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PRISONER'S CIVIL RIGHTS LITIGATION - CONSTITUTIONAL LAW UPDATE

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I. FIRST AMENDMENT RIGHTS

A. Freedom of Speech and Advocacy

1. Supreme Court Doctrine: Procunier v. Martinez, 416 U.S. 396 (1974); Turner v. Safley, 482 U.S. 78 (1987); Thornburgh v. Abbot, 490 U.S. 401 (1989)

Turner factors address issue of whether regulations are reasonably related to penological objectives. Four part test:

1. Is there a rational relationship between regulation and governmental interest.
2. Does prisoner have alternative means to exercise the right
3. Impact of exercise of right on other inmates or correctional officers
4. Is regulation an exaggerated response: whether alternatives exist that could accommodate the rights asserted without risk to prison security.

2. Recent Cases:

Beard v. Banks, 126 S.Ct. 2572 (2006) (rule prohibiting access to secular newspapers, magazines, and family photographs to certain special housing inmates (the so-called "worst of the worst") to create an incentive towards better behavior does not violate First Amendment; the state's rehabilitation and security concerns are supported by the affidavits of prison officials as to scope and purpose of the program; prison must show more than a "logical" relationship between goals and the rules; must show that the relationships is "reasonable; dissent questions whether any and all such rules are now valid simply because they might modify behavior in the future; are all denials of services and programs legitimate on this theory?).

Overton v. Bazzetta, 123 S.Ct. 2162 (2003) (Court upholds regulations limiting visitation at state prison. State permitted visitations by minor children only where they were the children or grandchildren of the prisoner, and further required children to be accompanied by a family member. Former prisoners were denied visitations rights. State also suspended most visits for prisoners who violated substance abuse rules; Court cites "alternatives," e.g., letters to inmates/telephones). See also, Dunn v. Castro, 621 F.3d 1196 (9th Cir. 2010).

Hammer v. Aschcroft, 570 F.3d 798 (7th Cir. 2009)(en banc) (BOP policy prohibiting face-to-face interviews of death row inmates with the media does not violate First Amendment and Equal Protection rights even if access to other inmates is allowed; security justifications are sufficient (e.g., to combat problem of jailhouse celebrities). Majority rejects argument that rule was changed with improper motive (a pretext to suppress views of death row inmates) as the rule on its face does not refer to content of speech, even though the policy was adopted after criticism of BOP for allowing Timothy McVeigh interview on television). See also, Young v. Beard, No. 07-1670 (3d Cir. 2008)(DOC prohibition on prison bands except for religious bands does not offend First Amendment, even though DOC took this action in response to public criticism of bands playing on TV; court says there was sufficient basis for DOC to find a security issue based on lack of supervision of the bands); Brittain v. Beard, 974 A.2d 479 (Pa. 2009) (sustaining regulation prohibiting receipt or possession of pornography, including mere nudity in settings with educational or artistic value; BOP allows nude pictures only where they have "significant literary or educational value." Burden on inmates to show that BOP policy is not related to security).

Singer v. Ramisch, F.3d (7th Cir. 2010)(court sustains prison prohibition on playing or having materials related to "Dungeons and Dragons" on ground that this game could lead

to "fantasy role playing," "competitive and hostile behaviors," and gambling; refuses discovery even in the face of numerous affidavits in support of prisoner that the game is not threatening to institutional security and does not promote gang activity; prison gang " "expert" stated that games can mimic gang organizations, with "Dungeon Master" as leader, though there was no evidence of such gang activity in the past).

Fontroy v. Beard, 559 F.3d 173 (3d Cir. 2009)(sustaining BOP policy requiring an attorney id number to be placed on incoming mail to preserve right to have the mail treated in confidential manner; fact that some attorneys did not use this process not sufficient grounds for striking the regulation)

Guajardo-Palma v. Martinson, 622 F.3d 801 (7th Cir. 2010) (opening legal mail is unconstitutional only if it provides prison officials with litigation strategy).

Al-Amin v. Smith, 511 F.3d 1317 (7th Cir. 2008)(the right to have legal mail opened in presence of inmate is sufficiently well-established as to defeat claim of qualified immunity; Turner factors do not undermine earlier cases granting this right; relief granted on free speech grounds but rejected on access to courts without a showing of actual injury). See also *29 Merriweather v. Zamora, 569 F.3d 307 (6th Cir. 2009)(denying qualified immunity where officers opened "legal mail" outside presence of inmate).

Jones v. Brown, 461 F.3d 353 (3d Cir. 2006)(prisoners have First Amendment right to be present when incoming legal mail is opened; prison's justification of prevention of anthrax contamination is rejected as too remote as it was more than 3 years since anthrax was sent by mail and no evidence that it was sent to prisons; court puts emphasis on confidentiality concerns).

Prison Legal News v. Lehman, 397 F.3d 692 (9th Cir. 2005) (Washington State regulations on bulk mail deliveries that prohibit inmates from receiving bulk and third and fourth class mail, including magazines, has no rational relationship to penological interests; claim that inmates would strong-arm others to gain gifts and creation of fire hazards are too speculative; qualified immunity denied as to claim of discriminatory enforcement). See also, Sorrells v. McKee, 287 F.3d 1213 (9th Cir. 2002) (same ruling with respect to rule prohibiting gifts of books or magazines to inmates).

Johnson v. State of California, 543 U.S. 499 (2005)(rejecting prison policy of considering race in cell assignments even for limited periods).

B. Retaliation Claims

Bridges v. Gilbert, 557 F.3d 541 (7th Cir. 2009)(recognizing retaliation claim where inmate claimed harassment by correctional officers and unjustified disciplinary charges after he signed affidavit in support of fellow prisoner in separate litigation, even if not a matter of "public concern"). See also, Dobbey v. Ill. Dept Corrections, 574 F.3d 443 (7th Cir. 2009)(while hanging of noose by white guards in front of black inmates did not amount to cruel and unusual punishment, there was a claim for retaliation where inmate was punished after filing a grievance on the incident).

Bibbs v. Early, 541 F.3d 267 (5th Cir. 2008)(sustaining retaliation claim where after inmate filed grievances against COs, the temperature in his cell was reduced to below freezing for several nights; sufficient to deter inmate of ordinary firmness from exercising constitutional rights; injuries are not *de minimis*).

