, "prison officials may open prisoners' incoming mail with an eye to maintaining prison security." . . . However, prison officials who open and read incoming mail [874] in an arbitrary and capricious fashion violate a prisoner's First Amendment rights.
>
> Moreover, when the incoming mail is "legal mail," we have heightened concern with allowing prison officials unfettered discretion to open and read an inmate's mail because a prison's security needs to not automatically trump a prisoner's First Amendment right to receive mail, especially correspondence that impacts upon or has import for the prisoner's legal rights, the attorney-client privilege, or the right of access to the courts. . . .
>
> In an attempt to accommodate both the prison's needs and the prisoner's rights, courts have approved prison policies that allow prison officials to open "legal mail" and inspect it for contraband in the presence of the prisoner. *See, e.g., Wolff v. McDonnell.* . . . "Opt-in" systems that require prisoners to request affirmatively that privileged mail be opened only in their presence are constitutionally sound "as long as prisoners received written notice of the policy, did not have to renew the request upon transfer to another facility, and were not required to designate particular attorneys as their counsel." (874)

Id.: "Not all mail that a prisoner receives from a legal source will implicate constitutionally protected legal mail rights. Indeed, even mail from a legal source may have little or nothing to do with protecting a prisoner's access to the courts and other governmental entities to redress grievances or with protecting an inmate's relationship with an attorney."

At 875: "In general, when there is no specific indication to the contrary, an envelope from an organization such as the ABA may be opened pursuant to the regular mail policy without violating the First Amendment rights of a prisoner." "Specific indication to the contrary" seems to mean markings on the envelope to alert prison staff that it should be opened in the prisoner's presence.

Mail from county clerks is not privileged legal mail because county clerks don't provide legal advice or direct legal services and don't have authority to take direct action on a prisoner's behalf. Therefore such mail "does not implicate a prisoner's right of access to the courts, of petitioning the government to redress grievances, or of competent representation by

counsel." (876) The issues county clerks deal with--birth, marriage, or death certificates, tax and real estate services, automobile title, etc., "are not the types of legal matters that raise heightened concern or constitutional protection."

Mail from state and federal courts "will frequently, but not necessarily, involve a currently pending legal matter affecting the prisoner's rights." (876) The court rejects the Seventh Circuit's holding that since court mail involves matters of public record, it is not privileged. In some cases the correspondence involves complaints that have not yet been filed publicly. At 877: "In order to guard against the possibility of a chilling effect on a prisoner's exercise of his or her First Amendment rights and to protect the right of access to the courts, we hold that mail from a court constitutes 'legal mail' and cannot be opened outside the presence of a prisoner who has specifically requested otherwise."

At 877-78:

> We find that the prisoner's interest in unimpaired, confidential communication with an attorney is an integral component of the judicial process and, therefore, that as a matter of law, mail from an attorney implicates a prisoner's protected legal mail rights. . . . . There is no penological interest or security concern that justifies opening such mail outside of the prisoner's presence when [878] the prisoner has specifically requested otherwise.

The defendants are entitled to qualified immunity on the claims about court mail, but not attorney mail.

A jury award of $750 in compensatory damages and $250 in punitive damages for each violation "is not clearly excessive, does not show the jury acted from passion, bias, or prejudice, and does not shock our judicial conscience." (880) The court says absolutely nothing about the theoretical basis for awarding damages for intangible violations or about the PLRA mental/emotional injury provision.

Grievances and Complaints about Prison/Summary Judgment/PLRA--Screening and Dismissal

Hart v. Hairston, 343 F.3d 762 (5th Cir. 2003) (per curiam). A retaliation claim requires a prisoner to allege "(1) a specific constitutional right, (2) the defendant's intent to retaliate against the prisoner for his or her exercise of that right, (3) a retaliatory adverse act, and (4) causation." (764, citation omitted) Retaliation for complaining about staff's misconduct is unlawful. The plaintiff alleged a "chronology of events" showing retaliatory motive, since the disciplinary charge was based on a grievance. The 27 days of commissary and cell restriction constituted an "adverse act." Causation was shown by the direct link between complaint and punishment.

Defendants argued that the 27 days' loss of privileges was *de minimis*. At 764: "Although we have not specifically addressed the quantum of injury necessary to constitute an 'adverse act' for purposes of a retaliation claim, the penalties imposed on Hart do not qualify as *de minimis* under various standards cited by other circuits."

PLRA--Exhaustion of Administrative Remedies/Searches--Person--Convicts

United States v. Carmichael, 343 F.3d 756 (5th Cir. 2003). The federal DNA Act requires collection of DNA samples from "qualified" persons by Bureau of Prisons officials. Neither the text nor the legislative history suggest any part for district courts at sentencing in the process. This contrasts with provisions for DNA sampling as a condition of placement on supervised release and probation, which require courts to order it. DNA sampling is not analogous to restitution, criminal forfeiture, or special assessments, which constitute part of a criminal sentence, since each of these requires a district court order. Therefore it is a "prison condition" for purposes of the PLRA. Conditions of confinement claims are not limited to complaints such as cell overcrowding and inadequate medical care; *Porter v. Nussle* says that they include prisoner petitions alleging not only "continuous conditions," but also

"isolated episodes of unconstitutional conduct," and implicate "all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." At 761: "Accordingly, we hold that the DNA Act's provision for the BOP's collection of federal offenders' DNA during incarceration is not part of appellants' sentence, but is rather a prison condition that must be challenged through a separate civil action after exhaustion of administrative remedies."

Grievances and Complaints about Prison/Procedural Due Process--Disciplinary Proceedings/PLRA--Exhaustion of Administrative Remedies/Summary Judgment/Use of Force

Scott v. Coughlin, 344 F.3d 282 (2d Cir. 2003). The plaintiff alleged that after he submitted a statement supporting another prisoner's excessive force claim, he was singled out for a pat frisk, subjected to excessive force, and falsely disciplined. In a separate incident, after filing a complaint about an officer who confiscated his legal papers, he was subject to harassment and physical abuse, and falsely disciplined.

