Kafka in the Desert: Palestinian Detainees Struggle

Imagine, if you will, an isolated prison in the desert. Surrounding the one conventional prison building is a large compound, divided into barbed wire enclosures, each holding several dozen prisoners in tents. The compound is walled in, and guarded by military police. The prisoners, however, are civilians. They have not been charged with a crime. Nor have they received a trial. They are imprisoned under half-year detention orders issued by the military which are capable of indefinite renewal and which contain no charges beyond the assertion that “this person constitutes a danger to security.” Such an order can be issued based merely upon a person’s expression of political views critical of the army or the government.

There is no need to imagine any of this. Not for the nearly 300 Palestinian “Administrative Detainees” imprisoned at Megiddo, an Israeli military prison located in a desolate corner of northern Israel. For those Palestinians, Megiddo is reality.

Some of the nearly 300 detainees have already served three or four years, with no idea how long their imprisonment will continue. Under “Emergency Regulations” which Israel inherited from the British colonial regime, no evidence is required to prove that the detainees constitute a danger to security.

In 1988, the Supreme Court in Jerusalem ruled that such detainees, held without trial, should receive prison conditions far better than those of ordinary prisoners and “comparable to the conditions of Prisoners of War” — as then Supreme Court President Meir Shamgar put it. But these stipulations are all but ignored by the Megiddo prison administration.

In 1996, a single Israeli extreme nationalist was imprisoned at Megiddo under the same set of “Emergency Regulations.” At the time, an impressive lobby of right-wing Knesset Members issued the demand that the authorities must either bring charges against the man or release him. (The second possibility was what eventually took place). None of these KM’s could be persuaded to apply the same logic to hundreds of Palestinian detainees.

The Oslo-2 Agreement explicitly mandated the release of all Palestinian women prisoners. With obvious reluctance, Prime Minister Netanyahu carried out this obligation in February 1997, a year and a half after the date originally stipulated. He seems in no hurry to carry out the clauses relating to male prisoners in general and administrative detainees in particular.

Meanwhile, long-simmering frustrations at Megiddo have boiled over. Whether or not by design, the fateful day of March 18, 1997, when Israeli bulldozers started work at Jebel Abu Ghnein/Har Homa, was also the day when several of the longest-held administrative detainees at Megiddo were informed that their incarceration was being extended by still another half-year.

On the night of March 19, the Palestinian detainees staged what were initially extensive non-violent protests. Their representatives met with prison officials, emphasizing that their protest was not about prison conditions but about the institution of administrative detention itself. Accordingly, they demanded an immediate meeting with a senior Israeli government representative, empowered to talk on this basic issue.

Short fruitless negotiations were followed with the invasion of the prisoner enclosures by a company of
Kafka (Continued)

soldiers. The prisoners reacted by throwing any object which came to hand, from lumps of soap to tin cans. the soldiers shot dozens of tear gas canisters, many of which were thrown back by the prisoners; the prisoners then set seven of the tents on fire. An enterprising Israeli TV reporter was able to climb and direct his camera over the prison wall, getting the Israeli public some dramatic footage of "Megiddo Prison on Fire". Dozens of prisoners were wounded during suppression of the mutiny, some being severely beaten by soldiers.

Shortly afterwards, however, prisoner representatives were invited to talk with Brigadier General Herzl Goetz, the army's Chief Security Liaison Officer with the Palestinian Authority, who agreed to convey their grievances to his superiors. A deal was made (so it seemed) on one concrete issue: the authorities were henceforth to give some advance warning to the prisoners whose terms of detention would be extended, instead of giving such bad news at the very last moment — which has the effect of letting the prisoner and his family entertain false hopes.

As often in Israeli-Palestinian relations, all this quite soon proved worthless. For two months, the prisoners heard nothing from the authorities except for dire threats of what would happen if "disturbances" occurred again in the prison. In May, Goetz came again empty handed, telling the detainees that "the problem was very complicated" and that they would have to "wait patiently"; and notices of detention extension continued to arrive, as usual, on the very last day of a prisoner's previous term.

For good measure, a new kind of prisoner began arriving at Megiddo: Palestinian prisoners who had once been sentenced by a military court for offenses against Israeli rule and who, at the end of their prison term, were presented with administrative detention orders instead of being released.

On the evening of May 15, the detainees held protest processions in their enclosures, carrying benches made to resemble coffins. They then stood for ten minutes with bandages covering their mouths, to signify that the detention was intended to prevent them from freely expressing their political opinions. Finally, prisoner representatives informed the prison administration that the detainees would not comply with prisoner regulations during the evening court.

One of the representatives was hauled off to solitary confinement. The warden, professing a personal sympathy for the detainees' grievances, told the other representatives that he had been ordered to take "tough steps". Shortly afterwards, soldiers began a heavy tear gas barrage, turning the prisoners' enclosures into virtual "white lakes". Prisoners who tried to climb up for fresh air were beaten. Dozens of detainees were subsequently in need of medical treatment, as well as two soldiers on whom gas was blown by the wind.

A few days later, Israeli television was invited to make a carefully supervised tour of Megiddo Prison "to see that everything is calm again". But immediately afterwards, more than half of the administrative detainees, said to be "ringleaders", were transferred from Megiddo to the Sharon and Damon Prisons, where they were housed in basement cells devoid of fresh air and sunlight, and subjected to a considerable worsening of their conditions regarding food, exercise, reading material and, last but not least, toilet paper.

Some of these deprivations were ameliorated after detainee protests, including in some cases hunger strikes; but as detainees told their lawyers, the strategy was clearly designed to force them to divert from their principled struggle against administrative detention back to particular issues of daily prison conditions.

Meanwhile, however, the repeated unrest and mutinies helped gain more attention for the issue from journalists and human rights activists.

In the Israeli paper Ha'aretz, Gideon Levy published a whole series of articles — concluding with the publication of photos, names, and brief descriptions of some sixty detainees — in an effort to counter the Israeli
media's tendency to portray Palestinians as a nameless, faceless horde.

On July 18, the news came of several administrative detainees starting a hunger strike, emphasizing that it was "not about prison conditions but about administrative detention as such". Hadash activists picketed the Prime Minister's Office, calling for the immediate release of all administrative detainees.

On the same evening, the Israeli TV's prestigious Friday Night Magazine gave ten minutes of coverage to the hitherto ignored cause. Several administrative detainees were interviewed through barbed wire fences, and TV crews visited the detainees' families.

The Israeli public, long accustomed to think of all imprisoned Palestinians as "terrorists", was confronted with such scenes as a little girl kissing her imprisoned father's photograph, and a woman crying bitterly in front of Hasharon Prisons, after being informed that because of a bureaucratic mistake she would not be allowed to visit her imprisoned brother.

Suha Bargouti of Ramallah — wife of Ahmed Katamsheh, already under administrative detention for five years — pulled out on camera a copy of an old document: the statement made from prison by five members of the Irgun (Jewish Underground headed by Menachem Begin) when they themselves had been placed under administrative detention by the Ben-Gurion Government during the first days of the state of Israel. The letter, setting out their reasons for starting a hunger strike, bore a strong resemblance to that issued by the present-day detainees.

The television located one of the five signatories on that 1948 letter, Betz'al el Amitzur. Asked for his opinion about the Palestinian detainees, the Irgun veteran said after some consideration: "Well, if they have no blood on their hands and nothing could be proven against them, then I really suppose they should be let go."

But the opinion of one old Israeli veteran notwithstanding, the administrative detainees continue their indefinite imprisonment. And their struggle is being taken up by other Palestinian prisoners.

According to the Bethlehem-based Prisoners' Association, 3,400 prisoners in Israeli jails staged a 24-hour hunger strike on September 15, 1997. The prisoners demanded an end to administrative detention.

In one example of such arbitrary arrests, Palestinian deputy Salah Tamari charged that the Israeli army had "arbitrarily arrested" eleven Palestinians near Bethlehem on September 15. Tamari charged that the youths, between 16 and 25 years old, were taken from their homes with no explanation or information about their detention.

The Prisoners' Association vowed that prisoners would heighten their campaign if their demands go unfulfilled.

[Editors Note: The bulk of this article was excerpted from the July-August 1997 issue of The Other Israel, the newsletter of the Israeli Council for Israeli-Palestinian Peace; P.O. B. 2542 Holon: Israel 58125. The accompanying side-bar is based on an August 25, New York Times article. Additional material was excerpted from Workers World (Vol. 39, No. 39).]
Beginning the first of March, 1998, the PLN book The Celling of America: An Inside Look at the U.S. Prison Industry will be on sale in bookstores nationwide. To date the feedback we've received on the book has been very positive. If you've read the book please write and let us know what you think of it. good or bad. We welcome comments so that we can improve any future books we publish. If you haven't ordered a copy yet just send $19.95 for each copy that you want, and $3 for priority mail postage, to PLN and it will be sent to you immediately. We hope that the book will inform and enlighten people about the reality of the prison industrial complex.

So far PLN's annual fund-raiser has brought in $2,697.24 in donations, which is still short of the goal of $6,000. If you haven't contributed to the PLN fund-raiser yet, it's not too late. All donations are tax deductible for those who pay taxes. Every little bit helps, so don't think that small donations don't count.

Recently a few readers have written in to ask about books they have seen reviewed in PLN. Namely, asking us to confirm if the books are indeed as good as we say they are in our reviews, if they are worth the price, etc. Our editorial policy for book reviews is that Dan or I look at all books or materials reviewed in PLN. In many cases we ask others to do the reviews themselves. I almost always review law related publications. We rarely run negative reviews. It's not because we like everything we read. Instead, due to space limitations we only review those materials that we think will interest and benefit our collective readership.

When it comes to expensive books (usually law books), we are especially conscious of the cost. In fact, some books don't get reviewed because we think they are overpriced. similar information is available elsewhere, cheaper, etc. When I review a book I ask myself if I would feel ripped off if I paid "X" amount for it and received it. In other words, is the average user likely to get that much use of it. In some cases we note in the review that a book might be great for a library, but not so good for an individual, as opposed to books that every prison inmate or person interested in jails/prisons, etc., should have. The same holds true for the book ads in PLN.

If readers respond to any reviews or ads in PLN please tell them that you heard about their product or services here. There are three ways that PLN can expand its size to bring you more information: increase our subscriber base, which cuts down our per issue costs; increase advertising revenue, which subsidizes PLN's fixed operating costs or raise subscription rates. We prefer to focus on the first two because we're committed to keeping PLN affordable. Telling publishers and advertisers that you heard about them in PLN will encourage them to advertise or continue advertising in PLN.

We'd like to thank all our readers that send us clippings and unpublished court rulings. Very few prison stories make the national media. The best sources of published information about prisons and jails is frequently the local and regional publications where the prisons are located. Frequently we learn about a story from a reader who sends us a clipping, at which point we can get further information from other sources, including PLN readers at a given facility. So keep the clippings coming, be sure to include the date and publication on each clipping. If you there is prison related news happening in your state and your wondering why PLN hasn't covered it, it's probably because no one has sent us any information on it. To the extent our coverage of some states is better and heavier than it is of other states is largely because we have readers in those states that keep us abreast of what is happening. So keep us posted on what's happening in your neck of the woods. Enjoy this issue of PLN and be sure to encourage others to subscribe.

Reader Mail

Tales from the Washington IMU Crypt

In case you'd like to report on recent events at Shelton [in one of Washington state's three "IMU" Control Units] here are the basics. In the first week of September [1997] a female guard told guys on F-tier to get ready for yard. [Only] One guy was let out and another guy questioned her about the delay in his yard. She smart-mouthed the guy and then went on break without running the other yards.

About an hour later they let another guy out on the tier [and he] refused to lock back up because he'd been denied part of his yard time. It took about 7 hours, but he eventually cuffed up and left the tier. But not before being shot in the forehead with what's called an "electrical impulse gun". It fires a load of hard rubber balls like buck shot. He was bleeding and required stitches when he left the tier.

A week later a guy was released from his cell without handcuffs. [He was then] told he received a "demotion" in level due to a so-called "observation report". These are infraction-type reports which only [line] stuff decide. There's no actual report other than the [line guard's] word. No hearing, no appeal and the prisoner has nothing to say about it, whether true or false.