Brodheim v. Cry, 584 F.3d 1262 (9th Cir. 2009) (threat of retaliation is sufficient if made in context where inmate would likely perceive punishment if he did not follow officer's directives)

Thomas v. Eby, 481 F.3d 434 (6th Cir. 2007) (sustaining retaliation claim on motion to dismiss where inmate alleged that *30 disciplinary write-up was the result of his prior grievance against another CO; court emphatically rejects argument that since he brought this civil suit, he cannot claim retaliation since he was not deterred from doing so; court also rejects argument, at least at MTD stage, that hearing committee's decision imposing discipline precludes suit on theory that CO issued a valid misconduct).

Espinal v. Goord, 554 F.3d 216 (2d Cir. 2009)(six month time separation from prisoner's protected actions in filing lawsuit and alleged act of retaliation sufficiently close in time to sustain the retaliation claim)

Rauser v. Horn, 241 F.3d 330 (3d Cir. 2001)(court sets standards for determining causal link between exercise of constitutional right and alleged retaliatory action of prison officials and adopts a Mt. Healthy and Turner analysis. Here, plaintiff showed exercise of right-refusal to participate in AA program that required acceptance of God; retaliation by transfer, loss of job, adverse parole recommendation; and causal link under Mt. Healthy by showing that the protected conduct was a "substantial or motivating factor." Prison can defend on ground that the action would have been taken regardless of the protected conduct). *Compare*, Yount v. PA DOC, 966 A.2d 1115 (Pa. 2009) (rejecting retaliation claim and putting burden on inmate to show violation of Turner factors).

Mitchell v. Horn, 318 F.3d 523 (3d Cir. 2003)(allegation that false disciplinary charges were filed to retaliate for the filing of complaints against the officer states a claim under First Amendment; key issue is motivation of COs).

Rhodes v. Robinson, 408 F.3d 559 (9th Cir. 2005)(sustaining retaliation claim and rejecting "Catch-22" argument that fact that prisoner filed the complaint demonstrated that he was not "chilled" by the conduct of the prison officials). See also Gill v. Pidlypchak, 389 F.3d 379 (2d Cir. 2004).

Crawford-El v. Britton, 118 S. Ct. 1554 (1998)(no heightened pleading requirement for showing intent or retaliation, even in context of qualified immunity defense. Court can require specific proof of intent in pleadings or at summary judgment stage).

C. Access to the Courts

Hebbe v. Pliler, 627 F.3d 338 (9th Cir. 2010) (prison cannot force inmate to choose between right to out-of-call exercise and access to law library).

Pruitt v. Mote, 503 F.3d 647 (7th Cir. 2007) (en banc) (standards for appointment of counsel in prisoner civil rights cases)

D. Freedom of Religion

1. General Standards:

O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)(courts should defer to reasonable regulations in the area of religious freedoms, but the deference is not absolute and prison officials must demonstrate a security or other penological need for the restriction; Turner factors are applicable in all First Amendment cases). The First Amendment test is not toothless. See, Boles v. Neet, 486 F.3d 1177 (10th Cir. 2007)(sustaining claim for damages and rejected qualified immunity where warden denied Jewish inmate right to wear religious garments on trip to hospital; rote assertion of security interests not sufficient).

Following City of Boerne v. Flores, 117 S.Ct. 2157 (1997), where Court ruled that the Religious Freedom Restoration Act is an invalid exercise of Congressional power under Fourteenth Amendment with respect to State facilities, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). The law provides that a prison rule or regulation that imposes a "substantial burden on . . . religious exercise" must be "in furtherance of a compelling governmental interest" and "be the least restrictive means of furthering that . . . interest."

The constitutionality of this law has been sustained in Cutter v. Wilkinson, 125 S.Ct. 2113 (2005). See also, Madison v. Virginia, 474 F.3d 118 (4th Cir. 2006)(sustaining the law under the Spending Clause, but finding no override of waiver of 11A immunity to damage actions against the state); Rendelman v. Rouse, 569 F.3d 182 (4th Cir. 2009)(no claim against officials in individual capacities); Nelson v. Miller, 570 F.3d 868 (7th Cir. 2009) (same); Cardinal v. Metrish, 564 F.3d 794 (6thCir. 2009) (same); Smith v. Allen, 502 F.3d 1255 (11th Cir. 2007) (permitting damage suits against officials in their official, but not individual capacities, but under PLRA limiting damages to nominal awards); Webman v. Federal Bureau of Prisons, 441 F.3d 1022 (D.C. Cir. 2006)(no waiver of state immunity).

The "compelling governmental interest" and "least restrictive means" tests will make certain claims viable that would not be actionable under the First Amendment.

Crawford v. Clarke, 578 F.3d 39 (1st Cir. 2009) (sustaining injunction requiring prison to provide closed-circuit broadcasting of *32 religious services to inmates in SMU who otherwise would not have access to these services)

Smith v. Ozmint, 578 F.3d 246 (4th Cir. 2009)(prison policy permitting forced shaving of hair determined to be too long violated RLUIPA for inmate whose religious beliefs prohibited cutting of his hair; prison failed to explain why the forced shaving was necessary, even assuming a strong governmental interest in short hair of all inmates, as plaintiff was already in an SMU and there was no showing that forced shaving was the least restrictive alternative). See also Wardsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005)(challenge to regulation regarding hair length under RLUIPA; substantial burden satisfied by punishment short of forced cutting of hair; security concerns are substantial, but not in a minimum security facility where there are less restrictive alternatives; court cites to policies in other prison systems and for women); Fegans v. Norris, 537 F.3d 897 (8th Cir. 2008)(compelling governmental interest in hair length and beard regulations); Longoria v. Dretke, 507 F.3d 898 (5th Cir. 2007)(same).

Greene v. Solano County Jail, 513 F.3d 982 (9th Cir. 2008)(denial of group religious services to inmates in maximum security states violation of RLUIPA and mere assertion by jail officials that such a practice would cause security concerns not sufficient for summary judgment; least restrictive means test requires careful scrutiny of all facts and here there are contested facts on space availability). See also, Salahuddin v. Goord, 467 F.3d 263 (2d Cir. 2006)(applying RLUIPA to various limitations on religious exercise rights including joint Shiite and Sunni worship, chaplains for Muslims and services for inmates in RHU); Kay v. Bemis, 500 F.3d 1214 (10th Cir. 2007)(remanding constitutional and RLUIPA claims for denial of religious materials, including tarot cards).