At 287-88 (citations omitted):

> To establish a *prima facie* case of First Amendment retaliation, a plaintiff must establish "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action." . . . Conclusory allegations or denials are ordinarily not sufficient to defeat a motion for summary judgment when the moving party has set out a documentary case. . . . Yet, in a retaliation case that is supported by detailed and persuasive factual allegations summary judgment without full discovery may be inappropriate. . . . Regardless of the presence of retaliatory motive, however, a defendant may be entitled to summary judgment if he can show dual motivation, *i.e.*, that even without the improper motivation [288] the alleged retaliatory action would have occurred. *See Mt. Healthy* . . . . Plaintiff has the initial burden of showing that an improper motive played a substantial part in defendants' action. The burden then shifts to defendant to show it would have taken exactly the same action absent the improper motive. . . .

Accord, *Bennett v. Goord*, 343 F.3d 133 (2d Cir. 2003). The plaintiff's "involvement in filing claims against prison officials and helping others do so was protected activity, as it was an exercise of his right to petition the government for redress of grievances under the First Amendment." (288)

Procedural Due Process--Disciplinary Proceedings/Habeas Corpus

Piggie v. Cotton, 344 F.3d 674 (7th Cir. 2003). The prisoner petitioner has a liberty interest protected by due process in earned-credit time *and* his credit-earning class, which was reduced as a disciplinary sanction.

The petitioner asked for a witness, prison officials said the witness refused to cooperate, but the witness says in an affidavit that that's not true. However, neither the witness nor the petitioner says how the witness might have helped him in his hearing, so relief was properly denied.

The refusal to let the petitioner see the videotape that was used as evidence against him denied due process. This court has held that the *Brady* rule applies in prison disciplinary proceedings "to insure that the disciplinary board considers all of the evidence relevant to guilt or innocence and to enable the prisoner to present his or her best defense. . . . Accordingly, an inmate is entitled to disclosure of material, exculpatory evidence in prison disciplinary hearings unless such disclosure would unduly threaten institutional concerns." (678)

The fact that the *Brady* rule has not been

applied to prison disciplinary proceedings by the Supreme Court does not mean it can't be enforced in habeas under AEDPA. The Seventh Circuit once suggested that in habeas proceedings challenging prison discipline, prisoners must show that the challenged conduct was unlawful under decisions of the Supreme Court. However, it has since disapproved that suggestion, since prison disciplinary boards are not "courts" for habeas purposes.

On remand, the district court should determine whether the state had a valid security reason for failing to disclose the tape; and, if not, did the tape contain exculpatory information; and, if so, was the error harmless? At 679: "We have never approved of a blanket policy of keeping confidential security camera videotapes for safety reasons, . . . and the logistics of the prison surveillance system are not at issue here because . . . [the petitioner] knew he was being videotaped [with] a hand-held camera." Where is it not apparent whether the tape is exculpatory or not, "minimal due process" requires that the district court review the tape *in camera*. (679)

Personal Property/Procedural Due Process--Property/Grievances and Complaints about Prison

Vance v. Barrett, 345 F.3d 1083 (9th Cir. 2003). A state statute provided for crediting monies earned by and sent to prisoners to their prison accounts. The Department of Prisons required all prisoners to sign an agreement in order to be eligible for prison employment which provided that their savings accounts would not accrue interest for their sole benefit. The plaintiffs refused to sign the agreement, were fired, and brought this suit alleging retaliation for exercising their constitutional rights.

The plaintiffs raised claims under the Takings Clause and the Due Process Clause. At 1089 (footnotes and citations omitted):

> . . . [T]he protections afforded by each are distinct. The Takings Clause limits the government's ability to confiscate property without paying for it. It is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." . . . The Due Process Clause, on the other hand, requires that the government provide appropriate procedural protections when taking such property--with or without compensation.

Id. n.6: Both these claims depend on the existence of an underlying constitutionally protected property interest. The court has previously held that interest on prisoner accounts is a constitutionally protected property interest, both as a result of state statute and as an independent constitutional matter.

The Takings Clause analysis is confined to those deductions that were authorized by statute; actions officials took without statutory authorization were done without any authority, and are analyzed under the Due Process Clause.

Officials have the right to deduct expenses incurred in creating and maintaining the prisoners' accounts. Reasonable user fees for the reimbursement of the cost of government services are permissible, and absent any allegation that the charges were unreasonable or unrelated to administration of the accounts, the Takings Clause challenge fails.

At 1090: "Without underlying authority and competent procedural protections, NDOP could not have constitutionally confiscated the net accrued interest." Since officials had neither statutory authority nor a procedure, the plaintiff's due process claim is valid.

The "well-settled doctrine of unconstitutional conditions" says that government may not require a person to give up a constitutional right in exchange for a discretionary benefit that has little or no relationship to the property. That doctrine applies in prison, but the law is unclear whether the standard "essential nexus/rough proportionality" test or the *Turner* standard governs. Also, the standard test is directed towards Takings Clause claims, not procedural due process claims, and they may be different. So the defendants are entitled to qualified immunity on the unconstitutional conditions claims.

The plaintiff prevails on his claim of retaliation for refusing to waive protected rights.

Defendants could prevail if their action advanced legitimate goals and was tailored narrowly to them, but here they don't have a legitimate goal. Their interest in recouping costs and running the prisons efficiently "does not extend to avoiding the limits placed upon them by the state legislature and failing to provide constitutionally adequate procedural protections." (1093)

Procedural Due Process--Disciplinary Proceedings/Disabled/Equal Protection/Classification--Race

Serrano v. Francis, 345 F.3d 1071 (9th Cir. 2003). The wheelchair-bound plaintiff alleged that prison officials refused to allow him to present live witness testimony at a disciplinary hearing.

There is no single standard for determining whether a prison hardship is atypical and significant; the court looks to

> whether the challenged condition "mirrored those conditions imposed upon inmates in administrative segregation and protective custody," and thus comported with the prison's discretionary authority; (2) the duration of the condition, and the degree of restraint imposed; and (3) whether the state's action will inevitably affect the duration of the prisoner's sentence. . . .
>
> Typically, administrative segregation in and of itself does not implicate a protected liberty interest.
>
> . . .

However, the plaintiff "wallowed in a non-handicapped-accessible SHU for nearly two months--25 days of which immediately followed" his being sentenced to a year in SHU. He was denied use of his wheelchair and alleges he could not take a proper shower, had to drag himself onto the toilet with his arms, could not go to the yard, and had to drag himself around a vermin-infested floor. Here, "the conditions imposed on Serrano in the SHU, by virtue of his disability, constituted an atypical and significant hardship on him." (1079, footnote omitted) At 1079:

> . . . [T]he placement of a wheelchair-reliant inmate into an unequipped administrative segregation facility worked an atypical and significant hardship on Serrano in relation to the ordinary incidents of prison life. The removal of his wheelchair dropped him from the relative baseline status that he maintained outside administrative segregation and forced him to endure a situation far worse than a non-disabled prisoner sent to the SHU would have to face.