Needless to say, this guy was not a happy camper. He kicked the phone off the wall [and] used it to break 22 cell door windows, tier lights, shower fixtures and parts of the walls which he pulled in as well. He cuffed up and left the tier after jamming all the door locks so the cops couldn't get anybody out without opening our doors.

A week after that, a guy on B-tier got out of his cell somehow and managed to break 22 more cell door windows with the phone, and lit a huge fire out on the tier. causing the guards to put on gas masks to evacuate the whole tier.

That led to our lockdown, but it didn't end the rebellion. Guys were still trying to break more windows, trying to get out of their cells, throwing stuff on the cops, flooding cells (2 or 3 tiers at once), fighting with the cops, getting gassed and beat up. This continued for about two days into the lockdown, which lasted a week.
It’s no exaggeration to say that for three weeks all we saw around here were goons in full riot gear, trying to restore “law and order” in IMU. [Letter edited for length]

— M.L. Shelton, WA

The Check’s in the Mail

Due to financial considerations, the recent killing of a NJ prison guard at Bayside State Prison in Leesburg, New Jersey (resulting in five different NJ prisons being locked down, July 30, 1997), the recent nightstick attack on a prisoner here at Trenton State Prison (morning of August 18, 1997), and the lunchtime attack (August 18) by prisoners on guards in the Trenton State Prison center rotunda (major traffic area for prisoners and staff) using the rotund guards’ nightsticks against them (guards), the resulting complete lockdown and search of the prison for eleven days and semi-lockdown/reduced prisoner movement as of the above date (September 7). I was not able to promptly renew my subscription, which will likely lead to an interruption in issues received.

[Editor’s Note: Don’t let this happen to you! Don’t wait for the last minute to renew. Save PLN both staff time and postage — and yourself a possible delay/interruption — by mailing in your PLN renewal at least four months in advance.]

— D.S. Trenton State Prison

Fingers in the PIE

I thought you might be interested in the Prison Industry Enhancement (PIE) program that was implemented at select Virginia prisons in 1997. The program allows the VDOC to contract outside of Virginia for prisoners to perform labor at minimum wage. I worked in the program until I found out how the money was being allocated. I enclose a copy of my pay stub that shows this allocation [received by PLN but not reproduced here].

Prisoners in this PIE program receive 25 percent of their gross pay; the DOC gets 25 percent; the Criminal Impact Compensation Fund gets 10 percent; and the withholding tax is about 8 percent.

It is interesting to note they take only 10 percent for the victims compensation fund (the federal guidelines say they can take out up to 20 percent for this type of fund). I doubt the 10 percent will even pay the salaries of those bureaucrats who decide who is eligible to receive compensation. The money does not go to the victim of the prisoner working in the PIE program. Instead it goes into a fund, and the bureaucrats sift through mounds of applications to decide who gets how much.

In addition, if the prisoner has been court-ordered to pay alimony or child support, then 20 percent is taken out for that purpose as well. If the prisoner has no court-ordered family support, the DOC automatically gets that money as additional “room and board.”

So, interestingly enough, the DOC manages to choose prisoners for the PIE program who do not have court-ordered family support, knowing that by doing so they will receive a bigger slice of the “PIE.” So it is easy to see how they decided on the name for this program. Anyway, as you will see from the enclosed documents, I made a total of $199.83 for 42.07 hours. I received a net pay of $49.06 and the DOC got a whopping $114.62, or 57 percent of my gross pay. I could not, in good conscience, continue in a program which I felt was designed to facilitate me paying to keep myself in prison.

— D.H., Virginia

Reaching the Breaking Point

A guy was mad over having his letter rejected because his girlfriend said something [in the letter] about sex. He was also tired of being lied to about getting out of IMU [Intensive Management Unit, Washington state’s version of a 23/7 Control Unit].

So last week [just before Thanksgiving] he goes to the shower, breaks the lights out in the shower, breaks the door down somehow, and gets out on the tier where he commences to break lights, cell door windows, and [pries] door frames apart using a metal bar he tore off the shower.

After this, he goes upstairs, stands on the railing, and breaks a hole in the false ceiling. Once he’s done, he climbs up into the ceiling, breaks through the wall separating B-tier from A-tier, and breaks another hole into the false ceiling over there.

Once he drops through [the hole in the ceiling] on A-tier, he proceeds to bust things up over there as well. He passed the metal bar into different cells so they could do the same.

By this time there’s a squad of 20 to 30 guards in front of A- and B-tier, fully equipped with electric shields, clubs, gas masks, tear gas guns, and a rubber bullet gun.

When they make the move to go in on him, he climbs back into the ceiling, goes over to C-tier, and breaks a hole in the false ceiling over there. Seeing this, the [goons] squad moves to C-tier, guns and all. So he goes [through the ceiling] to the law library area and does the same thing over there.

After this, he breaks up water pipes in the ceiling. So now we’ve got water raining down onto the tier. This went on for about four hours.

Finally the guards got tired of waving guns around. So they went to A-tier and fired into the ceiling with rubber bullets and tear gas. About 30 minutes later, he decides to give up.

— M.L. Shelton, WA

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March 1998
Doing Life: Reflections of Men and Women Serving Life Sentences. Portraits and Interviews by Howard Zehr

Book Review by Dan Pens

What does it mean to face a life prison sentence? That question holds a unique meaning in Pennsylvania, where more than 3,000 men and women are doing life. In Pennsylvania the only way out of a life sentence is commutation, and those exceed the mean prison sentence for Pennsylvania inmates.

Victim Offender Reconciliation Program (VORP) in the U.S. Dr. Zehr offers a brief conceptual outline of “restorative justice” in the book’s forward and afterward. Readers who find this topic of interest are encouraged to read Changing Lenses, one of Zehr’s earlier books.


BJS Reports on Sentencing and Imprisonment


The report on prisoners provides state-by-state (and federal) prison population statistics through year-end 1996. Highlights:

* During 1996, the number of female prisoners rose by 9.1 percent, nearly double the 4.7 percent increase of male prisoners.
* California (147,712), Texas (132,383), and the federal BOP (105,544) together held 1 in every 3 U.S. prisoners.
* On December 31, 1996, 1 in every 118 men and 1 in every 1,818 women were under the jurisdiction of state or federal correctional authorities.
* In 1996, the number of state and federal prisoners increased by 5 percent, lower than the 6.8 percent growth rate in 1995 and below the annual average growth rate of 8.1 percent since 1985.

The report on felony sentences reveals a stark difference between how felony convictions are disposed of by state and federal courts. Unlike the report on prisoners, this one does not offer a state-by-state breakdown on sentencing figures. It combines all states into one category and compares that figure with federal sentencing statistics.

The breakdown falls along category of crimes and how they are treated differently by state and federal courts. And this is where some surprising data are presented. Despite the general belief that federal courts are in the forefront of the vaunted “War on Drugs”, according to this report, 83 percent of all state felons convicted of drug offenses were sent to prison, compared with only 34 percent of persons convicted of federal drug charges. This figure, however, combines both possession and trafficking. When broken down by drug sub-categories, only 48 percent of those convicted of state drug trafficking charges were imprisoned, while 84 percent of federal drug traffickers received prison sentences.

One highlight of this report is the revealing statistics on the differences between state and federal sentencing practices in all categories of crimes. One of these differences is in the amount prison time expected to be served. The mean prison sentence for “all offenses” imposed by state courts in 1994 was 71 months, in federal courts it was 80 months. However, the amount of time expected to be served differs greatly: 29 months (or 41 percent of the sentence imposed) for state felons, compared to 68 months (85 percent) for federal felons.

These (and many other useful reports) are available free by calling the National Archive of Criminal Justice Data at the University of Michigan, 1-800-999-0960. The reports and data are also available on the Internet at http://www.ojp.usdoj.gov/bjs/ [a link to this and many other criminal justice related Internet websites can be found on PLN’s home page: www.prisonlegalnews.org]

Both reports can also be ordered by mail from: BJS Clearinghouse; PO Box 179, Dept. BJS-236; Annapolis Junction, MD 20701-0179.

March 1998 6

Prison Legal News
Peruvian Lawyers Arrested

Between November 18-21, 1997, in Lima, Peru, agents of the Peruvian political police, DINCOTE, arrested lawyers Ernesto Mesa Delgado, Carlos Gamero Quispes, Luis Ramon Landauer and Teodoro Benedeau Montes. The arrestees’ family members said they were given no reason for the arrests and noted that the detentions occurred after the lawyers had complained of “strange break-ins” at their law offices.

Attorney Diego Obregon Palacios, representing the detained attorneys, said that his colleagues were part of a list of more than 200 Peruvian lawyers who are being investigated by DINCOTE for “ties to terrorism” and who may be arrested in the near future. Obregon said the detained lawyers were being accused of acts of terrorism, apology for terrorism and treason to the fatherland. even though police had made no public statement concerning the charges. Obregon said their arrest was due to their defense of accused members of the Communist Party of Peru (PCP. AKA the “Shining Path”), and that they were being held for interrogation about the PCP.

All four arrested lawyers are members of the Association of Democratic Lawyers (ADL). In order to practice law in Peru one must be a member of the Bar Association. The ADL is composed of progressive lawyers who frequently represent citizens accused of political offenses. [For further information on the ADL see: “Peru’s Lawyers: A High Risk Profession.” PLN, Aug. 1994.] The ADL has paid a heavy price under the dictatorship of Alberto Fujimori: more than 40 of its lawyer members have been imprisoned for lengthy terms of incarceration for the “crime” of representing defendants accused of political offenses. Those are the lucky ones. Dozens more have been murdered or “disappeared” by government security forces.

The Peruvian court system offers nothing in the way of due process protection to political defendants. The accused usually learn of the charges against them when they appear in court. Trials take place before military tribunals of hooded, anonymous military judges. Prosecutors are also hooded and anonymous. Clients are not allowed to consult with their lawyers, if they have one, before the proceedings. Defense lawyers are powerless to present any type of meaningful defense: there are no witnesses to cross examine, no jury to sway, no evidence to examine. “Trials” are concluded in a matter of hours, with life sentences being the usual result. The role of ADL lawyers under these circumstances has been to essentially bear witness to the railroadings of those accused of political crimes.

ADL lawyers who arrive in court prepared to try to defend their clients don’t know if they will ever leave again as free citizens. When PCP chairman Abimael Guzman was placed on trial for “treason,” his lawyer, ADL president Dr. Alfredo Crespo Bragaryac, was prohibited from mounting any type of defense. When Guzman’s trial concluded a few hours later, Dr. Crespo was arrested and charged with treason for representing Guzman. Dr. Crespo is now serving a sentence of life imprisonment. The Peruvian government seeks to attribute the alleged crime of the client to their attorney. The equivalent to this practice is an American lawyer who represents a client charged with robbery being charged for the same crime as the client. Despite this abysmal and dangerous situation ADL members continue to represent citizens accused of political offenses.

In addition to extremely harsh prison conditions, which the government has openly admitted have the purpose of ensuring no one can survive a life sentence, the armed forces of Peru have carried out large scale massacres of political prisoners, including ADL members. [PLN, June, 1996 and September, 1992] Political prisoners in Peru are also denied the right to counsel after they are convicted in the anonymous military courts. Guzman, for example, has been denied all communication and contact with the outside world, including any visits from his doctor or his current lawyer, former National Lawyers Guild President Peter Erlinder.

The current arrest of ADL lawyers is seen as a “rounding up of the usual suspects” in the government’s ongoing, and unsuccessful, attempt to crush the PCP. Having declared the PCP “destroyed” several times in the past few years the Peruvian government is faced with an embarrassing resurgence of PCP activity. By targeting ADL members the government hopes to intimidate the legal profession into refusing to represent those accused of political offenses, essentially leaving no witnesses to the travesty of justice that passes for a legal system in Peru.

To protest the arrest of the ADL lawyers write:
Embassy of Peru
1700 Massachusetts Ave. N.W.
Washington D.C: 20036
Tel: (202) 833-9860
For more information on the revolution in Peru contact:
USA/PRP Friendship Association
304 Main Ave. Box 185
Norwalk, CT 06851
Website: www.blythe.org/mln

Corrections

In the January issue of PLN, on page 4, we reviewed the 16-page report, “Education as Crime Prevention: Providing Education to Prisoners”. At the end of the report we provided an incorrect address and telephone number for ordering copies of the report.