Mayfield v. Texas Dept. Of Criminal Justice, 529 F.3d 599 (5th Cir. 2008) (requirements of security trained, religious volunteer for services not a sufficient basis to bar services where because of limited number of "Odinist" clergy made this impossible; issue of whether inmates were entitled to possession of "runestones" for the services requires careful balancing of interests); compare, Fowler v. Crawford, 534 F.3d 931 (8th Cir. 2008) (prison offered adequate alternatives to a "sweat lodge").

Washington v. Klem, 497 F.3d 272 (3d Cir. 2007)("substantial burden" element of RLUIPA requires inmate to show either that he is forced to choose between precepts of his religion and forfeiting benefits otherwise available to other inmates *or* that prison has put *33 substantial pressure on inmate to modify his beliefs; regulation limiting inmate to 10 books in cell substantially burdens his religious beliefs that require him to read 28 books a week and government has not shown compelling interest or least restrictive alternative in the regulation).

Lovelace v. Lee, 472 F.3d 174 (4th Cir. 2006)(sustaining claim under RLUIPA of inmate who was denied right to fasting meals and to attend Ramadan services for alleged breaking of fast; court goes further and finds that policy that not only forfeits fasting practices for eating during the day but also forfeits Ramadan services is in violation of the statute and perhaps of the First Amendment).

Spratt v. Rhode Island Dept of Corrections, 482 F.3d 33 (1st Cir. 2007) (ban on inmates acting as preachers in prison must be supported by some showing of dangers of such activity; no such showing made on record where plaintiff had been preacher for 7 years before new regulation took effect and where state argued only that it is dangerous to allow inmates to become "leaders").

Kaemmerling v. Lappin, 553 F.3d 669 (D.C. Cir. 2008)(sustaining regulation requiring inmate to provide DNA sample against claim that it interfered with religious beliefs; also, government had compelling interest)

Cases involving diets: Abdulhaseeb v. Calbone, 600 F.3d 1301 (6th Cir. 2010)(right to halal diet under RLUIPA); Koger v. Bryan, 523 F.3d 789 (7th Cir. 2008)(request for non-meat diet was a "religious exercise" under the Act; "clergy verification" requirement is unlawful where it burdens minority religions without sufficient clergy members); Nelson v. Miller, 570 F.3d 868 (same); Beerheide v. Suthers, 286 F.3d 1179 (10th Cir. 2002)(applying Turner and striking down policy of not providing kosher meals; rejecting claims of budgetary impact and adverse impact on population); DeHart v. Horn, 390 F.3d 262 (3d Cir. 2004)(Court may not inquire into whether religious beliefs are central to the religion (here whether Buddhists must avoid meat and dairy items); this diet is complex and more difficult than kosher diets and requires individualized preparations; other religious needs were accommodated); Shakur v. Schriro, 514 F.3d 878 (9th Cir. 2008) (Islamic Halal diet request which could be satisfied by kosher meats is subject to RLUIPA and given particular medical needs of inmate the Act may require providing kosher diet even though consumption of Halal meat is not a central tenet of his religion); Patel v. U.S. BOP, 515 F.3d 807 (8th Cir. 2008)(no requirement to serve Halal diet where vegetarian alternatives are *34 provided); Baranowski v. Hart, 486 F.3d 112 (5th Cir. 2007) (rejecting First Amendment and RLUIPA claims for kosher diet on grounds that there were insufficient funds for these and other religiously based diets)

Williams v. Bitner, 455 F.3d 186 (3d Cir. 2006)(First Amendment violation for dismissing prison worker from kitchen job for religiously based refusal to handle pork).

Sutton v. Rasheed, 323 F.3d 236 (3d Cir. 2003)(limitations on access to religious materials to Nation of Islam inmates confined to special housing areas were unconstitutional under Turner factors, but officials had qualified immunity from damages claim).

Flores v. Congregation Pidyon Shevuyim, 603 F.3d 1118 (9th Cir. 2010) (contract chaplain subject to suit under RLUIPA).

Americans United for Separation v. Prison Fellowship, 509 F.3d 406 (8th Cir. 2007)(state funding of a religiously based residential based inmate rehabilitation program is unconstitutional under Establishment Clause; Biblical principles are the main agenda)

Inouye v. Kemna, 504 F.3d 705 (9th Cir. 2007)(parole department may not compel parolee to attend a religious based drug treatment program).

Kaufman v. McCaughtry, 419 F.3d 678 (7th Cir. 2005)(atheism study group cannot be banned).

Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007)(deprivation of Koran; denial of prayer sessions; no qualified immunity based on "terrorism exception").

II. RIGHT TO MEDICAL CARE

I. Supreme Court Doctrine: Estelle v. Gamble, 429 U.S. 97 (1976); Wilson v. Seiter, 111 S.Ct. 2321 (1991); Helling v. McKinney, 113 S.Ct. 2475 5 (1993)

I. Application of Doctrine:

Dominiguez v. CMS, 555 F.3d 543 (6th Cir. 2009)(serious medical condition established by heat exhaustion, including loss of consciousness, dizziness, and dehydration; nurse knew or should have known of need to treat and there was no burden on plaintiff to show that lack of treatment would lead, as here, to his becoming a quadripalegic). See also, Vaughn v. Gray, 557 F.3d 904 (8th Cir. 2009)(mentally ill inmate who medical personnel had reason to believe was ingesting shampoo causing him to vomit and later died from heart attack, was denied right to treatment by deliberate *35 indifference; no qualified immunity); Phillips v. Roane Cy., 534 F.3d 531 (6th Cir. 2008)(life threatening conditions existed over a 2 week period).

Harper v. Lawrence Cy., 592 F.3d 1227 (11th Cir. 2010) (inmate's physical condition and complaints of other inmates sufficient to establish notice).

Gayton v. McCoy, F.3d (7th Cir. January 28, 2010)(failure to provide inmate with serious heart condition and elevated blood pressure with medication or to provide a timely examination establishes deliberate indifference; chest pain and vomiting sufficient to put medical nurse on notice of need for care; court addresses scope of expert testimony)

McRaven v. Sanders, 577 F.3d 974 (8th Cir. 2009)(while prison official can rely on advice of medical personnel, there is no reasonable reliance where officials has independent information that would require medical treatment or where official has reason to know that the medical diagnosis was incomplete or inaccurate).