A blanket denial of live witnesses at a disciplinary hearing is impermissible, even where authorities allowed interviewing of witnesses outside the disciplinary procedure. The hearing officer cannot rely on a regulation that says witnesses will be called unless the appearance would endanger the witness, the official determines the witness has no relevant additional information, or the witness is unavailable, provides no defense, since it also calls for the hearing officer to document the reasons for refusing.

The hearing officer is entitled to qualified immunity because the court has never dealt with the question of the effect of disabilities on the existence of liberty interests in segregation.

The plaintiff alleged sufficient facts to go to trial on a claim that the decision to disallow live testimony was racially motivated. The hearing officer said that he didn't "know how black people think" and made references to the ongoing O.J. Simpson trial.

Personal Property/Procedural Due Process--Property

Schneider v. California Dep't of Corrections, 345 F.3d 716 (9th Cir. 2003). California prisoners are allowed to establish savings accounts that pay interest and Inmate Trust Accounts (ITAs) that do not pay interest; a prisoner must have an ITA to make canteen purchases and must keep at least $25 in it to maintain a savings account. Interest earned on the ITA money is not paid to the prisoners but to an Inmate Welfare Fund.

Allocation of interest on the ITAs to the

Inmate Welfare Fund is a taking of property "because it appropriates the interest earned by the ITAs and allocates them [sic] for a public use." (720) The district court found that the expense of administering an interest-bearing ITA system would be larger than the interest generated, leaving nothing for distribution. At 720: "Notwithstanding the district court's reliance on these average cost estimates, there remains the fundamental question for takings purposes of whether an *individual* inmate was deprived of any net interest." At 721:

> For takings purposes, . . . the relevant inquiry is not the overall effect on fund administration but whether any of the *individual* inmates themselves have been deprived of their accrued net interest. The government is not absolved of its constitutional duty to pay "just compensation" to an individual whose property has been taken for public use merely because the same government has benevolently conferred value on another affected property owner. Indeed, even if the total costs of operating a pooled fund outweigh the total interest generated, individual account holders in that fund are not precluded, on a proper showing, from enjoyment of their constitutionally protected property rights.

The relevant law has been in a "state of flux," so the defendants are entitled to qualified immunity.

The court notes that the state has stopped putting the ITA money in an interest-bearing account. At 722 n.3: "Curiously, California appears concerned that it would actually have to compensate individual prisoners for their net accrued interest and sought to forestall such calamity by eliminating deposits of ITA funds to the State treasury system altogether." The court reserves comment on the propriety of that action.

Medical Care--Standards of Liability--Deliberate Indifference/Medical Care--Denial of Ordered Care/Summary Judgment/Protection from Inmate Assault

Scicluna v. Wells, 345 F.3d 441 (6th Cir. 2003). The plaintiff's skull was fractured by another prisoner; he said he had previously told his counselor and unit manager that the assailant (his co-defendant) had a hostile relationship with him, and called to his attention the prison regulation concerning "known conflict situations," but no action was taken to transfer either of them. After the attack, a civilian emergency physician removed part of his skull and recommended continued treatment including cranioplasty. Rather than authorize further surgery, the prison's Medical Director recalled him from the hospital, prescribed Dilantin, and sent him for a neurosurgical consultation to a prison that could not provide a neurosurgical consultation. The Medical Director said he didn't know and wasn't deliberately indifferent. He was then transferred to a second facility with an order for the consultation, but wasn't seen for 20 days, at which time a doctor determined that his level of Dilantin was toxic and he still needed the consultation. He was then transferred two and a half months later to another facility in the same complex as the one he had initially been transferred from, and was put back under the care of the same Medical Director.

The plaintiff's deposition testimony that he told the unit manager about the risk is sufficient to defeat summary judgment; as the district court recognized, documentary testimony is not necessary.

The unit manager is not entitled to qualified immunity on the ground that he could not have known that "failure to follow up on general information pertaining to an inmate-housing conflict situation would expose the official to liability," since the plaintiff testified he had "far more than general information" before him, *i.e.*, information about a specific threat, and the prison regulation requiring the segregation of former co-defendants because of the risk of assault. The plaintiff, therefore, "was a member of an identifiable group of prisoners for whom risk of assault was a serious problem. . . ." (445, citation omitted).

This is important. Courts often brush aside

evidence of violation of prisons' internal regulations as not constituting evidence of deliberate indifference. This court has provided a rationale for giving such a regulation considerable weight in the deliberate indifference analysis.

The doctor who sent the plaintiff to a prison where he couldn't get the care he was sent for was not entitled to summary judgment; he supplied no affidavit in support of his statement that he didn't know theplaintiff wouldn't get care, but the plaintiff testified under oath that the doctor did know (not clear how the plaintiff knew that). He was not entitled to qualified immunity, even though there wasn't a case in point. At 446: "Transferring a prisoner in need of urgent medical attention to a facility that the official knows is unable to provide the required treatment is conduct that would alert a reasonable person to the likelihood of personal liability."

The doctor who didn't see the plaintiff for 20 days despite his serious and urgent condition said that he was entitled to summary judgment because there was no evidence he even knew the plaintiff was there. At 446: "In the absence of an explanation for the delay, however, a reasonable inference arises that Harvey purposefully ignored the emergency-treatment report specifying that Scicluna required an 'immediate neuro consult.'" He wasn't entitled to qualified immunity either. At 447: "Knowingly waiting three weeks to examine a prisoner referred to one's care for urgent attention is conduct that a reasonable prison official in 1992 should have known would subject him to personal liability."

Use of Force

Martinez v. City of Oxnard, 337 F.3d 1091 (9th Cir. 2003). The plaintiff alleged that a police officer "brutally and incessantly questioned him" after he had been shot in the face, back, and leg (eventually causing blindness and partial paralysis), and interfered with his medical treatment while he was screaming in pain and going in and out of consciousness. The Supreme Court reversed this court's holding that those facts stated a violation of the Fifth Amendment's privilege against self-incrimination regardless of whether his statements were ever used in a trial, but left open the possibility that they stated a violation of the plaintiff's clearly established Fourteenth Amendment due process rights. They do.