Just before we went to press, The Center moved, hence the address change. As far as the telephone number? Well, we just got it wrong. So, to order copies of the 16-page report, “Education as Crime Prevention”, please call or write:
The Center on Crime, Communities & Culture; 400 West 59 Street, Third Floor; New York, NY 1001 (212) 548-0600 [No collect calls, please]

In the February, 1998, issue of PLN we reported that a federal court in Spokane, WA, had struck down as unconstitutional the ban on PLN based on its mailing classification. The ruling has been published. The cite is: Miniken v. Walter, 978 F. Supp. 1356 (ED WA 1997).
I n my last column, I began a discussion of summary judgment motions in prison cases. Which I continue in this column. In prison cases, summary judgment motions are often made by defendants to try to get judgment without the need to go through a trial. Under Federal Rule of Civil Procedure 56 ("Rule 56"), summary judgment will be granted if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." (Emphasis mine.) In the last column, I discussed what summary judgment is, the role of discovery in summary judgment proceedings, and how to determine what are the material facts. In this column, I first discuss the legal standards that are used to decide summary judgment motions and then, in the context of the legal standards, discuss what a "genuine issue" is, and talk about how to show there are "genuine issues of material fact" sufficient to defeat a summary judgment motion.

Legal Standards For Deciding Summary Judgment Motions

Summary judgment, as it is written into Rule 56, is not supposed to be the same as a trial; rather, it is supposed to be a procedure by which the judge can decide whether a trial is necessary. So, in deciding a summary judgment motion, the court is not supposed to do things that a trial judge or jury does, such as figuring out who is telling the truth or resolving factual disputes. Instead, the court on a summary judgment motion is deciding whether a reasonable fact-finder at trial - the trial jury, or the judge in a non-jury trial - could give a verdict in favor of the nonmoving party. The U.S. Supreme Court has stated these requirements as follows:

"The inquiry performed is the threshold inquiry of determining whether there is the need for a trial - whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

...[T]his standard mirrors the standard for directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if under the governing law, there can be but one reasonable conclusion as to the verdict...If reasonable minds could differ about the import of the evidence, however, a verdict should not be directed."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251 (1986). Anderson goes on to say, however, that this means that there must be more than just "some evidence." The question for the judge is "not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party who opposes summary judgment.

A crucial legal standard for anyone opposing summary judgment to know and cite is that in ruling on a summary judgment motion, the judge must view the nonmoving party's evidence - your evidence if you are the plaintiff responding to the defendant's summary judgment motion - in the light most favorable to you: "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255.

This does not mean, however, that the judge must agree with everything you say or give you a trial just because you say there are genuine issues. There must be admissible evidence available before the judge can apply the above standards. I discuss how to produce this evidence below...

What Are "Genuine Issues" Of Material Fact Sufficient To Avoid Summary Judgment?

As shown in the last column, a "material fact" is a fact that relates directly to an essential element of a claim or defense. If the defendant files a summary judgment motion against you, you can demonstrate that there are "genuine issues" of material fact by showing, under the legal standards discussed above, that as to each material fact, a trial jury or judge could find in your favor at trial.

It is very important to note, however, that you cannot just rely on your complaint to show the existence of genuine issues. See the last two sentences of Rule 56(e). You must be able to bring forward evidence from depositions, interrogatory answers, declarations, admissions, etc. That evidence could in some cases be your own testimony, but it must be evidence, not just your complaint or your own statements that you think you have a claim.

In addition, if you are the plaintiff, there must be genuine issues (or undisputed evidence in your favor) as to every essential element of your claim for you to avoid summary judgment. There will not be a trial if the defendant can show that the evidence is not genuinely in dispute - and favors the defense - as to even one of the elements. For instance, if there is no genuine issue as to one of the elements, there is no reason to have a trial because the plaintiff could not win. For example, in making a claim of denial of access to the courts, it is now required that you show that you were hindered in your efforts to pursue a legal claim. Lewis v. Casey, 116 S.Ct. 2174 (1996). If you do not have enough evidence to permit a jury to find this element, you will lose a summary judgment motion no matter how strong your evidence is on the other elements.

The Process For Establishing Genuine Issues

The Supreme Court a few years ago clarified the summary judgment process as it relates to determining "genuine issues." The court did so in a way that favored defendants by making summary judgment easier to get in federal court than before. The case in which this happened is Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and it must be understood by anyone who is defending against a summary judgment motion.

In Celotex, the court held that a defendant making a summary judgment motion in federal court can win merely by showing that there is no evidence in the record that supports one or more of the essential elements of the plaintiff's claim. The court said that defendants are not required to put forward evidence negating the plaintiff's claims (as some federal courts previously thought), but could merely rely on the absence of evidence of an essential element that the plaintiff must prove to win at trial.

What this means is that, after a reasonable time to do discovery (see my last column), a defendant can file a summary judgment motion saying that there is no
Evidence in the record to support an essential part of your claim. For example, in a prison medical care case, you must show "deliberate indifference to a serious medical need" in order to win. The defendant could move for summary judgment saying that there is no evidence of "deliberate indifference." Unless you could point to something in the depositions, answers to interrogatories, or materials already in the record that would be enough to allow a judge or jury to find deliberate indifference, then you would have to produce evidence of deliberate indifference in response to the motion. If you didn't, then summary judgment would probably be granted.

To create a genuine issue, you must present evidence that, if put in the proper form, will be admissible at trial, although it does not have to be in admissible form at the time of the summary judgment motion. Celotex, 477 U.S. at 324. What this means is that you can present affidavits or declarations in response to a summary judgment motion, so long as those are on "personal knowledge." meaning that the person making the declaration would be able to testify to these facts at trial. The affidavit or declaration would not be admissible at trial, but the person could testify to the things they said in their affidavit, so long as they have personal knowledge. In contrast, you cannot successfully present affidavits that contain, for example, hearsay that would be inadmissible at trial: the person making the affidavit must have seen or heard what she or he swears to.

You can rely on circumstantial evidence in trying to defeat a summary judgment motion, but it must be strong enough to allow a jury to find the fact you are trying to prove. On some issues, such as state of mind, circumstantial evidence is often all you can come up with: It is rare for defendants to admit they have been, for example, "deliberately indifferent" to medical needs; you will have to rely on evidence of defendants' actions and words that you claim add up to "deliberate indifference." But you will have to show more than your own belief that you were mistreated; evidence from which a jury could infer deliberate indifference is required.

This process, as defined by the Supreme Court in Celotex, creates a number of problems for plaintiffs. The most glaring problem is that it allows defendants to sit back and just say "you can't prove it," while the plaintiff has to reveal much of his or her evidence in order to defeat summary judgment. Thus, even if the defendant doesn't win the summary judgment motion, they have had the benefit of a great discovery device, one that reveals their opponent's theories and strategies for how to prove the case. Therefore, when you respond to a summary judgment motion, you are faced with a difficult dilemma: You don't want to let the other side know all you've got and how you plan to put it together, but if you leave something out summary judgment might be granted. You will have to use your best judgment on this, but it is not particularly wise to leave something important out of a summary judgment response.

Another problem, especially for prisoners, is the need to gather evidence on somewhat short notice. Most federal districts have time limits within which to respond to summary judgment motions, often just 2-3 weeks. As I discussed in my last column, if there hasn't been enough time to do proper discovery, you may be able to get consideration of the motion put off under Sec Rule 56(f). However, if there has been time to do discovery, then you will have to respond to the summary judgment motion within the time given by the local rules. Therefore, it is important to be as prepared as possible to present evidence on short notice.

One very helpful way to respond to a summary judgment motion in a prison case is to use the defendants' own documents (or statements defendants make in their pleadings). If documents are written by the defendants, they are not hearsay under the rules; they are admissible at trial as admissions by the defendants (assuming you can show they are authentic). If you have memos or letters written by defendants that tend to prove parts of your case, especially on difficult-to-prove matters like state of mind (for example, "deliberate indifference"), they can be extremely helpful in defeating a summary judgment motion.

This highlights again, as discussed in more detail in the last column, the need to do early discovery. If you have, as is permitted by the discovery rules, asked the defendants in a Request For Production of Documents for all the documents they have relating to your claims, you will have increased your chances of defeating their summary judgment motion.

Summary judgment is a complicated subject which cannot be fully covered in the space I have had. I have tried in this column and the last one to give you an outline of what you face in responding to summary judgment motions. However, each case is unique, and this general overview is not intended to provide specific advice for your particular case.

[Jonh Midgley is a staff attorney at Columbia Legal Services in Tacoma, WA]

**California Irradiates Prison Visitors**

The California Department of Corrections (CDC) has installed nine high-tech X-ray scanners in six prisons and has plans to install them throughout the 33-prison system. The devices, based on "back-scatter" X-ray technology, are used to search visitors. The machine produces a crude image of visitors' bodies without their clothing.

"I think it's absolutely outrageous," said Sacramento attorney Rita Barker, who regularly visits San Quentin. "You know how careful doctors and dentists are about X-rays; they don't take them unnecessarily. For the state to subject us to this is unconscionable."

Nicolet Imaging Systems, which makes the "Secure 1000", says it can detect nonmetallic objects such as concealed money, syringes, narcotics, and ceramic explosives. The machines, which sell for $116,000 each, are safe. The company maintains the machines are safe, claiming the amount of radiation exposure is equivalent to "being alive 14 minutes on the planet."

Radiation experts from the state Department of Health have inspected the devices in San Diego, where they are manufactured, but say they need to further study the design and operation of the equipment before reaching any conclusions.

The same devices were tested in North Carolina prisons in a pilot program that ended in October, 1997.

"We wouldn't use it on our staff because it is very intrusive," said Capt. Marshall Hudson, coordinator of the pilot project at Central Prison in Raleigh, North Carolina. "If a female stood in front of it, it would show her bra, her panty line, [with] a male it would show just about everything he's got. We didn't like it... it may have worked as a deterrent... but [it] is a very expensive deterrent."

Source: Corrections Digest
BOP Porn Ban Held Unconstitutional

In the March, 1997, issue of PLN we reported the September 30, 1996, enactment of the “Ensign Amendment,” named after its author Nevada congressman John Ensign (R). The law was enacted as a rider to the federal government’s massive budget bill. No hearings or debate were held by congress nor was a committee report issued before the law was enacted.

In its entirety the Ensign Amendment states: “None of the funds made available in this act to the federal Bureau of Prisons may be used to distribute or make available any commercially published information or material to a prisoner when it is made known to a federal official having authority to obligate or expend such funds that such information is sexually explicit or features nudity.” Pub. Law No. 104-208, § 614, 110 Stat. 3009 (Sep. 30, 1996).

At the time PLN predicted that the law would be struck down as unconstitutional. On August 12, 1997, U.S. district court judge Stanley Sporkin, in the District of Columbia, did just that, holding that the Ensign Amendment violated the first amendment. The suit was brought by three BOP prisoners, Joseph Amate, Lee Moore and Daniel Levitan and three publisher plaintiffs, Playboy Enterprises, General Media Communications (publisher of Penthouse) and the Periodical and Book Association of America. The court granted the plaintiffs permanent injunctive relief enjoining enforcement of the Ensign Amendment.

The court discussed the background of BOP censorship rules, codified at 28 C.F.R. § 540.71 and noted the supreme court had upheld the rule’s constitutionality in Thornburgh v. Abbot, 490 U.S. 401 (1989). The BOP rules had previously held that sexually explicit heterosexual material would “ordinarily be admitted” and does not allow wardens to create lists of banned publications: each individual issue has to be reviewed by the warden before it is censored. After the Ensign Amendment was enacted the BOP issued an interim rule, 28 C.F.R. § 540.72, to implement the Amendment.

The federal government argued that the Ensign Amendment was a legitimate penological interest for the BOP because it allegedly furthered prisoner rehabilitation. The court flatly rejected this argument. “In face of the legislative history behind the Ensign Amendment and the plain language of the amendment, this court concludes that distinctions on the basis of content were not drawn solely with a view to the implications for rehabilitation. Rather, the Ensign Amendment is a content based statute with a sole focus on the sexual nature of the publications it seeks to prohibit.”

“The Ensign Amendment on its face does exactly what the 1979 regulations did not do: it restricts materials based solely on sexual content. Nothing in the statute or its history indicates any finding by congress, or even a belief on its part, that prohibition of sexually explicit materials or those featuring nudity would have furthered rehabilitative goals in a manner that prohibition of other materials would not.”