Goebert v. Lee County, 510 F.3d 1312 (11th Cir. 2007) (pregnant inmate who had leaked amniotic fluid for several days stated claim for denial of medical care where fetus was stillborn; record showed that prison official did not believe her complaint; no qualified immunity)

Danley v. Allen, 540 F.3d 1298 (11th Cir. 2008)(prisoner had a serious medical need after being subjected to pepper spray and rights were violated by keeping him in small enclosed area and not providing proper shower)

Hayes v. Snyder, 546 F.3d 516 (7th Cir. 2008)(prison doctor who had policy of not providing prescription level pain killers and who would not make a referral to a specialist when he could not determine source of pain; inmate had serious medical condition of testicular cysts and growths that caused excruciating pain).

Flanory v. Bonn, 604 F.3d 249 (6th Cir. 2010)(denial of toothpaste for 1 year); Berry v. Prettyman, 604 F.3d 435 (7th Cir. 2010) (lack of effective services for serious dental pain is actionable); McGowan v. Hulick, 612 F.3d 636 (7th cir. 2010)(delay in dental surgery was actionable; claim of delay caused by economic factors).

Davis v. Carter, 452 F.3d 686 (7th Cir. 2006)(denial of methadone to incoming inmate who was on methadone maintenance and suffered painful withdrawal symptoms states claim for denial of medical care; failure of county to have in place a system for such *36 care establishes municipal liability); Foelker v. Outagamie Cy., 394 F.3d 510 (7th Cir. 2005) (need for methadone to continue maintenance program was serious medical need and signs of withdrawal sufficient to show knowledge of medical personnel).

Williams v. Leifer, 491 F.3d 710 (7th Cir. 2007) (delay in medical care that prolongs serious pain is actionable and can be proven without expert testimony if medical records demonstrate that treatment eventually provided alleviated the pain and the medical condition).

Gordon ex rel. Gordon v. Frank, 454 F.3d 858 (8th Cir. 2006) (newly admitted inmate who complains of congestive heart failure and shows symptoms of this disease and who repeatedly requested care before he died of a heart attack, stated claim under Eighth Amendment)

Clark-Murphy v. Foreback, 439 F.3d 280 (6th Cir. 2006) (denial of care to inmate with severe psychiatric problems; court discusses how to determine liability of a large number of defendant officers who had contact with or were responsible for inmate's safety)

Pabon v. Wright, 459 F.3d 241 (2d Cir. 2006)(discussing right to refuse treatment and to informed consent based on relevant medical information; inmate had hepatitis C and was subjected to liver biopsy that led to infection; he was entitled to information regarding side effects and dangers of procedure)

Spruill v. Gillis, 372 F.3d 218 (3d Cir. 2004) (sustaining claims for lack of treatment for serious back pain and threat of permanent injury).

Natale v. Camden County Correctional Facility, 318 F.3d 575 (3d Cir. 2003)(failure to provide insulin to person with diabetes was deliberate indifference to serious medical condition and private medical provider could be liable for failing to have policies and practices to ensure that this medication is provided on a timely basis).

Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008)(prohibition of transportation of pregnant inmates to off-site for elective abortion is unconstitutional; under Turner factors, no showing of serious security problems and rejecting "heckler's veto" where there were anti-abortion demonstrations at some clinics)

Nelson v. CMS, 583 F.3d 522 (8th Cir. 2009)(en banc)(policy of shackling women prisoners during labor is violation of Eighth Amendment as it interferes with necessary medical care and is *37 unduly painful; risk of flight is almost non-existent; court denies qualified immunity as prior case law was sufficient to put officials on notice and prison regulations required a balancing of medical and security concerns).

Shepherd v. Dallas Cy., 591 F.3d 445 (5th Cir. 2009)(systematic failure to diagnose serious ailments or to provide care); Langford v. Norris, 614 F.3d 445 (8th Cir. 2010)(complicated grievance procedure denied access to care).

Thomas v. Cook Cy. Sheriff's Department, 604 F.3d 293 (7th Cir. 2010) (sustaining $4 million award against individuals and City for failure to properly tret inmate who dies of meningitis; officers were on notice of his need for care by direct observation and by complaints of other inmates; city liability based on evidence that there was widespread practice of not collecting medical request forms or to reviewing those collected; city can be liable even if contractor's personnel were not individually responsible for the death).

Conn v. City of Reno, 591 F.3d 1081 (9th Cir. 2010)(individual officers could be held liable for failing to provide information to jailers as to the serious suicide risk of decedent; attempt to kill oneself in patrol car sufficient to put officers on notice; causation is issue for jury; City can be held liable for failure to train on suicide prevention and identification of suicide risks; that suicides in custody are predictable as a statistical matter; and lack of written policies requiring reporting of suicide attempts while in police custody could be proven by post incident evidence that officers were not disciplined for this event). See also Clouthier v. Cy. of Contra Costa, 591 F.3d 1232 (9th Cir. 2010).

Long v. County of Los Angeles, 442 F.3d 1178 (9th Cir. 2006) (county could be held liable for lack of care for inmate suffering from congestive heart failure where VA doctor set forth what care was needed and sentencing court ordered an examination and report upon admission to the jail; fact that medical professionals were in charge of care did not relieve the City of duty to properly train and supervise the staff; city must have adequate policies and training as to medical care for acutely ill inmates)

Lawson v. Dallas County, 286 F.3d 257 ((5th Cir. 2002) (sustaining award against county on Monell theory for lack of treatment for parapalegics; fact that this was first injury does not defeat claim; in this case the plaintiff had developed severe decubitus ulcers on his lower back, but health and correctional officials *38 ignored the condition and failed to provide even basic care; award of $250,000 sustained)

Blackmore v. Kalamazoo Cy., 390 F.3d 890 (6th Cir. 2004) (symptoms of appendicitis should have been obvious, so no need for expert testimony on effect of delay in treatment).

Johnson v. Wright, 412 F.3d 398 (2d Cir. 2005)(medical protocol rejecting certain medical treatment for substance abuse patients does not automatically protect defendants from liability where they made no individualized assessment of dangers of medication; jury question on whether there was

deliberate indifference to Hepatitis C inmate where medication refused on basis of protocol).