U.S. District Court Cases

Procedural Due Process--Administrative Segregation/Classification

Miller v. McBride, 259 F.Supp.2d 738 (N.D.Ind. 2001). There is no constitutional right to a hearing when a prisoner is removed from protective custody.

Procedural Due Process--Temporary Release/Grievances and Complaints about Prison/Pleading

Segreti v. Gillen, 259 F.Supp.2d 733 (N.D.Ill. 2003). The plaintiff was on work release. He alleged that he had a dispute with an officer, filed a grievance against the officer, who then filed a false disciplinary report against him; the officer was allowed to participate in the hearing and dictated its result. He was transferred and could no longer participate in work release.

The plaintiff alleged a sequence of events which could support a claim of retaliation, which is all that is required at the pleading stage.

The plaintiff had a liberty interest in staying in work release, which is analogous to parole; removal from it is an "'atypical and significant hardship [upon an inmate] in relation to the ordinary incidents of prison life. [Citations omitted] Therefore, the inmate has a statutory liberty interest in participation in the work-release program, once it has been awarded pursuant to [statute], which cannot be terminated without due process." (If the analogy is parole, then the liberty interest would be constitutionall based and not statutory. Also, application of the *Sandin* "atypical and significant/ordinary incidents of prison life" standard to a work release case doesn't make much sense, since the prisoner is being subjected to what most prisoners get.)

PLRA--Exhaustion of Administrative Remedies/

Burgess v. Morse, 259 F.Supp.2d 240 (W.D.N.Y. 2003) (Larimer, J.). The court dismisses for non-exhaustion. It notes that the plaintiff "will likely face expired administrative deadlines. Therefore, the Court *directs* that the IGRC Supervisor consider referral from this Court a mitigating circumstance for any such untimely filing." (247, emphasis supplied) But the court implicitly rejects any emergency exception to the exhaustion requirement (at 247):

> Though the rule requiring dismissal at first glance may appear to be harsh, it must be applied here. The rationale underlying the PLRA's exhaustion requirement is based on the goals of resolving inmate grievances quickly, expeditiously remedying errors by prison officials, and streamlining and clarifying issues that may need to be decided in a subsequent federal court action. *Neal*, 267 F.3d at 122. To allow plaintiff to file his complaint and a motion for a temporary restraining order, and then exhaust his administrative remedies with prison officials would undermine the exhaustion requirement altogether. *Id.*

The court directs plaintiff to file the necessary grievance with the IGRC on the appropriate form within 30 days of receiving this decision.

PLRA--Exhaustion of Administrative Remedies

Morgan v. Maricopa County, 259 F.Supp.2d 285 (D.Ariz. 2003). The court, contrary to the great weight of authority, dismisses for non-exhaustion despite the fact that the complaint was not filed until after the plaintiff's release, criticizing and denying the relevance of the Ninth Circuit's decision in *Page v. Torrey*, where the plaintiff was civilly committed after a criminal sentence and the court held that only current criminal incarceration makes one a prisoner for PLRA purposes. In other words, this court holds that a statute that says prisoners must exhaust means that people who are not prisoners must exhaust.

Publications/Religion/Injunctive Relief--Preliminary

Neal v. Lewis, 259 F.Supp.2d 1178 (D.Kan. 2003). The Kansas prison system allows prisoners 15 books in their cells, consisting of one primary religious text, one dictionary, one thesaurus, and 12 others of the prisoner's choice, not to exceed a cumulative value of $100. The plaintiff alleged that the confiscation and destruction of excess books violated his religious rights.

The court grants a preliminary injunction against destroying the books removed from the plaintiff's cell and requiring the prison to make them available to the plaintiff by exchange that will keep him within prison regulations. Constitutional violation constitutes irreparable injury. The balance of harms favors the plaintiff, since though the books could be paid for if destroyed, interference with his religious rights is a greater injury. The threatened injury to the prison from holding the books is minor. At 1181: "The promotion of the constitutional right of freedom to exercise one's religious beliefs is one deeply rooted in this nation's history. The protection of this right is always in the public's best interest and this case, being inside a prison, is no exception." There is a fair ground for litigation of the issue.

PLRA--In Forma Pauperis Provisions--Applicability

United States v. Boyd, 259 F.Supp.2d 699 (W.D.Tenn. 2003). The PLRA (here, the filing fees provisions) "does not apply to appeals of orders denying § 2255 motions." (710)

Sexual Abuse/Municipalities/Pendent and Supplemental Claims; State Law in Federal Courts

Faas v. Washington County, 260 F.Supp.2d 198 (D.Me. 2003). The plaintiff was sexually abused by a jail officer on two occasions. The plaintiff denied this conduct when jail administrators investigated based on another prisoner's report. She filed a grievance upon leaving the jail and the officer

was suspended and a criminal investigation begun.

Evidence of prior sexual misconduct by officers in the jail precludes summary judgment for the municipality. At 206: "Sexual misconduct by the corrections officers towards inmates, consensual or otherwise, if it were a common practice, may have contributed to the environment in which, ultimately, Plaintiff was sexually assaulted." Evidence of other inappropriate relationships between staff members and inmates may also support the claim even though the staff members were investigated and disciplined.

The plaintiff's failure to train claim is rejected, since the officer was trained not to sexually assault inmates, jail policy was to the same effect, and common sense would have informed him of that anyway.

Access to Courts--Confiscation and Destruction of Legal Materials/Personal Involvement and Supervisory Liability/Habeas Corpus

Lueck v. Wathen, 262 F.Supp.2d 690 (N.D.Tex. 2003). The plaintiff alleged that documents he needed to prepare his state court habeas corpus petition were confiscated by prison officials and not returned.

The loss of the affidavit of a key witness who was not interviewed by his criminal trial attorney constituted actual injury under *Lewis v. Casey*. At 695: "Without this affidavit, plaintiff cannot establish the materiality of the missing testimony which is necessary to prove his ineffective assistance of counsel claim."

The court cannot say the plaintiff's claims are frivolous; although his ineffective counsel argument has been dismissed on direct appeal, it was not based on the failure to interview the witness, which would have been raised for the first time on collateral review.