“Looking first to the legislative history, the sponsors could not have been more plain in their intent. They believed that restricting sexually explicit materials would make prisons more punitive. Regardless of the merit of this argument as a matter of fact, it is clear that as a matter of law, any such concerns cannot be addressed without considering the legitimate first amendment rights of prisoners.”

The court held that the BOP’s attempt to define the statute through regulation only emphasized the “non-neutral” nature of the statute as

Washington Porn Ban Challenged

Playboy Suit Not Frivolous: In an unpublished ruling the court of appeals for the ninth circuit held that a federal court in Spokane, Washington, erred when it dismissed as frivolous a lawsuit by prisoner Mark LaRue challenging the censorship of his subscription to Playboy. In his complaint LaRue alleged that his first and fourteenth amendment rights were violated when Washington prison officials confiscated his Playboy magazine under its ban on sexually explicit materials. [See Nov. 1997. PLN for the background on recent censorship in Washington state prisons.] LaRue also claimed the policy was arbitrarily enforced.

The appeals court held this was sufficient to state a claim under 42 U.S.C. § 1983. The case was remanded to the district court for further proceedings. Readers should note this is not a ruling on the merits and, as an unpublished ruling, cannot be cited as precedent. See: LaRue v. Blodgett, 1997 WL 412542 (9th Cir. WA). Case No. 96-35658.

WSP Mail Rules Upheld: Joseph Allen filed suit challenging various aspects of the mail policy at the Washington State Penitentiary. After filing suit Allen did no discovery and when the defendants moved for summary judgment he did not bother responding. Not surprisingly, the court ruled against Allen. Surprisingly, the court decided to publish its ruling and establish a precedent. On the DOC’s uncontested motion the court upheld a WSP ban on catalogs, sexually explicit materials, loose postage stamps, personal letters to and from Allen describing homosexual activity and books of stamps without Allen’s name and DOC number on them. See: Allen v. Wood, 970 F. Supp. 824 (ED WA 1997).

Washington readers should note that the DOC’s ban on sexually explicit materials is being challenged in the ACLU sponsored suit Humanists of Washington v. Lehman. See: PLN, Nov. 1997.
BOP Ban (Continued)

it banned Playboy and Penthouse but allowed the Sports Illustrated Swimsuit Issue and the Victoria’s Secret catalog. “If rehabilitation was the content neutral goal of the Ensign Amendment, then presumably it would ban all non rehabilitative publications. If anything, the distinction drawn by the new program statement further emphasizes the non neutral nature of the Ensign Amendment.” The court expressed its doubts that the law would pass constitutional muster, even if it were constitutional, because the censored materials were not required to be “obscene” or even “pornographic.”

“It is of concern to this court that this law ignores the history of careful and time tested regulation and replaces it with a hastily drafted statute tagged on to a massive budget bill. It is clear that this amendment had nothing to do with budgetary concerns. The cost of monitoring materials, returning them to their publishers and mailing out notifications, clearly exceeds the de minimis cost of simply distributing publications. It is also clear that the Amendment was passed with little consideration of its consequences."

“Because the court finds that the Ensign Amendment is not ‘neutral,’ the court holds, pursuant to Turner v. Safely, Supra, that it is facially violative of the First Amendment. Accordingly, the court declares the Ensign Amendment unconstitutional, and grants plaintiffs’ motion for permanent injunctive relief.” The court ordered the defendants, “their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, be PERMANENTLY ENJOINED from enforcing section 614 of the Omnibus Appropriations Act of 1997. Pub.L. No. 104-208, § 614, 110 Stat. 3009 (Sep. 30, 1996)(the ‘Ensign Amendment.’). See: Amatel v. Reno, F. Supp. 365 (D.DC 1997).”

Struggle at Folsom

by W. Wisely

On August 11, 1997, almost 400 prisoners in California’s New Folsom prison staged a one-day work strike to protest continuing elimination of privileges and programs. Six members of the Men’s Advisory Committee were placed in administrative segregation, suspected of leading the strike.

“The [prisoners] were rather frustrated with things occurring to them in general,” said Lt. Jay Schievelbein, a prison spokesperson. Schievelbein said the strike was apparently prompted by a statewide prison regulation prohibiting prisoners from wearing personal blue jeans, gray tee-shirts, and athletic shoes to visits. Prisoners are now forced to wear only state-issued denim pants, chambray shirts, and brown work boots.

Although seemingly inconsequential, this is just one of many restrictions the Department has imposed or plans including a ban on weigh-lifting, family visits, rehabilitation programs, vocational training, packages from home, and canteen.

“The [prisoners] in that facility have been a little bit uneasy with the taking of some of the things back from the prisoners.” Schievelbein said. “This was a thing that broke the camel’s back.” The strike was the first known since a work stoppage by hundreds of prisoners at the maximum security prison in Lancaster, California, two years ago. The one-week strike there was in response to the ban on family visits for most of the state’s 155,000 prisoners.

Guards fired tear gas on three occasions on prisoners who refused to lock up on the administrative segregation yard in September of 1997. Schievelbein said the sit-down strikes in segregation were probably related to the earlier work stoppage.

“There was one [prisoner] from the strike, from the [Men’s Advisory Committee], who was a very vocal leader from out on the yard,” he said. “That might have had something to do with it. They had a list of complaints they wanted addressed. [The com-

Plaintiffs] ranged from food condiments they wanted placed in their lunches to additional items for the canteen list.”

The MAC at New Folsom’s C Facility distributed a list to state lawmakers, reporters, and others, detailing the programs and privileges the Department has banned or planned to ban. The MAC pointed out that all the targeted programs and privileges were begun to reduce violence in prison, and that they believe the Department intends to spark a new wave of violence inside in order to justify getting more tax dollars from the Legislature.

In one sit-down strike, nine prisoners refused to leave the small concrete segregation exercise yard for seven hours before guards fired tear gas at them. In another, a dozen prisoners stood off guards for nearly five hours before being gassed. On the third occasion, seventeen prisoners refused to leave the yard.

While the sit-down strikes were going on, prisoners in 56 segregation cells covered their windows with toilet paper to prevent guards from conducting the count. When special teams of guards wearing bullet-proof vests, helmets with visors, steel-toed boots, and carrying plastic shields attempted to forcibly extract prisoners from their cells, they found every door tied shut with sheets, and the floors slick with water and soap.

Prison authorities said 38 prisoners were transferred from segregation at New Folsom to the Security Housing Units at Pelican Bay and Corcoran prisons as a result of the incidents between September 10-13.

IN FACT

More than 116,000 women are imprisoned in the U.S. Over 80 percent were convicted of non-violent offenses. More than 5 million children nationally have a parent under criminal justice supervision.
Spanish Speaking Prisoners Entitled to Interpreters

In a wide ranging and extensive ruling a federal court in the District of Columbia held that by failing to provide interpreters to non English speaking Hispanic prisoners the DOC violated the plaintiffs' eight and fourteenth amendment rights. As the first published ruling in a class action suit involving language discrimination against prisoners, this opinion warrants study by detention facility administrators as well as those who assist Limited English Proficiency (LEP) prisoners.

The DC DOC has about 9,000 prisoners in its custody, 188, or 2%, of whom are Hispanic. Eighty percent of the Hispanic prisoners have LEP and cannot function effectively in English on a daily basis. The number of Hispanic prisoners is expected to rise. The prisoners are spread out among eight prisons operated by the DC DOC. The prisoners claimed that they were not provided with interpreters for disciplinary parole and classification hearings; medical interviews; religious services; programs and educational classes or any other prison activity.

A 1991 study by the DOC identified substantial areas of liability involving LEP Latino prisoners and recommended remedial measures. Despite ample knowledge of its shortcomings in this area the DC DOC took no steps to resolve the problems until shortly before trial. Identified deficiencies included a failure to translate policies into Spanish; failure to distribute the few policies that were translated; failing to recruit bilingual staff; failing to provide interpreters, etc.

The court painted a picture of incompetence, indifference and ineptitude on the part of the DC DOC with regards to LEP prisoners. "While the defendant offered evidence regarding a flurry of activity within the Department of Corrections in the weeks prior to trial. The record as a whole establishes that these meager steps, taken five years after the district was placed on notice of the underlying problems, were nothing more than a weak attempt to shield its deliberate indifference from judicial scrutiny once it became clear that this case was going to trial. In any event, the court has no confidence that these actions, taken on the eve of trial, were sincere attempts to deal with the violations of LEP Hispanic inmates' constitutional rights."

After a five day bench trial, where it heard extensive testimony from prisoners, DOC officials and numerous expert witnesses. The court ruled in the plaintiffs' favor on the following issues:

**Medical and Mental Health Care:** The court found that a lack of interpreters or bilingual staff violated the plaintiffs' eighth amendment rights because "the defendant's actual (not written) policies and practices were the moving force denying Hispanic prisoners adequate medical treatment and placing them at substantial risk of serious harm." The court rejected the DOC's argument that it was not liable because no LEP prisoners had died yet due to inadequate medical care. The court listed numerous examples of LEP prisoners being unable to access medical care or treatment or counseling. An LEP prisoner who tested positive for the HIV virus was informed of the test results "by a monolingual English speaking physician who simply told him, 'positivo,' without providing further counseling."

"Hispanic inmates have been, and are being, placed at substantial risk of serious harm due to structural deficiencies in the defendant's medical care system. These deficiencies include, at the core, the inmate's inability to communicate their medical problems because of the defendant's failure to provide sufficient bilingual staff or qualified translators for medical care encounters.... The plaintiffs have been forced to communicate through sign language, broken English or untrained, ineffective interpreters." The court noted that language barriers between doctor and patient can lead to misdiagnoses and, continued for a long period of time, can contribute to unconstitutional deficiencies in medical care. The use of guards, prisoners and untrained staff to interpret was "grossly inappropriate, dangerously inadequate and violates prisoners' rights to privacy in their mental health information."

The court held that with only two bilingual medical care providers and one bilingual mental health care provider, "the defendant employs insufficient bilingual staff to service 150 LEP Hispanic inmates spread among eight institutions." Inadequate medical staffing violates the constitution.

"Systemic failures in the area of mental health care includes the failure to make necessary and appropriate treatment available to Hispanic prisoners: the failure to monitor properly Hispanic inmates who receive mental health care to ensure continuity of treatment; and the failure to obtain informed consent prior to the administration of psychiatric medication. Finally, the evidence at trial firmly established that the defendant knowingly disregarded the substantial risk of serious harm to the plaintiff class."

**Hearings:** "The defendant's failure to provide qualified interpreters at disciplinary hearings and parole hearings is an affront to due process. If due process means anything at all, it provides constitutional protection of the right to participate meaningfully in critical proceedings. For due process to be satisfied in the prison setting, an inmate must be provided notice of charges, must have the right to call witnesses and present evidence on his or her behalf, and the inmate must be provided with written findings... For this procedural regime to be meaningful, it should be obvious that the prisoner must be able to understand the proceedings and participate on his or her own behalf. Non English speaking prisoners who are not provided with qualified interpreters at any of these critical stages of the discipline proceedings or during parole proceedings are denied due process of law."

"Unless Spanish speaking inmates understand and can communicate with the hearing board, They are being denied the due process protections..."
guaranteed in Wolff. Therefore, we find that due process requires that Spanish speaking inmates who cannot read and understand English must be given notice and statements in Spanish or provided with a translator. Who should be present at the hearing in any case?"

The court held that parole hearings also required interpreters. The court found the DOC's practice of translating documents into Spanish and providing interpreters to be "at best, haphazard." This failure violated the plaintiffs' due process rights.

The plaintiffs withdrew their access to the court claims after the supreme court decided Lewis v. Casey, 116 S. Ct. 2174 (1996). The court ruled against the plaintiffs on their religious claims, finding there was no evidence the lack of interpreters was designed to intentionally interfere with religious worship. The court held that even though no LEP prisoner had ever received good time credits because they were unable to participate in educational programs due to the language barrier, there was no equal protection violation because there is no constitutional right to good time credits or rehabilitation programs. The court held that even though many DC DOC staff members used racially derogatory names against Hispanic prisoners, this did not rise to a level of official discrimination. Likewise, the court dismissed plaintiffs' claims of being confined in a "racially hostile environment" where the plaintiffs showed a disproportionate number of physical attacks inflicted on them. The court found this proved only that prisons were dangerous places.