Agster v. Maricopa Cy., 422 F.3d 836 (9th Cir. 2005)(no federal privilege of peer review mortality reviews and studies made by defendant health care provider)

Rodriguez v. PAS, 577 F.3d 816 (7th Cir. 2009)(discussing standards for determining whether private ambulance service and private hospital which refused to treat plaintiff acted under color of state law).

Thomas v. Bryant, 614 F.3d 1288 (11th Cir. 2010)(deliberate indifference standard and not malice governs claim of improper use of chemical agent on mentally ill inmates not capable of responding to prison directives or regulations).

United States v. Georgia, 126 S.Ct. 877 (2006)(Title II of ADA validly abrogates state sovereign immunity for actual violations of 14th Amendment rights). See also, Kiman v. New Hampshire Dept. of Corrections, 451 F.3d 274 (1st Cir. 2006)(discussing medical needs recognized by ADA and suggesting standards of review of statutory rights that are similar to RLUIPA); Hale v. King, 624 F.3d 178 (5th Cir. 2010)(no state liability for ADA claims that do not state separate 14th Amendment violation).

III. DUE PROCESS AND PUNISHMENT IN PRISONS

A. Supreme Court Doctrine:

Sandin v. Conner, 515 U.S. 472 (1995). Court held there was no right to due process hearing unless the change in conditions "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Real issue is what is the proper baseline for determining whether segregation imposes such hardships. Plaintiff had been in RHU for 30 days.

Wilkinson v. Austin, 125 S.Ct. 2384 (2005)(super max prisons impose extreme isolation on most violent and disruptive prisoners and, therefore, inmates have a liberty interest in avoiding placement; state provides sufficient due process by requiring notice of proposed placement, "fair opportunity for rebuttal," and a short statement of reasons, after hearing).

B. Lower Court Decisions:

Davis v. Barrett, 576 F.3d 129 (2d Cir. 2009)(55 days in administrative segregation may require due process safeguards depending on harshness of the conditions)

Hardin-Bey v. Rutter, 524 F.3d 789 (6th Cir. 2008)(indefinite placement in administrative segregation presents due process issue)

Stevenson v. Carroll, 495 F.3d 62 (3d Cir. 2007)(pre-trial inmates alleged valid due process claims based on being housed in SHU areas without a hearing or adequate reasons; fact that there may have been a legitimate classification decision does not bar suit and some discovery is necessary on this issue).

Colon v. Howard, 215 F.3d 227 (2d Cir. 2000)(305 days in SHU was atypical and severe hardship requiring procedural due process; discussion of bright line rule of 180 days; and advice to district courts to develop record on impact of segregation for periods of 100-300 days); Kalwasinski v. Morse, 201 F.3d 103 (2d Cir. 2000)(same); Scott v. Coughlin, 78 F.Supp.2d 299 (S.D.N.Y. 2000)(applying test).

Tellier v. Fields, 280 F.3d 69 (2d Cir. 2002)(plaintiff put in RHU as an " "escape risk" for 522 days; court rules that federal regulation requiring a " "detention order" with reasons stated for restrictive housing placement creates a liberty interest regarding duration of confinement and that this prolonged confinement is "atypical and [a] significant hardship" under Sandin. Further, law was clearly established on his point even though court had not yet declared regulation to create a liberty interest and, therefore, no qualified immunity defense to damages claim). See also, Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007).

Palmer v. Richards, 364 F.3d 60 (2d Cir. 2004)(while duration of segregation--77 days-was not atypical, the conditions of confinement were so substandard as to make the detention atypical and thus subject to due process standards); Serrano v. Francis, 345 F.3d 1071 (9th Cir. 2003)(same; placing of disabled person in solitary without ability to take showers, etc. was atypical).

Shoats v. Horn, 213 F.3d 140 (3d Cir. 2000)(eight year confinement to RHU requires due process safeguards, but periodic reviews satisfied this requirement).

Farid v. Ellen, 593 F.3d 233 (2d Cir. 2010)(vagueness of prison regulations with respect to possession of written materials violated due process rights).

Burns v. PA DOC, 544 F.3d 279 (3d Cir. 2008)(inmate had property interest protected by due process where prison disciplinary proceeding resulted in an assessment on his inmate account for expenses caused by his assault)

Howard v. U.S. Bureau of Prisons, 487 F.3d 808 (10th Cir. 2007)(inmate entitled to production of video of incident on claim that denial of such exculpatory evidence would deny due process of law).

Luna v. Pico, 356 F.3d 481 (2d Cir. 2004)("some evidence" rule for disciplinary sanctions is not met where prison simply provided hearsay allegations of assault without any consideration of credibility of " "complainant;" however, qualified immunity precludes damages claim). See also, Wilson v. Jones, 430 F.3d 1113 (10th Cir. 2005)(no evidence at hearing in support of disciplinary charges); Sira v. Morton, 380 F.3d 57 (2d Cir. 2004)(discussing notice and disclosure of evidence requirements).

C. Procedural Issues

Muhammed v. Close, 124 S.Ct. 1303 (2004)(where prisoner sues for damages for allegedly false misconduct charge, and thereby seeks to challenge conditions of confinement as opposed to fact or duration of confinement, Heck v. Humphrey, 512 U.S. 477 and Edwards v. Balisok, 520 U.S. 641 (1997) favorable termination rule is not applicable as a predicate to suit). Wilkinson v. Dotson, 125 S. Ct. 1242 (2005)(challenge to parole procedures not barred by Heck since outcome of new hearing is unpredictable; court may grant injunctive and declaratory relief).

Leamer v. Fauver, 288 F.3d 532 (3d Cir. 2002)(court permits challenge to placement in restricted activities program as part of sex therapy program permitted to proceed under §1983 where inmate's claims if successful would not lead to earlier release, but rather attacks a condition of confinement. Further, the fact that the inmate seeks access to programs that would enhance his chances for parole does not turn this challenge into one that sounds in habeas. Court also determines that remand is necessary to assess due process and other claims). See also, Torres v. Flauver, 292 F.3d 141 (3d Cir. 2002) (same).