The plaintiff's claim is not barred by the *Heck v. Humphrey* rule, even though it implicated his criminal conviction, since the plaintiff "seeks redress for being deprived of the opportunity to even challenge his conviction." (697) Such a claim does not necessarily imply the invalidity of his conviction or sentence. The court notes that the plaintiff seeks an injunction. At 698:

> If plaintiff prevails on his access claim, the court could order defendants to search for the missing legal materials and, if they have been destroyed or cannot be found, replace the state court records and appellate briefs. Defendants could also be ordered to search for [the witness] so plaintiff can obtain another affidavit. Clearly, *Heck* does not bar this type of relief.

The plaintiff may also be able to seek damages, since five Justices in *Spencer v. Kemna* said that *Heck* is not available to persons without recourse to the habeas statute. At 698-99:

> Applying *Heck* to the instant case puts the plaintiff in an untenable "Catch-22" situation. He would be precluded from suing defendants for violating his right of access to the courts until he successfully overturns his conviction, but cannot effectively challenge that conviction because defendants have confiscated important legal materials . . . necessary to obtain post-conviction relief.

The defendants are not entitled to qualified immunity on the present record. At 700: "This evidence suggests that defendants violated established prison policy by scattering, destroying, and otherwise disrupting plaintiff's legal materials during a shakedown." They failed to safeguard the materials, provide plaintiff with written notification identifying it or the reason for its removal; the plaintiff was initially told that the materials had been returned, which was false; later defendants admitted they couldn't find the material; the plaintiff was threatened to keep him from pursuing the matter. Defendants have offered nothing to justify the objective reasonableness of their conduct.

Federal Officials and Prisons/Transfers/Injunctive Relief--Preliminary/Exhaustion of Remedies

Tipton v. Federal Bureau of Prisons, 262 F.Supp.2d 633 (D.Md. 2003). The court grants a

preliminary injunction against the transfer of three persons serving sentences in community confinement centers who have been notified that they will be transferred to a federal prison for the remainder of their sentences based on the Department of Justice's new theory that the practice of decades, to follow judges' recommendations to place certain offenders in community confinement centers, is illegal.

The hardships to the prisoners and their families is clear, and there is no comparable harm to the government, since the Bureau of Prisons was quite satisfied with the old policy until told it could not continue. At 636: "Further, the public interest in maintaining the defendants as productive, wage-earning members of the community with stable families far outweighs any statement the Department of Justice hopes to make concerning the need to treat certain offenders more harshly, as whatever legitimate policy concerns may have motivated this change will be equally served by a prospective application of the new rule." The plaintiffs are likely to prevail because (a) the government's interpretation is wrong, (b) judicial review is not barred by statute, and the new rule appears invalid for failure to follow the notice and comment procedures of the Administrative Procedures Act, (c) there is a strong Ex Post Facto Clause argument, and (d) the requirement of administrative exhaustion is excused on grounds of futility (PLRA not mentioned).

Color of Law and Liability of Private Entities/Dental Care/Medical Care--Standards of Liability--Serious Medical Needs/Medical Care--Standards of Liability--Deliberate Indifference

Goodnow v. Palm, 264 F.3d 125 (D.Vt. 2003). The plaintiff was transferred from Vermont to Virginia, broke a tooth in Virginia, and was returned to Vermont, where EMSA provides dental and medical services. A dentist examined him and developed a treatment plan but said he would have to wait possibly more than a year. After six weeks he complained of dental pain and was referred to the dentist for evaluation and treatment, which he did not receive. Three and a half months later, he filed a grievance, which was referred to the dentist and never acted on. Two months later, he complained again, was diagnosed again, got a new treatment plan, and was then transferred to Virginia again. In Virginia, he was found only to be in need of cleaning; the dentist declined to work on the broken tooth.

EMSA was not entitled to summary judgment for lack of "personal" responsibility for the denial of care, since the plaintiff "alleged that his treatment/non-treatment involved several different EMSA employees and has otherwise demonstrated the possibility of a broader awareness of the problem." (129) At 130: "EMSA has argued that administrative back-logs and patient prioritization, not deliberate indifference, led to the delay in Goodnow's treatment. . . . Such statements could lead a reasonable jury to find 'personal responsibility' on the part of EMSA as an employer." The plaintiff's complaints to several EMSA personnel, his verbal complaint to Superintendent Lanman, and his formal grievance could support a jury finding of "an organizational awareness that Goodnow was experiencing mouth pain." In addition, EMSA's contract with the state requires it to provide a program of on-site dental services including preventive and restorative care. At 130: "When Goodnow requested dental care, EMSA was obligated to provide a dentist who would complete such care in a way that did not violate Goodnow's constitutional rights. . . . If its policy and protocols have insufficient checks on its doctors by which a patient is left without care for an unreasonable amount of time, EMSA could be held institutionally responsible for such delays."

The plaintiff's medical need was sufficiently serious, notwithstanding observations of no edema, foul odor, or oral drainage, and a nurse's note that he was "calm, laughing and comfortable." He was in enough pain to complain on more than one occasion and for his mother to have contacted the Superintendent between 10 and 15 times, and the nurse thought it serious enough to refer him to the dentist for treatment. He states that he had trouble eating, brushing his teeth, and breathing in the winter air, and presents an affidavit from a doctor documenting his damaged tooth and noting that pain is consistent with his condition.

The seven-month delay in treating the plaintiff's painful condition supported a deliberate indifference claim. At 134: "EMSA points to its policy and its back-log as a reason for having failed to treat Goodnow. But it has not presented significant evidence indicating where Goodnow fits into its back-log or priority list of patients or even evidence establishing that a back-log actually existed during the time in question."

Under *Wyatt v. Cole*, EMSA said it was entitled to an affirmative defense of good faith reliance on its contract, and it treated his routine problem consistently with the contract. At 134: "But that argument misses the point. The real concern raised in this case is the fact that in seven months, EMSA never actually treated this dental problem, whether it was routine or not. Nothing in EMSA's policies or in its contract with Vermont would suggest the propriety of such a delay."