The court ordered the defendants to file a remedial plan to resolve the constitutional violations found by the court. The court stated that it would order appropriate relief under 18 U.S.C. § 3626 of the Prison Litigation Reform Act. See: Franklin v. District of Columbia, 960 F. Supp. 394 (D DC 1997).

Other cases involving the need for interpreters to LEP prisoners are: Acevedo v. Forcinto, 820 F. Supp. 886 (D Nd 1993) [PLN, Oct. 1993] which held jail officials must provide interpreters to assist LEP prisoners in gaining access to the courts. In Anderson v. County of Kern, 45 F.3d 1310 (9th Cir. 1995) [PLN, Oct. 1995] the court held that LEP prisoners must be provided to LEP prisoners seeking medical care.

In the December, 1995, issue of PLN we reported the unpublished settlement in Lopez v. Riveland, C93-1030WD, a lawsuit filed in federal court in Seattle which challenged the Washington DOC's failure to provide interpreters and similar services for Hispanic LEP prisoners. (The suit was initially filed on behalf of eight Hispanic LEP prisoners by PLN editors Paul Wright and Ed Mead.) That settlement is the most comprehensive approach to challenging the lack of services for LEP prisoners. As the number of LEP prisoners rises this type of litigation will probably increase as well. Detention facilities can limit their liability by providing translators on their own, before they are sued, or doing as the Washington DOC did and settling the case early on rather than go through a full blown trial as the DC DOC did in Franklin.

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Attorney Fee Award in Smoking Suit Affirmed

The court of appeals for the eighth circuit affirmed an award of $11,299 in attorney fees to a prisoner who sued over being exposed to Environmental Tobacco Smoke (ETS, AKA second hand smoke). In the December, 1996, issue of PLN we reported Weaver v. Clarke, 933 F. Supp. 831 (D NE 1996). George Weaver, a Nebraska state prisoner, filed suit claiming that prison officials were violating his eighth amendment rights by exposing him to ETS, a known carcinogen. The eighth circuit held that the defendant prison officials were not entitled to qualified immunity for their actions. See Weaver v. Clarke, 45 F.3d 1253 (8th Cir. 1995). On remand from the court of appeals, the district court denied Weaver’s motion for a preliminary injunction but set a schedule for discovery, an evidentiary hearing and a hearing for Weaver’s motion for a permanent injunction on the ETS issue.

Shortly thereafter, Nebraska DOC director Harold Clarke announced a ban on all smoking within DOC buildings. Clarke stated that “Pending inmate litigation, both locally and nationally, on the issue of second hand smoke are concerns that must be addressed.” Because of the smoking ban, the district court granted summary judgment to prison officials, finding that Weaver had obtained all the prospective relief he wanted. The district court also held that Weaver was the “prevailing party” for the purpose of an award of attorney fees. The court awarded Weaver $11,299 in attorney fees and costs for expenses incurred after the remand from the eighth circuit.

The court of appeals affirmed the lower court ruling in a brief opinion. The court noted that in Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996) it had rejected the argument by Nebraska prison officials that the eleventh amendment prohibits the award of attorney fees against the state and that 42 U.S.C. § 1997(e) of the Prison Litigation Reform Act could be applied retroactively to reduce an award of attorney fees where the work was performed before the PLRA’s enactment.

The court held the district court did not err in finding Weaver was the prevailing party for fee award purposes because his lawsuit played a "catalyst" role in the smoking ban’s implementation.

The court rejected Weaver’s cross appeal that prison officials had been deliberately indifferent to his serious medical needs and that the lower court had erred in not awarding all attorney fees and costs sought by Weaver in the lower court. See: Weaver v. Clarke, 120 F.3d 852 (8th Cir. 1997).

Court Questions PLRA IFP Provisions

In a rare voice of dissent to the PLRA’s filing fee provisions, Judge Reynolds of the U.S. district court in Wisconsin, described the filing fee requirements of the Prison Litigation Reform Act, then summed it up.

"This provision is mean spirited and unnecessary. In forma pauperis is fundamental to our nation’s beliefs that justice is blind: that money is no prerequisite to access to the courts; that a litigant’s claim — not is social status — determines how his cause will fare in the courts. To require prisoners to pay some sort of filing fee while non prisoner indigents pay nothing undermines these vital principles.... Finally, this new legislation forgets that in forma pauperis litigation has historically been a vital source of law enforcing, defining, and upholding the basic freedoms that define our nation."

Certainly, many believe prisoner suits are out of control, and that this provision is a necessary response. Without it, the argument goes, prisoners have no incentive to refrain from bringing silly claims wholly without merit, as do other litigants. Identifying a problem, however, does not, in and of itself justify any solution, no matter how impractical, unjust, and counterproductive.

“On one hand, the filing fee is unlikely to have a significant impact on prisoner litigation because the fee is collected in minimal installments. On the other hand, the administration costs involved are likely to well exceed any benefit either the courts, the tax payers, or the prisons may incur. For example, the costs of administering the ongoing financial relationship between the clerk’s office and the prisoner litigant, in terms of postage, record keeping, and accounting, will be substantial.

“Congress has passed a law that is unlikely to achieve its stated goals, costs the supposed beneficiaries more than it benefits them, and is a departure from the nation’s traditional view of justice. Nevertheless, the court is bound to follow the law, no matter how ineffective, mean spirited or unjust.” See: Luedtke v. Guzman, 971 F. Supp. 1263 (ED WI 1997).
AZ Jail's Discriminatory Treatment of Muslims Requires Trial

The court of appeals for the ninth circuit held that a district court erred when it granted summary judgment to jail officials regarding claims of discriminatory treatment by a Muslim jail prisoner. Benjamin Freeman was held in the Maricopa county jail in Arizona for nine months. Freeman, a practicing Muslim, filed suit claiming he was prevented from attending weekly Jumah services. Freeman also claimed that only Muslims prisoners were shackled and handcuffed on their way to religious services, required to sign attendance sheets, be subjected to abusive slurs by jail officials and not given a 10-15 minute notice before services ended. Prisoners of other religious faiths were not subjected to these practices. The district court granted the defendants summary judgment and dismissed the suit.

The court of appeals affirmed in part, reversed in part and remanded. Freeman had originally filed suit under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, which was struck down as unconstitutional in City of Boerne v. Flores, 117 S.Ct. 2157 (1997). The RFRA standard was more favorable to prisoner litigants.

The court affirmed dismissal of Freeman’s claims with regards to being shackled, required to sign in and being denied notice the services were ending. The court held that none of these allegations placed a substantial burden on Freeman’s free exercise of religion as they did not prevent him from participating in the mandates of his religion.

Turning to Freeman’s equal protection claims, the court noted “Prisoners enjoy religious freedom and equal protection of the law subject to restrictions and limitations necessitated by legitimate governmental interests. The constitution’s equal protection guarantee ensures that prison officials cannot discriminate against particular religions... To prevail on an equal protection claim, a plaintiff in a section 1983 claim must show that officials intentionally acted in a discriminatory manner.” The court held that Freeman had established a genuine issue of material fact, requiring a trial, as to whether he was given a reasonable opportunity to pursue his faith, compared to other prisoners at the jail, by being denied access to religious services and being shackled to and from the services.

Freeman presented affidavits that only Muslims were prevented from attending religious services when jail guards refused to open their cells. Freeman also presented affidavits that only Muslim prisoners were shackled when taken to religious services. The court held this evidence was sufficient to raise a genuine issue of material fact requiring a trial. The case was remanded for further proceedings and a trial. See: Freeman v. Arano, 125 F.3d 732 (10th Cir. 1997).

When PLN reported City of Boerne and the demise of the RFRA, we noted that free exercise of religion claims would continue under the first amendment. as they had before the RFRA. While this is not a ruling on the merits it does show that it’s possible to withstand summary judgment under the O’Lone standard.

Arizona Court Fee Law Upheld

A federal district court in Arizona upheld the constitutionality of a state statute that requires prisoners to pay the full filing fee in state court actions they initiate. The Arizona legislature enacted A.R.S. § 12-306(c) and A.R.S. § 12-302(B) which eliminates the waiver of filing fees in all state court actions, except dissolution of marriage and child support cases, brought by state prisoners. Instead, prisoner plaintiffs must pay an initial filing fee of 20% of their prison trust fund account and 20% of their accounts monthly balances each month thereafter until the fee is paid in full. The Arizona statutes are almost identical to the filing fee provisions of the federal Prison Litigation Reform Act (PLRA). In a footnote the court observed that the PLRA was modeled on the Arizona statutes at issue in this lawsuit and both were drafted by Arizona Attorney General Grant Woods.

Arizona prisoners filed a class action lawsuit challenging the constitutionality of the Arizona laws, claiming they violated their right of access to the courts and equal protection of the law. The court rejected both claims.

The court held that because the statutes do not prevent prisoners actually filing a lawsuit, they just have to pay the filing fees, there is no burden on their right of court access. Roller v. Gunn, 107 F.3d 227 (4th Cir. 1997) and Hampton v. Hobbs, 106 F.3d 1281 (6th Cir. 1997) both upheld the filing fee provisions of the PLRA and the court relied on those cases to uphold the Arizona statutes in this case. The court noted that prior to the PLRA courts had upheld collecting partial filing fees from prisoners. See: Lumbert v. Illinois DOC, 827 F.2d 257 (7th Cir. 1987). The court characterized the situation as one where prisoners need to decide whether vindicating their rights in court is more important than buying “peanuts and candy” from the prison commissary.

The court found there was no equal protection violation because neither prisoners nor indigents are a suspect class for fourteenth amendment purposes and the laws were rationally related to a legitimate governmental interest, namely reducing the amount of litigation filed by prisoners. See: Beck v. Swinington, 972 F. Supp. 532 (D AZ 1997).
Slavery in South Carolina
by Dan Pens

What is the difference between a good slave and a bad slave? The South Carolina Department of Corrections (SCDC) knows: Good slaves "continue to work and stay out of trouble".

Below is the full text of a memorandum addressed to the South Carolina "inmate population" and signed by SCDC Director Michael W. Moore:

On January 20, 1998, changes will be made in inmate pay. You will continue to receive your inmate pay as long as you are working on a job. However, if you are in lock-up or unemployed on this date, you will not be paid for the rest of your sentence.

Any new inmate entering the South Carolina Department of Corrections after January 19, 1998, will not be paid.

On January 20, 1998, if you are a paid inmate, your pay will be frozen at your current pay. It will not increase after that date. However, if you are found guilty of a major disciplinary or criminal offense within SCDC, you will lose all of your pay for the rest of your time in prison.

Again, your current pay will not be affected as long as you continue to work and stay out of trouble. A new policy will come out soon. Your questions will be answered when the new policy is published.

Why not eliminate pay for all prisoners effective on the same date? Well, that would create one unified class of about 21,000 very unhappy slaves.

By throwing a temporary bone to those prisoners who "continue to work and stay out of trouble", the SCDC creates one class of prisoners who might very well be inclined to rebellion. And how better to control the volatility of the disaffected slaves than through the skillful manipulation of their peers?

Those who remain in paying jobs after January 20, 1998, will most likely be quite eager to "continue to work and stay out of trouble". In fact, any kind of "trouble" popping off is the last thing these prisoners would want. They'll be sure to actively dampen any sparks of rebellion. I can see it now. "Hey, guys, what we all gotta do here is stay calm and not do anything stupid."

Perhaps in a year or two, the SCDC will issue another memo announcing that pay for all prisoners will be terminated. Period. And what then? There will again be two classes of prisoners: 1) those who lost their pay a year or so before (and harbored a resentment for the paid prisoners ever since) and 2) the "let's all stay calm" prisoners who toed the line, continued to work and stayed out of trouble.

Divide and conquer. Pure and simple. And you know what? It'll probably work.

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Ohio Death Row Uprising

In the November '97 PLN, we reported “Tensions Rise in Ohio Prisons.” Our coverage of the September 5, 1997 uprising on Ohio's death row at the Mansfield Correctional Institution (MANC) was based entirely on published press reports. and as such was woefully inadequate. PLN has since obtained several firsthand accounts, which we report here.

At 5 p.m. on September 5 a prisoner working as a porter overpowered a guard and took his keys. That guard and two others working in the area then fled. All of the pod cell doors were opened using the guard's keys.