IV. PRIVACY RIGHTS IN PRISON

A. General Principles

United States v. Kincade, 379 F.3d 813 (9th Cir. 2004)(en banc) (sustaining statute requiring inmates convicted of certain crimes and on parole to provide DNA samples for future identification in criminal investigations); U.S. v. Sczubelek, 402 F.3d 175 (3d Cir. 2005)(same); Green v. Burge, 354 F.3d 675 (7th Cir. 2004)(same).

Demery v. Arpaio, 378 F.3d 1020 (9th Cir. 2004)(sheriff's use of "webcams" to stream live images of pre-trial detainees on the Internet deprived inmates of privacy rights under 14th Amendment and amounted to punishment not authorized by law; court finds invasion of privacy to be serious and gratuitous).

Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002)(en banc)(right to procreation does not survive incarceration and prisoner has no substantive due process right to have his wife artificially inseminated with his sperm. Under Turner, the right is inconsistent with incarceration. Dissent would find no state interest in interfering with this right)

Willis v. Artuz, 301 F.3d 65 (2d Cir. 2002)(convicted inmate has no privacy interest to be free from search of cell conducted at behest of police, even where no institutional interests are served by the search).

Powell v. Schriver, 175 F.3d 107 (2d Cir.1999)(transsexual's right to keep condition private and confidential; inmate also states claim under Farmer v. Brennan for deliberate indifference where he was subjected to attacks because of this disclosure)

Neumeyer v. Beard, 421 F.3d 210 (3d Cir. 2005)(sustaining suspicionless searches of cars of visitors to state prison).

B. Strip Searches:

Florence v. Bd. of Chosen Freeholders, 621 F.3d 296 (3d Cir. 2010) (sustaining blanket strip search policy).

Bull v. City of San Francisco, 595 F.3d 964 (9th Cir. 2010)(en banc) (sustaining a blanket strip search policy)

Allison v. GEO Group, Inc., 611 F.Supp. 2d 433 (E.D. Pa. 2009)(DuBois, J.)

Powell v. Barrett, 541 F.3d 1298 (11th Cir. 2008)(en banc)(no need for individualized suspicion in jail strip searches).

Tardiff v. Knox Cy., 365 F.3d 1 (1st Cir. 2004)(sustaining class certification of damages class for unconstitutional strip searches at jails and prisons).

Hutchins v. McDaniels, 512 F.3d 193 (5th Cir. 2007)(strip search of inmate must be based on a proper institutional safety or security need)

Sanchez v. Pereiva-Custillo, 590 F.3d 31 (1st Cir. 2009)(invasive abdominal surgery to determine if inmate hiding cell phone violated clearly established rights; no qualified immunity).

V. FIFTH AMENDMENT PROTECTIONS AGAINST SELF-INCRIMINATION

McKune v. Lile, 122 S.Ct. 2017 (2002)(finding constitutional over Fifth Amendment challenge prison policy of reducing privileges and changes in classification for sex offenders who do not disclose past sexual misconduct including case on which they were convicted where state does not guarantee confidentiality of these statements. Consequences to inmate were not ""atypical." Justice O'Connor, concurring, rejected the test of plurality and sustained the program only because inmate would not likely be "compelled" by the consequences to provide the information).

Searcy v. Simmons, 299 F.3d 1220 (10th Cir. 2002)(extending Lile to regulation that forfeited good time credits for failure to participate in program and provide incriminating information; prisoner was faced only with ""difficult choice").

Gwinn v. Awmiller, 354 F.3d 1211 (10th Cir. 2004)(prisoner not convicted of sex offense can be classified as sex offender and can be made to forfeit good time for refusal to engage in sex offender program; court does not decide whether refusal to parole inmate in these circumstances would be "compulsion" under Fifth Amendment).

Wirsching v. Colorado, 360 F.3d 1191 (10th Cir. 2004)(denial of visitation with children of inmate is permissible for failure to participate in sex therapy program).

Ainsworth v. Stanley, 317 F.3d 1 (1st Cir. 2002)(even where refusal to participate in sex offender programs (with required admissions) would reduce chances for parole, no Fifth Amendment protections).

United States v. Antelope, 395 F.3d 1128 (9th Cir. 2005)(requirement of sex offender program for probationer to discuss full sexual history, without provision of immunity, violates Fifth Amendment; threat of imprisonment is sufficient compulsion). See also, *43 United States v. Saechao, 418 F.3d 1073 (9th Cir. 2005)(requirement that probationer reveal possession of any weapons violates Fifth Amendment).

VI. GENERAL CONDITIONS OF CONFINEMENT AND THE EIGHTH AMENDMENT

A. "Conditions Litigation"

Bowers v. City of Philadelphia, 2007 WL 2818501 (January 25, 2007, E.D.Pa.)

Coleman v. Schwarzenegger, F.Supp. 2d (N.D. Cal. 2009) (3-Judge Court) (requiring reduction in population in California state prison system due to harm caused by lack of medical care); cert granted, 2010. See also Plato v. Schwarzenegger, 603 F.3d 1088 (9th Cir. 2010)(appointing receiver to oversee medical system); Graves v. Arpaio, 623 F.3d 1043 (9th Cir. 2010).

Hubbard v. Taylor, 538 F.3d 229 (3d Cir. 2008)(pre-trial facility that housed 3 to cell, with mattresses on floor must be judged by Fourteenth Amendment, not Eighth Amendment standards; triple celling alone not sufficient to show "punishment") See also Hart v. Sheahan, 396 F.3d 887 (7th Cir. 2005)

Pierce v. County of Orange, 519 F.3d 985, as amended, 526 F.3d 1190 (9th Cir. 2008)(finding ADA violations and constitutional violations (denial of adequate exercise time) in proceeding to determine need for continued injunctive relief under PLRA).

Smith v. Peters, F.3d (7th Cir. 2011)(severe cold conditions violated Eighth Amendment).

Thomas v. Ponder, 611 F.3d 1144 (9th Cir. 2010)(denial of exercise for 14 months cannot be justified by refusal to sign form no to engage in violent behavior).

Foster v. Runnels, 554 F.3d 807 (9th Cir. 2009)(denial of 16 meals over a 23 day period can state claim for cruel and unusual punishment)

Sain v. Wood, 512 F.3d 886 (7th Cir. 2008)(discussing cases finding 8A violations on conditions)

Vinning-El v. Long, 482 F.3d 923 (7th Cir. 2007)(inhumane conditions in punitive segregation, with non-working sink and toilet; water on floor; blood on walls provides strong circumstantial evidence that defendants who worked on this unit knew of the conditions).