PLRA--Exhaustion of Administrative Remedies/Medical Care--Standards of Liability--Deliberate Indifference/Personal Involvement and Supervisory Liability

Sulton v. Wright, 265 F.Supp.2d 292 (S.D.N.Y. 2003) (Sweet, J.). The plaintiff complained of medical neglect during a period in which he was transferred among facilities; he filed two grievances and exhausted them. Defendants argued that he did not sufficiently exhaust all the occurrences at all the prisons. The court addresses a series of major PLRA exhaustion issues favorably to prisoners. At 297-98:

> . . . So long as the prisoner's grievance "present[s] the relevant factual circumstances giving rise to a potential claim . . . sufficient under the circumstances to put the prison on notice of potential claims and to fulfill the basic purposes of the exhaustion requirement . . . . [T]here does not appear to be any reason to require a prisoner to present fully developed legal and factual claims at the administrative level." . . . This has particular application to the complex issues involved in medical care cases.
>
> Rigid "issue exhaustion" appears inappropriate when the fundamental issue is one of medical care from the same injury. . . .
>
> A prisoner need not name every defendant in the grievance to preserve his right to sue. It is enough for the prisoner to "provide as much relevant information as he reasonably can." . . . As this Circuit has noted, an unrepresented prisoner may have difficulty identifying all defendants. . ..
>
> The Defendants' argument for total issue and party exhaustion is a view borrowed from federal habeas corpus law that has not been adopted by this Circuit in civil rights cases or in the administration of the PLRA. The distinctions between Section 1983 cases and habeas corpus filings are of long and venerable duration, and the claims are analytically very different. *Heck v. Humphrey*, 512 U.S. 477 (1994); *Preiser v. Rodriguez*, 411 U.S. 475 (1973).
>
> [A] grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in a notice-pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievant needs to do is object intelligibly to some asserted shortcoming.

A delay of nearly four years in treating torn knee ligaments, during which time the plaintiff had repeated falls, tears of tendons, pain, muscle wasting, and the possibility of becoming crippled, states an Eighth Amendment claim; the court characterizes it as an example of prison officials' "intentionally denying or delaying access to medical care" as described in *Estelle*. (300) *Id.*:

> Where "deliberate indifference

> cause[s] an easier and less efficacious treatment to be consciously chosen by the doctors," a claim is stated. *Williams v. Vincent*, ... Indeed, even if an inmate receives "extensive" medical care, a claim is stated if, as here, the gravamen of his problem is not addressed.

At 300: "Liability for deliberate indifference by supervisors does not require that they have an individual doctor-patient relationship with the plaintiff." An Eighth Amendment claim is supported by allegations that the chief medical officer of the prison system "adopted a utilization review mechanism for specialist consultation and surgery approval that used a contractual vendor whose goal, in practice, was to limit care as much as possible"; that he failed to correct the failures of the medical tracking system which resulted in surgery having to be re-approved after transfers; and that he failed to correct the failure of medical holds and coordination of patient work-up between prisons.

PLRA--Exhaustion of Administrative Remedies/Mootness/Injunctive Relief--Changed Circumstances/Class Actions--Conduct of Litigation/Class Actions--Effect of Judgments and Pending Litigation/Protective Custody/Qualified Immunity

Lewis v. Washington, 265 F.Supp.2d 939 (N.D.Ill. 2003). Plaintiffs challenged protective custody conditions, and the court certified a class. As in Title VII cases, the exhaustion requirement is satisfied when one member of the class has exhausted.

The transfer of the named plaintiffs to another unit did not moot the case. At 943:

> While the general rule is that an Article III case or controversy must exist at every stage of litigation, there is a special rule for class actions that allows named plaintiffs to continue representing a class even after their own claims are moot. . . . This is based on the fiction that once a class is certified, the class obtains a legally cognizable interest independent of that of the named plaintiffs, and the class claims thus preserve the adversarial interest needed for the invocation of jurisdiction.

Changes in the length of stay and the number of inmates held in the unit do not obviate the need for injunctive relief, since voluntary cessation of allegedly illegal conduct does not moot a case unless the defendant can show there is no reasonable expectation that the wrong will be repeated. (943) Absent a statute or regulation implementing the change, defendants fail to show that there is no reasonable expectation of repetition.

PLRA--Exhaustion of Administrative Remedies/Publications/Deference

Cline v. Fox, 266 F.Supp.2d 489 (N.D.W.Va. 2003). The plaintiff challenged the censorship of "the 'Paper Wings' line of books, an adult-fiction serial" after exhausting. During discovery, he said that he had found similar material in the prison library. Prison officials then purged the library.

The prison policy prohibiting materials "which are obscene because they depict explicit sexual activity" (enumerating acts), is not unconstitutional as applied under the *Turner* standard. The justifications--protecting security by minimizing violence arising from barter of obscene materials, minimizing inmates' "titillation and arousal," and protecting rehabilitation--are legitimate and content-neutral. (Avoiding titillation and arousal promotes security insofar as it reduces the incidence of sexual attacks, the court finds, based on no discernible evidence.) The connection between the censorship and its objectives is supported by common sense; prison officials need not show that the terrible things they are trying to prevent have actually occurred. There are alternative means of exercising First Amendment rights, i.e., read non-obscene books. The impact of letting the plaintiff have the books would be to compromise the interests the policy serves; the fact that he personally

might be unaffected is not dispositive, since others might read them. The plaintiff does not show an alternative at *de minimis* cost; his proposal to make individualized determinations for each prisoner and to ban only pictorial representations of sexual activity respectively are unworkable and would require the court to substitute its judgment for prison officials'.

Disabled/Use of Force--Restraint/Medical Care--Denial of Ordered Care/Personal Involvement and Supervisory Liability/Cruel and Unusual Punishment--Proof of Harm

Bane v. Virginia Dep't of Corrections, 267 F.Supp.2d 514 (W.D.Va. 2003). The plaintiff alleged that he was injured when prison staff ignored an order to handcuff him in front because of a medical problem with his shoulder, which he said resulted in dislocation of his shoulder.

The plaintiff alleged a violation of the Rehabilitation Act. The defendants do not contest that they regard him as an individual with a disability; they had issued him a pass from rear-cuffing based on it. A permanent shoulder injury limiting the arm's range of motion would appear to be a disability in any case (520 n.2). The general rehabilitative and correctional activities of prisons are "programs" under the statute, and prison officials are obliged to accommodate disabilities in day-to-day prison operations. The allegation of failure to carry out the reasonable accommodation he was granted states a claim. The Department of Corrections may be held liable on a *respondeat superior* theory for the actions of its staff in that respect.

The Rehabilitation Act supports a private right of action. It is not unconstitutional as applied. The state accepted federal funds and has waived sovereign immunity; the requirement to do so in order to receive federal funds is not a coercive condition in violation of the Tenth Amendment.