There are conflicting reports about what happened next. One source says he saw two prisoners beating a third. Another source said that “No one was doing anything” but just milling around and that guards could have come into the unit any time and peacefully regained control. Not much else happened for five hours.

Just before 10 p.m. about 60 highway patrol cops and 50 prison guards stormed death row. One prisoner says he looked through the window of his cell and saw men in gas masks. Then came a loud banging like the firing of shotguns. A tear gas canister shot through his window, shattering the glass and causing minor cuts on his arms. He says at least five canisters of tear gas were shot into his cell. He tried to put his face up to the broken window to get air. A guard sprayed liquid mace through the hole.

Another prisoner reports essentially the same treatment. His cell door window shattering as tear gas canisters are fired in. trying to get air at the window and being sprayed in the face with liquid mace. “Over the next 25 minutes, the guards tossed in 13 canisters of tear gas into our cell,” one prisoner reported.

“After an hour the guards came to our cell door. told us to strip to our underwear, then get up against the back wall. Then they burst into the cell, pulled us down to the ground on our stomachs and cuffed us. One guard stomped once on my head. once on my face. then stood on my face and ground his boot into it. while other guards stomped on my bare feet, legs and kicked me in the ribs. and another one kneft on my back and sprayed a whole can of mace in my eyes and face, burning my skin until it actually blistered.”

Details of this phase of the assault are fairly consistent. Prisoners report being cuffed, maced, and severely beaten. One prisoner suffered a skull fractured and several broken ribs. At least seven prisoners were injured seriously enough to require hospitalization. Most of the rest received little or no medical attention.

The prisoners were taken to a maintenance building, dressed in orange jumpsuits and laid on a bare cement floor, still cuffed behind their backs. “They kept us there for five hours and wouldn’t let us go to the bathroom. Two prisoners urinated on themselves where they lay.”

Meanwhile, guards rampaged through the death row pod, destroying prisoners' property. “The guards smashed 20 TV’s and as many radios.” reports one prisoner. He says he lost “60 embossed envelopes. 7 legal pads. 4 bags of coffee. 3 cans of tobacco... 2 pairs of running shoes, a black sweat-suit, a fan, 15 music cassette tapes, a family photo album, 20 writing pens, a bag full of personal letters...” Essentially all of his property was smashed or confiscated. All 37 prisoners suffered similar property loss.

As to the cause. Sonny Williams, a former prisoner and coordinator of the Ohio Prisoners' Rights Union said. “I know from my contact with prisoners that it was the conditions on death row and the repression against the Lucasville Five that were the main reasons for the uprising.”

The Lucasville Five — George Skatzes. James Were. Jason Roff. Keith Lamar and Siddique Abdullah Hassan (formerly Carlos Sanders) — started a hunger strike in 1996 to protest the isolation and specific punishments focused on them. There was another hunger strike, lasting for 30 days. in 1997. Little changed in the way of conditions. however. especially the extra isolation and punishment focused on the Lucasville Five.

Williams summed up: “The prisoners were demanding their constitutional and human rights, and the prison administration ignored them and retaliated with more repression. I wasn’t surprised that this [rebellion] happened. because when prisoners are oppressed and treated like animals. they’re gonna respond to get the word out about the conditions that they’re living in.”

Sources: Revolutionary Worker. Against All Odds. Reader Mail. Skatzes/Lucasville Five Support Bulletin No. 6

West Virginia Jailers Sentenced to Prison

Former Grant County, West Virginia sheriff John Leatherman, 39, was sentenced October 14, 1997, to six years in the state penitentiary on a civil rights count and one year in the county jail on a battery count. Leatherman pleaded no contest in a case where female jail detainees were forced into sex acts with law enforcement officials.

A former Petersburg. Grant County, city police officer, Rodney Weister, 27, was sentenced the same day to five years in prison for raping one female detainee four times. After sentencing, Leatherman and Weister were put in the Grant County holding facility where, later that night. Weister reportedly tried to hang himself.

A third defendant, former Grant County jail guard Estes Sites, 23, pleaded guilty to a bribery charge and was given a 1-year suspended jail term and a $1,000 fine. Sites allegedly forced a woman in his custody to perform oral sex.

Weister had no official business at the jail, but sometimes went there when his friend Sites was working. He had been a Petersburg city policeman for about four months. According to state police investigators. Weister was hired despite a police record for public intoxication and several other misdemeanors.

The victims have lodged multimillion-dollar civil suits against the county in federal court.

Source: Charleston Gazette

Prison Legal News 17 March 1998
Turning the Screws in California

by W. Wisely

Each year, the California Department of Corrections asks the Legislature for an ever-increasing piece of the state's tax pie based in part on claims that violence in the prison system is increasing. The truth is, violent incidents inside have been steadily declining the past decade, the legacy of incentives begun in the early 1970s. In the past few months the Department has quietly taken back many of those incentives. In what many believe is an attempt to spark violence inside in order to justify a bigger budget, the Department is turning the screws on California's 155,000 prisoners.

On October 16, 1997, Gregory Harding, Chief Deputy Director of the Department of Corrections, issued a notice of change to the state's administrative regulations governing prisoner grooming standards. Department administrators intend to turn the clock back more than twenty years by prohibiting male prisoners from having hair longer than three inches. Facial hair would be limited to a trimmed mustache, no more than one-quarter of an inch from the corner of the lips.

Female prisoners would be allowed hair any length, but they will have to wear it up above the collar. Females will not be allowed to wear colored hair clips. beads, barrettes, or hair ties. Only clear nail polish will be allowed. The women will be allowed one pair of "authorized" earrings, while male prisoners will be prohibited from wearing earrings or from having any body part pierced. A public hearing on the proposed regulation change was scheduled for December 12, 1997.

On July 21, 1997, the Department announced rule changes concerning law library services in prison. The Department intends to divert the entire $1 million budget for the prison law library system for other uses. As law books become damaged, lost, or out of date they will not be replaced except where necessary to assist a prisoner in filing "initial pleadings" in a civil suit or criminal appeal. Initial pleadings are defined by the Department as a complaint and reply in a civil suit, an opening brief and reply in a criminal appeal, and a petition and traverse in a habeas corpus action. Other pleadings, such as discovery, motions to compel discovery, opposition to motions to dismiss or for summary judgment, are not considered "initial pleadings," and therefore no law library resources will be allocated for prisoners to prepare such pleadings.

Officially, prison administrators will only confirm the law library and grooming standard changes. Unofficially, however, they talk of even more restrictions. "The weights are gone," says one administrator at Lancaster prison: "The Department is getting a lot of heat from outside agencies about suspects recently released from prison with muscular builds," the administrator explained.

According to laundry staff, white jumpsuits have already been ordered. Beginning sometime next year, the Department will jettison some $14 million worth of prison blue shirts and denim pants, then spend an estimated $6 million more to purchase jumpsuits for the entire prison population. Staff members claim too much money is being lost by damaged clothing. However, they weren't able to explain how money was a significant factor when prisoners are charged for missing or damaged state clothing issued to them.

Some of the other restrictions rumored to begin next year include prohibiting quarterly packages, limiting canteens to just soap, shampoo, and toothpaste, eliminating smoking, personal electronics and radios. It's tit for tat," one sergeant said. "The victims aren't running around lifting weights, eating three meals a day, wearing braids in their hair with their pants sagging. And neither should the scum responsible for all the hurt."

"For years the Department has exported money from the Legislature by claiming violence is on the rise in our prisons. The truth is, violence has dropped off. This wave of restrictions is designed to return the system to the level of violence we saw in the early 1970s so the Department can get more money, plain and simple. And they're making these changes without the knowledge of state lawmakers," said Ann Sullivan, Legislative Liaison for FamilyNet, a statewide visitor advocacy group.

In 1972, the Department abolished rules requiring male prisoners to keep their hair short and limiting them to a short mustache. The same year, former Governor Ronald Reagan started the family visiting program. Prisoners were allowed to buy their own small televisions and radios. Regular visits were made a right by statute. Over the past few years, however, family visits have been taken from most prisoners, and regular visits are a privilege rather than a right now. "Gee," Ms. Sullivan said, "let's see, take back all the incentives that helped reduce violence. What do you suppose the result will be?"

The word is beginning to spread inside. Younger prisoners react with disbelief. "They ain't fixin' to cut my hair," said a young lifer. Older cons remember the way things used to be. "I can't believe we're going to do this again," said Red, a fiftysomething lifer at Lancaster. "Didn't someone say those who don't learn from history are doomed to repeat it?" Yes, someone said that once. But, they didn't have billions of dollars to gain by increasing violence in prison. The history of California prisons seems ready to repeat itself. As the signal for yard recall blared, Red sat unmoving on the curb. wondering. Wondering whether he'd be around after the turning of the screws.

IN FACT

About 10,000 people are falsely convicted of serious crimes each year in the U.S., according to the results of a study published in the book, Convicted But Innocent: Wrongful Conviction and Public Policy. One of the book's authors, C. Ronald Huff, concludes that about 0.5 percent of 1.9 million convicted annually of serious crimes are actually innocent.
Tax Court Required to Assist in Witness Subpoena

The court of appeals for the ninth circuit held that a tax court's refusal to honor subpoenas filed by an indigent pro se prisoner litigant, without prepayment of the witness and mileage fees, violated the prisoner's right of access to the courts. Douglas Hadsell is an Oregon state prisoner. In 1992 the IRS commissioner assessed three notices of deficiency against Hadsell claiming that in three tax years he had failed to file timely tax returns and failed to pay the correct amount of taxes. The commissioner claimed Hadsell owed the IRS $13,000 in back taxes and penalties. Hadsell filed a petition in the U.S. Tax Court seeking a redetermination of the deficiencies and the court allowed him to proceed In Forma Pauperis (IFP).

The trial took place in the Oregon State Penitentiary's board room (Hadsell's tax problems appear completely unrelated to any criminal activity). Before trial Hadsell petitioned the tax court to waive the witness and mileage fees required by tax court rules and allow him to subpoena three witnesses without payment of the necessary fees as he was indigent as a result of his imprisonment. The court denied the request and none of the witnesses showed up at the trial nor was any of the requested evidence produced. The court largely ruled against Hadsell, who appealed. The ninth circuit held that the tax court's refusal to serve Hadsell's subpoenas without payment of the fees violated his right of access to the courts.

The court noted that in *Tedder v. Odel*, 890 F.2d 210 (9th Cir. 1989) it had held that 28 U.S.C. § 1915, the IFP statute, does not allow courts to waive witness and mileage fees for subpoenas. Every circuit court to consider this issue has ruled likewise. [Readers should note that, as discussed below, indigent prisoner litigants can obtain the presence of witnesses at trial by requesting that the court call the witnesses as its own witnesses. See PLN, Feb. 1994, "How to Secure the Attendance of Witnesses at Trial," by Paul Wright. Copies are available for $5.] Hadsell did not question Odel.

The trial court noted that while prisoners have a right of access to the courts under *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491 (1977), that right does not include "the right to a perfect trial in all respects." Thus, the constitution does not require the government to pay for witness fees, depositions, etc., in civil cases. The court distinguished this case by holding that Hadsell did not have adequate alternatives to prove his claims at trial in the tax court with regards to tax records seized by police, records Hadsell had subpoenaed to show he had properly filed his tax returns for the years in question.

Sixth Circuit Discusses Habeas IFP

The court of appeals for the sixth circuit has outlined the procedures habeas corpus petitioners seeking In Forma Pauperis (IFP) status must follow. Every circuit to consider this issue has held that the Prison Litigation Reform Act’s (PLRA) filing fee provisions do not apply to indigent habeas corpus petitioners. Thus, habeas petitioners unable to pay the appeals court filing fee can seek leave to appeal without payment of the $105 filing fee under Fed.R.App.P. 24(a).

Habeas petitioners may seek a waiver of the filing fees in the district court under 28 U.S.C. § 1915(a)(1). "By exempting § 2254 and § 2255 [the federal habeas statutes in 28 U.S.C.] from the provisions of § 1915(b) and the three strikes provision of § 1915(g) ... we provide a prisoner the ability to seek § 2254 and § 2255 relief as a pauper under § 1915(a)(1). This conclusion requires that the prisoner submit an affidavit of indigency in compliance with § 1915(a)(1). However, a prisoner is not required to file a trust account statement because the information contained in the trust account is only necessary for the payment formula of § 1915(b). If the prisoner is a pauper, the district court may grant the prisoner pauper status and the case may proceed in forma pauperis on appeal after the district court has issued its judgment. The case must be processed in accordance with Fed.R.App.P. 24(a). In addition, the district court must certify any issue on appeal."