Gillis v. Litscher, 468 F.3d 488 (7th Cir. 2006)(court compares claims of conditions of confinement at Supermax with a "stay at a *44 Soviet gulag in the 1930's'D' and finds triable issue under 8th Amendment)

Spencer v. Bouchard, 449 F.3d 721 (9th Cir. 2006)(long term exposure to cold and wet conditions violate rights of pre-trial detainee).

Lopez v. City of Chicago, 464 F.3d 711 (7th Cir. 2006)(depriving suspect of food and drink shackling him during periods of interrogation for several days violates Fourth Amendment; also state violation of Gerstein v. Pugh requirement of arraignment within reasonable period of time).

Hydrick v. Hunter, 466 F.3d 676 (9th Cir. 2006)(discussing constitutional limitations on conditions of confinement for persons civilly committed as sexually violent predators).

Miller v. King, 384 F.3d 1248 (11th Cir. 2004)(court grants relief under 8th Amendment for conditions of confinement where he was placed in isolation, and there were no accommodations for his paralysis and other disabilities).

Magluta v. Samples, 375 F.3d 1269 (11th Cir. 2003)(harsh, solitary confinement conditions imposed for a period in excess of 500 days for pre-trial detainee could be found to amount to punishment in violation of 14th Amendment; failure to provide periodic reviews as required by regulations; no qualified immunity as law was clearly established).

Demery v. Arpaio, 378 F.3d 1020 (9th Cir. 2004)(sheriff's use of " "webcams" to stream live images of pre-trial detainees on the Internet deprived inmates of privacy rights under 14th Amendment and amounted to punishment not authorized by law).

Despain v. Uphoff, 264 F.3d 965 (10th Cir. 2001)(unsanitary conditions caused by flood of cellblock; standard does not change merely because flooding occurred during prison riot; indiscriminate use of pepper spray stated 8th Amendment violation; no qualified immunity as these rights were clearly established).

Atkinson v. Taylor, 316 F.3d 257 (3d Cir. 2003)(inmate with serious allergies to second hand smoke claimed that exposure to environmental tobacco smoke in cell violated Eighth Amendment by the risk of future harm and the infliction of current injuries. Court sustained both claims based on record testimony and further ruled that there was no qualified immunity given settled status of the law). See also, Powers v. Snyder, 484 F.3d 929 (7th Cir. 2007).

B. Excessive Force Claims

Wilkins v. Gaddy, 130 S. Ct.1175 (2010). See also, Hendrickson v. Cooper, 589 F.3d 887 (7th Cir. 2009).

Giles v. Kearney, 571 F.3d 318 (3d Cir. 2009)(use of force while inmate was fully restrained is excessive; no qualified immunity)

Iko v. Shreve, 535 F.3d 225 (4th Cir. 2008)(use of excessive amounts of pepper spray during "cell extraction" stated 8th Amendment claim where inmate did not physically resist officers; failure to provide medical care for the spray was also actionable; overall use of force that resulted in death was not justified; no qualified immunity)

Danley v. Allen, 540 F.3d 1298 (11th Cir. 2008)(use of pepper spray after inmate was no longer refusing an order; failure to provide medical attention following use of spray; refusal to allow inmate to leave contaminated cell, with poor ventilation, where he could not properly breathe, while being mocked by officers, states 8th Amendment claim)

Lawrence v. Bowersox, 297 F.3d 727 (8th Cir. 2002)(sustaining jury verdict finding excessive force for use of large amounts of pepper spray in plaintiff's cell; also finding that officer on scene had duty to intervene and that officers were not protected by qualified immunity). See also, Treats v. Morgan, 308 F.3d 868 (8th Cir. 2002); Martinez v. Stanford, 323 F.3d 1178 (9th Cir. 2003)(same).

Irving v. Dormire, 519 F.3d 441 (8th Cir. 2008)(death threats to inmate by officers; labeling plaintiff a "snitch," and permitting other inmates to assault plaintiff are all violations of clearly established rights under 8th Amendment; court also finds a failure to protect under these facts)

Valdes v. Crosby, 450 F.3d 1231 (11th Cir. 2006)(warden can be held liable for excessive force causing death of inmate where there was evidence of pattern of excessive force pervasive enough to constitute notice to warden and failure to take adequate steps to prevent such force). See also, Matthews v. Crosby, 480 F.3d 1265 (11th Cir. 2005)(warden was specifically warned about illegal use of force and in particular by CO sued in this case; testimony showed his indifference to use of force problem including the handling of complaints from inmates).

Bozeman v. Orum, 422 F.3d 1265 (11th Cir. 2005)(continued use of force after prisoner was subdued and then delaying medical care for 14 minutes while he lay unconscious states claim for malicious use of force).

Brooks v. Kyler, 204 F.3d 102 (3d Cir. 2000)(minor injuries sufficient to establish excessive force claim where force was maliciously applied). See also, Smith v. Messinger, 293 F.3d 641 (3d Cir. 2002)(jury issue on extent of force and holding that officer in location may be liable for not intervening to protect inmate from attack by fellow officer).

Fuentes v. Wagner, 206 F.3d 335 (3d Cir. 2000)(standards for excessive force claims for pre-trial detainees)

C. Duty to Protect

Rodriguez v. Dept. of Corrections, 508 F.3d 611 (11th Cir. 2007) (prisoner who notified officials of threats from former gang members (for leaving the gang) and was attacked by one of the gang members upon release from protective custody states claim and there was a jury question as to whether the deliberate indifference caused the injuries)

Howard v. Waide, 534 F.3d 1227 (10th Cir. 2008)(prisoner's oral request for protection after being sexually assaulted was sufficient to give notice of danger to prison officials; identification by prisoner of the group that had made the threats was sufficient, even though prisoner failed to name specific inmates; remedies of transfer or protective housing were available to officials, but were not used)

Brown v. Fortner, 518 F.3d 552 (8th Cir. 2008)(failure to secured seat belts for inmates who were shackled and being transported in vans; careless driving; and mocking of their request for safety in the vans states a claim under 8th Amendment and Farmer).