The plaintiff's allegations raise a factual dispute precluding summary judgment; "the allegation that [defendants] ignored the requirements of a medical order they knew to be valid and deliberately caused harm to the Plaintiff state claims for deliberate indifference . . . and excessive force." A defendant who allegedly ripped the medical waiver off the plaintiff's cell door could be held liable even if he did not physically participate in the handcuffing; he could also be held liable on a theory of bystander liability for excessive force. An allegation that a higher supervisor was notified of the existence of a medical waiver, but chose to disregard it and ordered his subordinates to violate it, states a deliberate indifference claim against him.

The plaintiff's allegation that his shoulder was dislocated and he suffered intense pain for a week is not negated by the absence of medical reports or permanent scars. At 532: "It is up to a jury to determine whether the pain allegedly suffered by the Plaintiff amounts to anything more than *de minimis* injury."

Correspondence--Non-Legal/Communication with Media/Standing/Deference

Canadian Coalition against the Death Penalty, 269 F.Supp.2d 1199 (D.Ariz. 2003). A state statute prohibited prisoners from sending mail to or receiving mail from a communication service provider or from having access to the Internet through a provider. Prisoners who were suspected of violating the policy were ordered to have all information about themselves removed from web sites.

The statute is unconstitutional under the *Turner* standard. It lacks a valid, rational connection to the defendants' asserted interests, the need to prevent attempts to defraud the public and to preclude inappropriate contact with minors, victims, or other prisoners. Existing statutes and regulations already prohibit such conduct. The prison also has methods in place to enforce those existing regulations. Inmates have no direct Internet access; prison staff may open all incoming mail and inspect for contraband, and incoming non-privileged mail may be read to see if it might facilitate criminal activity; outgoing mail may also be read and examined for contraband. Telephone calls may be monitored and recorded.

Other interests asserted by defendants fail because "prison authorities cannot avoid court scrutiny under *Turner* by reflexive, rote assertions." (1203, citation omitted) Thus the court rejects the

claim that society may perceive confinement as less punitive and that crime victims may perceive that their perpetrators are not being adequately punished. It rejects the claim that rehabilitative opportunities will be limited, since prisoners are not going to get Internet access under any circumstances. There is no evidence supporting the speculative outcome that deterrence will be impaired because prisoners and the general public will perceive incarceration as less arduous. At 1203: "Although prison authorities are permitted to establish regulations in anticipation of potential problems, 'they must as a minimum supply some evidence that such potential problems are real, not imagined.'"

Since the statute fails the rational relationship factor of *Turner*, the other *Turner* factors need not be considered.

Access to Courts--Legal Assistance Programs

White v. Kautzky, 269 F.Supp.2d 1054 (N.D.Iowa 2003). The state stopped keeping up its law libraries and switched to a system of "contract attorneys." The plaintiff alleged that the contract attorneys failed to assist him in determining whether he had a viable claim for post-conviction relief under state law.

The plaintiff raised an issue of material fact as to whether the contract attorney system provided a reasonable opportunity for him to present his claimed violation to the courts. The contract required assistance to persons who wish to file pleadings for post-conviction relief and advice about the merit or lack of merit of proposed litigation, but the plaintiff said that he did not receive those services; the attorney just handed him a form without advising him, and he had no other source of information to assess the merits of his claim. At 1062: ". . . [H]anding an inmate an application for post-conviction relief, standing alone, does not appear to be nearly enough."

To show actual injury as required by *Lewis v. Casey*, the plaintiff must show that he was hindered in pursuing a nonfrivolous claim. His affidavit, which sets out the legal and factual basis for the alleged violation, raises an issue of material fact that his claim was not frivolous, and the record indicates that he had no other source of information because the law library was out of date and he was not allowed to consult with jailhouse lawyers. Because filing a meritless post-conviction relief petition would have allowed the refiling of charges carrying substantial additional prison sentences, the plaintiff has raised an issue of material fact that he was "so stymied" that he couldn't even file a timely complaint.

Religion--Services Within Institution/Religion--Practices/Religion--Practices--Beards, Hair, Dress/Mootness/Damages--Intangible Injuries/PLRA--Mental or Emotional Injury/Pendent and Supplemental Claims

Wilson v. Moore, 270 F.Supp.2d 1328 (N.D.Fla. 2003). The plaintiff's release from prison mooted his claims for declaratory and injunctive relief.

The plaintiff sought compensatory and punitive damages for violations of his religious rights. At 1328: "However, there are no allegations of physical injury or harm to Plaintiff and, without physical injury, Plaintiff's request for monetary damages must necessarily be limited to nominal damages by virtue of 42 U.S.C. § 1997e(e)." Thus the court simply assumes without explanation that the injury resulting from violation of intangible rights is no more than mental or emotional in nature, and also fails to explain why the plaintiff can't seek punitive damages.

The plaintiff alleged that restrictions on Native American worship were more onerous than restrictions on other religions (e.g., that they couldn't wear headbands and bone-choker necklaces, while other groups were allowed to wear religious headgear and/or necklaces). The defendants did not address this claim in their summary judgment motion, so it should go to trial.

The refusal to designate "Holy Ground" did not violate the First Amendment because the plaintiff did not show "that he could not engage in other religious practices and express his faith without Holy Ground, or that Holy Ground is so essential to the practice of his faith that its absence would be a

substantial burden on the exercise of his religion. In any case the burden was reasonable, "since prisons cannot be expected to set aside and police patches of land for every religious sect."

The refusal to allow "smudging" is upheld in the absence of "evidence showing the importance of smudging to Plaintiff's Native American faith or that smudging is so essential that its absence would be a substantial infringement." In any case the risk of fire and of concealment of the smell of burning marijuana or crack justifies the burden.

The prayer pipe is undisputedly a significant practice of the plaintiff's faith, but it wasn't defendants' fault the plaintiff could not participate in that ceremony, since prison officials had tried to get someone to come in from outside and lead the ceremony without success. At 1352: "Defendants do not have the obligation to hire a minister of every faith to conduct religious services for prisoners, nor do they have the obligation to drum up volunteers." Prison officials could not be required to let him have a prayer pipe in his cell, since it was sacred and couldn't be touched by anyone else, giving him a perfect place to hide contraband. The refusal to let him keep a prayer pipe in the chapel for supervised private or group prayer requires a trial, since it looks like an exaggerated response--it can't take up much room, they keep drums in the chapel, and it is very difficult to find an outside volunteer to bring a pipe in.