The court noted that if prisoners attempt to style civil rights actions as habeas petitions the district courts must assess the PLRA filing fees. See: *Kincade v. Sparkman*, 117 F.3d 949 (6th Cir. 1997).

"Without having to declare section 1915 unconstitutional as applied to Hadsell, the tax court could have attempted to acquire these records in at least two ways. By relying on Federal Rule of Evidence 614(a) the court could have, on its own accord, called detective Menzies and ordered him to bring with him Hadsell's tax records that were still in the possession of the Newport police department. Rule 614(a) provides that a 'court may, on its own motion ... call witnesses.' See tax Court Rule 143(a) (trials before tax court are to be conducted according to the rules of evidence applicable in United States district courts); *United States Marshals Service v. Means*, 741 F.2d 1053; 1057-59 (8th Cir. 1984) (holding that fees for witnesses called by a court's motion may be ordered advanced by the government as a party and later taxed as 'costs'). Alternatively, it could have granted Hadsell a continuance with the suggestion that he seek the return of the documents directly from the city of Newport, either through administrative channels or an action in state court."

"In a case such as this, where the court explicitly notes the lack of needed evidence and the plaintiff claims that just that evidence is available but beyond his reach due to his incarceration, the plaintiff presents a serious question of meaningful access to the courts as described in *Boddie and Bounds*. If a waiver of witness fees were the only means by which Hadsell could obtain that evidence, the constitutionality of section 1915 as applied to him would be at issue. Given the alternative remedies discussed above, however, we do not reach this constitutional question.* The tax court's decision was vacated and remanded for the tax court to consider its power to call the witness, bringing with him the documents Hadsell had requested, under Fed.R.Evid. 614(a) or to continue the hearing to allow Hadsell an opportunity to obtain the documents directly. The court noted that this ruling does not limit the tax court's ability to consider other methods of ensuring pro se prisoners' access to the courts. This ruling will be helpful to prisoner litigants confronting the problem of producing witnesses and evidence in court in non tax cases. See: *Hadsell v. Commissioner, IRS*, 107 F.3d 750 (9th Cir. 1997)."

Prison Legal News 19 March 1998
AZ: In November, 1997, the state DOC announced that the construction of a 4,150-bed prison complex at Gila Bend, a 200-bed juvenile prison at the same location and an 800-bed addition to a Yuma prison was $19 million over budget. The combined projects were supposed to cost $190.5 million but cost overruns have already added at least 10% to the initial estimate.

Brazil: On December 27, 1997, police shot and killed 9 unarmed prisoners that had surrendered after a botched hostage-taking escape attempt at the prison of Fortaleza.

Brazil: On December 30, 1997, prisoners at the Sorocaba prison seized 699 visitors as hostages after a botched escape attempt led to a shoot-out. The hostage-taking began when 15 prisoners dressed as women attempted to leave with visitors. Guards recognized the disguised prisoners and opened fire, killing an escapee and a woman visitor. The remaining escapees then took 699 visitors and 17 guards hostage. On January 1, 1998, the hostage-taking ended when riot police stormed the prison, injuring 4 policemen and 10 prisoners. Designed to hold 500 prisoners, Sorocaba held 900 at the time of the incident.

CA: On December 2, 1997, Mark Philyaw, a security guard jailed for outstanding traffic warrants was beat to death by jail guards in the Los Angeles county jail after he refused to bend over for a strip search. Philyaw's family hired the law firm of Johnnie Cochran to represent them. Carl Douglas, a lawyer with the firm, said he wanted to know how a naked, unarmed man could die in custody.

CA: On September 26, 1997, Nevada county sheriff’s deputy Bobby Rutledge pleaded not guilty to 12 charges of rape, attempted rape and conducting unlawful strip searches. Six female jail prisoners were Rutledge’s victims. As a jail guard Rutledge lacked legal authority to strip search female prisoners.

IA: Former Urbandale police officer James Trimble was sentenced to two years probation, a $1,000 fine and 100 hours of community service after being convicted of stealing seven ounces of methamphetamine from the police department’s evidence locker. Prior to his arrest Trimble headed the city’s Drug Abuse and Resistance program and acted as a liaison between police and school officials. Trimble was arrested after being pulled over at 4 AM, a search of his vehicle revealed methamphetamine, marijuana, LSD, cocaine and sexually explicit videos and photos. Police said Trimble "had a battery operated sexual device inserted in his body" when he arrested. As part of his community service Trimble was ordered to tell schoolchildren about the dangers of drugs. Apparently the judge did not consider whether anyone would want Trimble speaking to their children about anything.

MI: A rising prison population and legislative refusal to fund new prison construction led DOC director Kenneth McGinnis to announce on November 14, 1997, that the state would send up to 2,000 prisoners out of the state until new prisons are built. The first batch of 50 state prisoners were sent to federal prisons in December.

MT: Freeman militants held in the Billings jail since they ended their 81 day standoff with the FBI in 1996 have encouraged other jail prisoners to represent themselves in criminal proceedings. Relying on a bizarre rambling of legal "theories," District judge Diana Barz said "They’re contaminating our good criminals."

Northern Ireland: On December 27, 1997, Loyalist Volunteer Force death squad leader Billy Wright was shot and killed in the Maze prison by three prison members of the socialist Irish National Liberation Army.

NY: On December 16, 1997, prison guard David Jemmott was sentenced to five years probation after pleading guilty to kidnapping his three children from their mother as part of a custody dispute.

NY: On November 6, 1997, Attica prisoner Frank Guilloty was shot in the hand by prison guards after he allegedly attacked another prisoners with a homemade knife.

OH: On October 22, 1997, Mansfield Correctional Institution prisoner Augusta Cassana was questioned in the stabbing death of his cellmate, Walter Hardy, in their cell the day before.

OH: On October 31, 1997, a state jury refused to award damages to prisoner Claude E. Smith III, who mistakenly had his healthy prostate removed. Smith’s medical records were confused with those of prisoner Claude A. Smith who had prostate cancer. Smith III claimed that after his surgery he lost bladder control and the ability to maintain an erection. The jury ruled in favor of Dr. Jeffrey York, who carried out the surgery, finding that while he was negligent he was not responsible for Smith III’s injury. Smith III settled his claims against the Ohio DOC for $30,000 and the Ohio State University Medical Center for $20,000.

Rwanda: On December 3, 1997, 400 Hutu rebels attacked a prison in Rwerere and freed 103 prisoners awaiting trial for their role in the 1994 slaughter of 500,000 people.

Pakistan: On December 27, 1997, five members of the Islamic group the Friends of the Prophet, an armed Muslim party, escaped from a prison in Ghazi Khan after an accomplice blinded a guard by throwing chili pepper in his face. The escape occurred during a visit by eight other group members, who also used automatic weapons to assist in their comrades escape. Four guards were injured in the shoot-out and escape.

TX: On July 29, 1997, Jimmy Billingsley, a former guard at the Terrant County Community Corrections Facility, was charged with sexually assaulting one female prisoner and exposing himself to another. The facility is operated by Correctional Services Corporation, a private company. After being charged, Billingsley fled the area and arrest warrants were issued.

TX: On October 21, 1997, Colorado City prisoners Humberto Paura and Frank Ramirez were sentenced to 25 years imprisonment after pleading guilty to murdering prisoner Rene Guerra at the Wallace Unit in 1995.

TX: On September 26, 1997, a federal grand jury indicted federal prison guard Darren Humphries, on charges of aggravated sexual assault. Humphries, a Bureau of Prisons guard at the FCI

VA: In September, 1997 a disturbance at the Greenville Correctional Institution in Jarrett left one unidentified prisoner dead and four other prisoners and two guards injured. No reason was given for the altercation.
Ad Seg May Require Due Process

THE court of appeals for the second circuit held that a district court wrongly concluded that administrative segregation (ad seg), in and of itself, does not violate due process. The court held prisoner plaintiffs must be given an opportunity to develop a factual record for their ad seg claims.

Emmeth Sealey is a New York state prisoner who was infracted for fighting, assault and weapons possession. At a disciplinary hearing Sealey was found not guilty but on the basis of confidential information he was placed in ad seg as an alleged threat to prison safety and security. Sealey was provided with an ad seg hearing where he requested, and was denied, witnesses. Sealey administratively appealed. and Donald Selsky, the NY DOCs director of special housing and prisoner discipline, reversed the finding and ordered a new hearing. Sealey was again sentenced to ad seg after which he filed suit claiming his right to due process was violated by the denial of witnesses. The district court dismissed the suit holding that under Sandin v. Connor, 515 U.S. 472. 115 S.Ct. 2293 (1995) Sealey had no due process right not to be placed in ad seg. See: Sealey v. Giltner, 857 F. Supp. 214 (ND NY 1995).

The court of appeals affirmed in part, reversed in part and remanded. The court held the supervisory officials were properly dismissed for lack of personal involvement. "As a result of Sandin, a prisoner has a liberty interest only if the deprivation of which he complains is atypical and significant and the state has created the interest by statute or regulation." The court noted that in Brooks v. DiFasi, 112 F.3d 46, 49 (2nd Cir. 1997); Miller v. Selsky, 111 F.3d 7, 8-9 (2nd Cir. 1997) and Samuels v. Mockry, 77 F.3d 34, 38 (2nd Cir. 1996) it had indicated the desirability of fact finding before determining whether a prisoner has a liberty interest in remaining free from segregated confinement. Sealey had no opportunity to develop a factual record on the liberty interest issue because the district court raised the issue su sponte and without notice to the parties.

"Notwithstanding this lack of notice. Sealey did produce some proof that (1) he faced an indefinite term in the SHU limited only by the length of his sentence; (2) he actually served 152 days during which he was deprived of all programming opportunities and privileges that inmates in general population enjoyed. Sealey must be given an opportunity to develop additional facts relevant to the liberty analysis." The court rejected the defendants' argument that, as a matter of law, New York statutes created no liberty interest because they did not raise that argument in the district court.

The court remanded for further proceedings Sealey's claim that he was entitled to more due process than that mandated in Hewitt v. Helms, 459 U.S. 460, 103 S.Ct. 864 (1983) because his confinement was actually disciplinary in nature and because of the length of his actual and potential confinement. The district court did not address these claims. "We remand for consideration of whether the defendants acted in bad faith, labeling as administrative a confinement that only could be justified as punitive and if so, whether the notice Sealey received was adequate. Assuming the court concludes the confinement was administrative, and that notice was sufficient to justify the confinement initially, the court should consider whether the initial notice, coupled with any explanation Sealey received at later hearings, sufficed to justify the full duration of the confinement."

"By emphasizing notice, we do not intend to restrict the district court's analysis. Depending on the scope, if any, of the liberty interest the district court finds, it may wish to examine the adequacy of other aspects of the process Sealey received. We note in particular that Sealey asserts that both Giltner and Brimmer failed to make an independent review of the evidence before them." See: Sealey v. Giltner, 116 F.3d 47 (2nd Cir. 1997).
Supervisors Liable for Excessive Force

The court of appeals for the eighth circuit affirmed an award of compensatory and punitive damages against a guard who beat a handcuffed and unresisting prisoner, the four guards who held the prisoner down during the attack, the lieutenant who supervised the beating and the warden who had repeatedly ignored previous complaints of excessive force by the same guard.

Jeffrey Davis-El, a Missouri state prisoner, did not respond to guards’ orders fast enough during a search of his housing unit. A “movement team” was called in to subdue the unresisting prisoner. The movement team consists of five guards in padded clothing that restrain a prisoner. Davis did not offer any resistance and was duly handcuffed on the floor of his cell when guard David McPeak hit Davis 20 to 25 times on his head and face and smashed his chin into the cell floor. Davis filed suit claiming the attack violated his eighth amendment rights.