Ambrose v. Young, 474 F.3d 1070 (8th Cir. 2007)(inmate required to work near downed power line was electrocuted when CO ordered him to stamp out a fire in close proximity to the line; deliberate indifference was proven by these facts)

Morgan v. Morgensen, 465 F.3d 1041 (9th Cir. 2006)(requiring inmate to work on dangerous equipment on a job for which he had volunteered states cause of action by showing of deliberate indifference to his safety).

Kahle v. Leonard, 477 F.3d 544 (8th Cir. 2007)(sufficient evidence to show that supervisor was deliberately indifferent to substantial risk that another CO was sexually assaulting plaintiff; defendant knew that CO had entered the cell three times after lockdown and stayed over 5 minutes on one occasion; no qualified immunity).

Green v. Bowles, 361 F.3d 290 (6th Cir. 2004)(pre-operative male-to-female inmate stated claim for deliberate indifference when he was placed in unit with inmate warden knew to be predatory).

Cottone v. Jenne, 326 F.3d 1352 (11th Cir. 2003)(prison officials who were aware of violent nature of inmate (both a history of violence and current schizophrenic attacks) were liable for his assault on plaintiff; right was clearly established and therefore no qualified immunity).

Calderon-Ortiz v. Laboy-Alvarado, 300 F.3d 60 (1st Cir 2002)(lack of proper classification procedures may be basis for claim for lack of protection from assaults).

Cavalieri v. Shepard, 321 F.3d 616 (7th Cir. 2003)(standards for deliberate indifference in jail suicide; no qualified immunity once there is a showing that official knew of and disregarded excessive risk).

Pierson v. Harley, 391 F.3d 898 (7th Cir. 2004)(awareness of inmate's violent propensities and failure to follow classification procedures sufficient to establish liability; no need to show which inmate might be in danger). See also Brown v. Butz, 398 F.3d 904 (7th Cir. 2005); Gonzales v. Martinez, 403 F.3d 1179 (10th Cir. 2005).

VII. EX POST FACTO

Pa. Prison Society v. Cortes, 622 F.3d 215 (3d Cir. 2010)(rejecting Ex Post Facto challenge to amendments to commutation procedures); Mickens-Thomas v. Vaughn, 355 F.3d 294 (3d Cir. 2004).

VIII. DAMAGES AND QUALIFIED IMMUNITY

Pearson v. Callahan, 129 S.Ct. 808 (2009)

Hope v. Pelzer, 122 S.Ct. 2508 (2002)(8th Amendment prohibits use of ""hitching post" for extended time as punishment for misconduct. Even without specific precedent on this type of punishment, no qualified immunity for defendants since some conduct is so obviously unconstitutional as to not require prior case law with "materially similar" facts).

Thomas v. Cook Cy. Sheriff's Department, 588 F.3d 445 (7th Cir. 2009) (sustaining $4 million award against individuals and City for failure to properly treat inmate who died of meningitis; officers were on notice of his need for care by direct observation and by complaints of other inmates; city liability based on evidence that there was widespread practice of not collecting medical request forms or to reviewing those *48 collected; city can be liable even if contractor's personnel were not individually responsible for the death).

Gibson v. Moskowitz, 523 F.3d 657 (6th Cir. 2008)($ 2 million compensatory and $3 million punitive award upheld for wrongful death of inmate who died of dehydration after being kept in extremely hot room while on psychiatric medications)

Haynes v. Stephenson, 588 F.3d 1152 (8th Cir. 2009)(sustaining punitive award of $2500 where jury awarded only nominal compensatory damages).

Harrison v. Ash, 539 F.3d 510 (6th Cir. 2008)(nurses employed by private medical provider not entitled to QI; court places heavy emphasis on fact that provider was a for-profit corporation who could attract medical personnel without protections of QI). See Richardson v. McKnight, 521 U.S. 399.

Inouye v. Kemna, 504 F.3d 705 (9th Cir. 2007)(no qualified immunity from claim that defendants violated parolee's rights by requiring him to be placed in a religion-based narcotics treatment program as condition of parole).

Williams v. Bitner, 455 F.3d 186 (3d Cir. 2006)(law was clearly established that inmates could refuse to handle pork in prison condition for religious reasons even though Third Circuit had not yet ruled on this precise issue)

Hydrick v. Hunter, 466 F.3d 676 (9th Cir. 2006)(no qualified immunity on claims regarding conditions of confinement in civil commitment for sexually violent predators as conditions would have violated clearly established rights even of those convicted of crime; lack of case law on SVP does not provide automatic grounds for immunity)

Farmer v. Perrill, 288 F.3d 1254 (10th Cir. 2002)(clearly established right not to be subject to humiliating strip search conducted without legitimate prison interest).

Walker v. Horn, 286 F.3d 705 (3d Cir. 2002)(dismissing qualified immunity interlocutory appeal as facts were in dispute; if plaintiff was forced-fed without reason, no immunity on constitutional claim).

Sterling v. Borough of Minersville, 232 F.3d 190 (3d Cir. 2000)

Beers-Capitol v. Whetzel, 256 F.3d 120 (3d Cir. 2001)

Pryer v. Slavic, 251 F.3d 448 (3d Cir. 2001)

Allah v. Al-Hafeez, 226 F.3d 247 (3d Cir. 2000)(freedom of religion claim for damages subject to PLRA restrictions on damages; absent physical harm, inmate entitled to nominal and punitive damages). Compare, Oliver v. Scott, 276 F.3d 736 (5th Cir. 2002)(leaving open issue of constitutionality of limitations on damages for First Amendment claims).

IX. TRIAL ISSUES

Pleading requirements: Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009); Erickson v. Pardus, 127 S.Ct. 2197 (2007); Gee v. Pacheco, 624 F.3d 1304 (10th Cir. 2010) (applying Iqbal to retaliation and free speech claims and requiring specificity where facts are known to inmate); Edwards v. Snyder, 478 F.3d 827 (7th Cir. 2007).

Sides v. Cherry, 609 F.3d 576 (3d Cir. 2010)(sustaining shackling procedures at civil trial).

Drippe v. Tobelinski, 604 F.3d 778, 787 (3d Cir. 2010)(reversing summary judgment granted in violation of Rule 56 time requirements; "we require prisoners to adhere strictly to . . . PLRA. It is not too much to ask that non-prisoner parties play by the . . .Rules of Civil Procedures" (Ambro, J., concurring)).

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