Refusal to allow construction and use of a sweat lodge is upheld. Exclusive use of an area for one group of inmates could create discord and unrest among others. At 1353: "Though not argued by Defendants, the court can see how non-Native Americans might view this as a sauna and would demand their own." Also, the sacred nature of such a structure would restrict access by prison officials, and there are concerns about allowing fires on prison grounds. The fact that other prisons in other states allow sweat lodges does not require a different conclusion. At 1353: "Admittedly . . . Native American inmates do not appear to have many alternative means of exercising their faith beyond reading books, but that finding alone is insufficient to overcome Defendants' security interest." Building a sweat lodge would also require building storage facilities, require work by officers, etc.

Evidence that Native Americans are denied headbands except during religious services while Muslims and Jews are allowed to wear their headgear at all times supports an equal protection claim. The prohibition looks like an exaggerated response, since prison officials can regulate size, shape, etc., so they don't look like gang symbols.

Defendants are entitled to summary judgment on their denial of a craft shop. Although their evidence of security risk related to tools was countered by plaintiffs' evidence that similar tools were used with minimal supervision in work assignments, plaintiffs failed to show that craft work had religious importance.

Defendants are entitled to summary judgment on their policy that prisoners cannot personally possess drums and rattles, but can only use them at meetings and ceremonies. They could become unreasonably disruptive in housing areas.

The defendants have qualified immunity, since there is virtually no case law on these subjects.

Homosexuals and Transsexuals/Medical Care--Standards of Liability--Serious Medical Needs/Medical Care--Standards of Liability--Deliberate Indifference/Grievances and Complaints about Prison/Qualified Immunity

Brooks v. Berg, 270 F.Supp.2d 302 (N.D.N.Y. 2003). The plaintiff, a pre-operative transsexual, tried to get treatment for gender identity disorder in prison and was ignored for two years. His grievance requested "all of the minimal, though appropriate treatments," and the grievance response said that cosmetic surgery was not performed unless medically required and, on appeal, "body altering requests" were not granted. Prison policy was to continue treating prisoners (including hormone therapy) whose gender dysphoria was identified before incarceration.

The handling of the plaintiff's grievance did not raise a constitutional issue. Prison grievance procedures do not confer substantive rights on prisoners. However, the superintendent under whose authority his grievance was denied was not entitled to

summary judgment for involvement in the denial of medical care.

Defendants don't dispute that plaintiff's gender identity disorder is a serious medical need.

At 310: "Courts have found that under the Eighth Amendment inmates with GID must receive *some* form of treatment. . . . In addition, courts have held that the treatment plan for an inmate with GID must be formulated by a medical professional and not by prison administrators." Defendants don't dispute that the plaintiff was never treated despite his requests and have not provided any evidence that the decision to refuse treatment was "based on sound medical judgment." (310) They are not entitled to summary judgment on the question of deliberate indifference.

The defendants are not entitled to qualified immunity despite the absence of precisely identical case law. *Hope v. Pelzer* held that a general constitutional rule already identified may "apply with obvious clarity" to the challenged conduct even if there is no case in point.

Defendants argued that their conduct was objectively reasonable because it was consistent with prison system policy. At 311: "Although defendants fail to cite a case in support of this argument, courts have found that a defendant's claim of qualified immunity is bolstered by evidence that he was following orders when he acted unconstitutionally." However, a policy could not make reasonable a belief that is contrary to decided case law, and "defendants who act pursuant to a facially invalid policy are not entitled to qualified immunity." (311-12) At 311 n.6: An official cannot rely on an agency policy if he promulgated the policy.

Here, defendants "do not explain the puzzling distinction that the policy makes between those inmates who were diagnosed before incarceration and those who were diagnosed after being incarcerated." (312) Diabetics, schizophrenics, etc., are surely not denied treatment if they were diagnosed in prison. At 312: "This blanket denial of medical treatment is contrary to a decided body of case law. . . . Prison officials cannot deny transsexual inmates all medical treatment simply by referring to a prison policy which makes a seemingly arbitrary distinction between inmates who were and were not diagnosed with GID prior to incarceration." The numerous cases holding that prisoners are entitled to some treatment for GID negates their claim of objective reasonableness.

Publications/Procedural Due Process/Deference

Prison Legal News v. Lehman, 272 F.Supp.2d 1151 (W.D.Wash. 2003), *aff'd*, 397 F.3d 692 (9th Cir. 2005). Defendants' policies prohibited prisoners from receiving "bulk mail" except for subscription publications, and from receiving catalogs regardless of how they were mailed. The special rate for nonprofit publications is a bulk mail rate.

The policies are unconstitutional under the *Turner* standard. They do not have a valid, rational connection to reducing the volume of mail that may contain contraband. At 1156: "As a matter of common sense and the defendants' experience, it is far more likely that contraband would be contained in personal first class mail from, for example, an inmate's friends or family members, than in bulk mail, which consists of identical pieces of mail sent to numerous recipients."

The policies do not have a rational relationship to reducing the volume of mail generally. Although all the mail must be sorted, prohibiting receipt of mail by postage rate is an arbitrary means of achieving volume control. If lifting the ban leads to an unmanageable influx, they can find other means to control it.

The policies do not have a rational relationship with avoiding fire hazards, since the prison system already has limitations on volume of paper and other property.

The policies do not have a rational relationship with the efficiency of cell searches, given the limitations on volume of property.

Receipt of publications is not only a First Amendment right but a liberty interest protected by due process. Since catalogs and bulk mail are constitutionally protected, their addressees must be afforded the same procedural protections afforded to recipients of first class, second class, and subscription

standard rate mail. The plaintiffs sought "notice and review," and there is no detail about what is actually at stake.

A policy prohibiting delivery of materials not delivered directly from the publisher/retailer is upheld under the *Turner* standard. It has a rational relationship with the goal of reducing contraband; prisoners have alternative ways of obtaining reading material (a big library system as well as their own purchases); PLN can send subscriptions to prisoners. The court also upholds application of the policy to bar PLN's sending contributor's copies to prisoners, although the policy is not applied to books the PLN sells (apparently it's an approved vendor for that purpose). Striking down the policy would require mailroom staff to search mailed books and magazines more thoroughly. There are no obvious alternatives.

Prohibition of "third-party legal materials" (i.e., materials that are from a case other than the recipient's) that violate a ban on information which might create a risk of physical harm or violence is not unconstitutional. The basic ban is clearly constitutional. Its application to legal materials, which the plaintiff says convey information that is already available, requires a case-by-case inquiry.

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