After a bench trial the district court agreed and awarded Davis $10,000 in compensatory damages against McPeak and six other defendants and $5,000 in punitive damages against McPeak and prison warden Paul Delo. The court found that McPeak maliciously and sadistically used force against Davis for the sole purpose of causing him harm. The court held the other members of the movement team were liable for failing to protect Davis from the attack. The lieutenant was liable because he had knowledge of the substantial risk of harm faced by Davis when he selected McPeak to serve on the team despite knowing McPeak had a propensity to use excessive force against prisoners. The warden was liable because he had knowledge of McPeak’s propensity to use excessive force and was deliberately indifferent to the substantial risk of harm faced by Davis.

The court’s findings included a ruling that testimony by the other guards that they did not see McPeak beat Davis was “not credible” and that none of the guards’ written reports of the incident mentioned any injury to Davis. The court noted that a videotape of the incident was forwarded to the Missouri DOC and was “lost.” The defendants appealed the district court’s verdict, which the court of appeals affirmed in its entirety.

The appeals court noted that its review of the lower court’s determination that the defendants’ actions constituted cruel and unusual punishment was a legal question reviewed de novo as a matter of law. Davis suffered serious injuries as a result of the beating, including internal and external sutures of a cut chin and swelling and bruising to his face still visible a week later.

“Given that the court found Davis’ testimony to be credible, the court’s finding that the physical force expended to control Davis vastly exceeded the amount of force required supports its conclusion that McPeak used force maliciously and sadistically for the purpose of causing Davis harm. The court’s conclusion is also supported by evidence that McPeak taunted and threatened Davis on the day after the incident.”

The court held McPeak was not entitled to qualified immunity. “We agree that the law was well established that striking an unresisting inmate 20 to 25 times in the head while four other officers were restraining his limbs and two other officers were standing by to assist if necessary, is a violation of the eighth amendment’s prohibition of cruel and unusual punishment. We find no error in the trial court’s denial of McPeak’s claim to qualified immunity.”

The court held the evidence clearly supported finding the other team members liable for McPeak’s attack because the law was clear that prison officials can be held liable for failing to protect prisoners from the use of excessive force by other prison employees. “The trial court found that the movement team members witnessed McPeak beating an inmate and did nothing to intervene and therefore violated a clearly established right of which a reasonable corrections officer would have known.”

Gregory Dunn, the lieutenant in charge of the team was properly found liable because he too witnessed the beating, did nothing to protect Davis and failed to report the beating in his written account of the incident. The court held there was no basis for distinguishing Dunn’s liability from that of the other team members.

At trial warden Delo’s testimony that he couldn’t recall any prior complaints about McPeak was found “not credible.” The district court found that Delo had authorized an investigation into McPeak’s excessive use of force in another incident where McPeak had used excessive force against prisoners but had failed to order investigations into any of the complaints Delo also took no action when a state senator’s assistant told him McPeak should be discharged or reassigned due to persistent complaints that he used excessive force against prisoners.

“Given Delo’s knowledge of these previous complaints, and the fact that he was the only individual who could have ordered investigations into these allegations of excessive force prior to the decision to choose McPeak in a planned use of force, the trial court concluded that Delo had been deliberately indifferent to a substantial risk of serious harm to inmates. We find that the record adequately supports the trial court’s conclusion. The record also supports the trial judge’s denial of Delo’s claim of qualified immunity.” The court affirmed the award of punitive damages against Delo and McPeak because their actions showed evidence of evil and malicious intent. See: Estate of Davis by Ostenfeld v. Delo, 115 F.3d 1388 (8th Cir. 1997).

Ohio Students Rally in DC

Students from Dayton Ohio’s Colonel White High School were outraged when they read about Kemba Smith in Emerge magazine. Smith, a 24-year-old Virginia woman, was sentenced to 24 years in federal prison without the possibility of parole for refusing to cooperate with federal prosecutors who wanted her to testify against her drug-dealing boyfriend.

“Free Kemba! Free Kemba!” the students chanted on the steps of the U.S. capitol. They were joined by members of the Congressional Black Caucus. Kemba Smith’s parents, Smith’s 3-year-old son, and representatives of FAMM (Families Against Mandatory Minimums).

“Kemba’s only crime,” said high school junior Michelle Paynt “was that she was blinded by love and thought that she couldn’t turn the man she loved into the police when they wanted her to.”

“Want her out of prison,” said 16-year-old student D’wan Taylor. “And we want to help other non-violent offenders that may be in the same predicament she’s in.”

Source: The Marion Star. Associated Press

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Prison Legal News
Evidence Must Support Disciplinary Ruling

A federal district court in Indiana granted an Indiana state prisoner’s petition for habeas corpus finding that no evidence supported a disciplinary committee’s “guilty” finding of possessing intoxicants. Timothy Hayes was convicted for possessing intoxicants after a guard found a bottle of an “orange substance” in Hayes’ cell. The infracting guard claimed Hayes had him obtane from the prison school.

At the hearing no physical evidence was presented, no evidence was presented proving the substance in question was an intoxicant and the bottle alleged to have contained the substance was not presented. The hearing officer found Hayes guilty as charged and revoked 90 days of good time credits and demoted his credit earning class. The finding was administratively affirmed and Hayes then filed a habeas corpus petition in federal court contending no evidence supported the decision. Indiana does not provide any state judicial review of prison infractions which is why Indiana prisoners file challenges directly in federal court.

The court noted Indiana prisoners have a due process liberty interest in their good time credits. In Superintendent v. Hill, 472 U.S. 445, 105 S.Ct. 2768 (1985) the Supreme Court held that reviewing courts should afford prison disciplinary verdicts if “some evidence” supports the decision. While only “some evidence,” (in reality the same as “any evidence”) must support such findings, that evidence must present “sufficient indicia of reliability.”

In Griffin v. Youngblood, 969 F.2d 16 (3rd Cir. 1992) the court held it was not necessary for prison officials to offer the actual intoxicating substance into evidence at the disciplinary hearing. Thus, the court held that the non production of the substance taken from Hayes’ cell at the hearing did not warrant habeas relief.

However, no evidence was presented at the hearing to prove that the substance in question was actually polyurethane or any other intoxicant. The infracting guard did not offer his opinion about the substance, instead the hearing officer based his decision on the guard’s claim that Hayes admitted the substance was polyurethane. A claim that Hayes denied in a sworn affidavit to the court.

Health Care Contractor Subject to Monell Liability

The court of appeals for the eleventh circuit held that private companies performing traditional government functions are liable under 42 U.S.C. § 1983 but enjoy the protection of Monell v. Dept. of Social Services of New York, 436 U.S. 658, 98 S.Ct. 2018 (1978). Junior Buckner was a pretrial detainee in the Clayton county (GA) jail when he developed a psychological condition called “conversion reaction” that made him unable to walk. The jail contracted with a private company, Prison Health Services (PHS), to provide medical care. While PHS “treated” Buckner they did not diagnose his condition and it became permanent.

Buckner filed suit claiming that the county, sheriff and PHS were deliberately indifferent to his psychiatric medical needs. The district court granted the defendants summary judgment holding that under Monell a plaintiff must show the municipality itself injured the plaintiff by having a policy or practice which caused the plaintiff’s injury. The court held Buckner had not shown the existence of any such injurious policy by either the county or PHS.

The court of appeals affirmed. This ruling is significant for anyone suing county or city governments over constitutional violations and, more importantly, any private companies those governments hire to provide government services, in this case jail health care.

The court notes that in Monell the Supreme Court held that municipalities are “persons” for the purpose of § 1983 and can be held liable when “the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body’s officers.” Municipalities can also be sued under § 1983 for constitutional violations that occur under government “custom” even if it occurs without formal approval from that body’s official decision making channels. Readers should note that Monell applies only to cities and counties, it does not apply to state agencies.

“When a private entity like PHS contracts with a county to provide medical services to inmates, it performs a function traditionally within the exclusive prerogative of the state.... In doing so, it becomes the functional equivalent of the municipality.”

The court held that Monell requires “that liability be found only against persons who cause the constitutional injury... This requirement is an element of the § 1983 claim.” The court held that Monell “merely restricted municipal liability to instances where the municipality actually caused the alleged deprivation of rights.”

“The policy or custom requirement is not a type of immunity from liability but is instead an element of a § 1983 claim. Accordingly, we affirm the district court’s finding that the Monell policy or custom requirement applies in suits against private entities performing functions traditionally within the exclusive prerogative of the state. Such as the provision of medical care to inmates.” See: Buckner v. Tulsa, 116 F.3d 450 (11th Cir. 1997).
Fred Zain was a crime lab serologist, who tested evidence for the West Virginia state police from 1979 to 1989, and was chief of serology his last five years. During that time Zain falsified evidence and testified about the results of tests he never performed.

In 1989, Zain took a letter of recommendation from the West Virginia governor and headed to Texas, where he was named head of serology at the Baxter County medical examiner’s office in San Antonio. Zain worked there until 1992 when his West Virginia shenanigans came to light. [See: “Fraudulent Police Chemist Flees Justice”, PLN Vol. 5, No. 10]

An investigation was triggered by the case of West Virginian Glen Dale Woodall, whose 1987 rape convictions were overturned after DNA tests showed he could not have committed the crime for which he had already served five years. In 1993, the WV supreme court invalidated as many as 138 felony convictions because of evidence tainted or fabricated by Zain. Woodall was awarded $1 million for his false incarceration. William O’Dell Harris, also convicted by flawed testimony from Zain, was later awarded $1.8 million.

In October, 1997, West Virginian Gerald Wayne Davis settled for a reported $650,000 in a similar case. During Davis’ 1986 trial, Zain said the defendant’s semen matched that found in the victim. Subsequent DNA tests negated Zain’s findings.

The three settlements reported above are the only WV cases to have been settled.

Survivors Manual

How do you survive in a concrete coffin?

With the proliferation of Control Unit (aka SuperMax) prisons in the U.S., an increasing number of prisoners struggle for an answer.

Survivors Manual is a 72-page paperback written by and for people who live in Control Units. The manual was compiled and edited by prisoner rights activists Bonnie Kerness and Holbrook Teter. Most of the material in the book is written by control unit prisoners who were asked to write about what things they do to survive in long-term isolation. Any prisoner, whether doing control unit time or otherwise, can benefit from reading the combined wisdom and experience of the manual’s contributors.

The book is available from California Prison Focus (CPF) for $7 including shipping. CPF is a nonprofit group that functions as a watchdog of the California department of corrections, and promotes solidarity between prisoners and people on the outside.

CPF is a solid organization. They could use all of the support, financial and otherwise, that you can offer. For a copy of the Survivors Manual, send $7 to: California Prison Focus, 2469 Mission Street, #28, San Francisco, CA 94110.

Source: Charleston Gazette, Seattle Times

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Failure to Protect Informant Violates 8th Amendment

The court of appeals for the third circuit held that prison informants have an eighth amendment right to be protected from the consequences of their informing and that a lower court erred in failing to appoint counsel. Jerome Hamilton is a Delaware state prisoner. Since at least 1976 he has been the subject of attacks by other prisoners, including stabbings and beatings, in one case he was assaulted and stabbed by an irate mob of 20 prisoners. Hamilton has spent a great deal of time in protective custody as well as stints in federal and Virginia prisons for his own protection.

The instant case arose in 1992 when a guard told other prisoners that Hamilton was “a good telling mother f***ing snitcher” for informing on a drug trafficking operation that led to the arrest of several prisoners and guards in 1986. Three months later a classification committee recommended that Hamilton’s request for protective custody (PC) be granted. A review committee then decided to take no action. Two months later Hamilton was assaulted and suffered two jaw fractures. Hamilton filed suit claiming prison officials were deliberately indifferent to his right to safety under the eighth amendment. The district court granted summary judgment to the defendants and dismissed the suit. The court of appeals reversed and remanded.

The eighth amendment requires that prison officials take reasonable steps to protect prisoners from violence at the hands of other prisoners. See: Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970 (1994)[PLN, July, 1994]. For a prisoner to win a failure to protect claim he must show that he faced a serious risk of substantial harm and that prison officials knew of the risk and failed to take reasonable steps to mitigate that risk, i.e., they showed deliberate indifference to the risk.

The appeals court held that the district court erred when it concluded there was no evidence that Hamilton faced a substantial risk of harm. The appeals court held that the initial classification report recommending PC for Hamilton was enough to alert the reviewing officials to the danger. Moreso when Frances Lewis, one of the reviewing officials, had previously approved two PC placements for Hamilton in the past. “...since Lewis should be charged with knowledge of Hamilton’s known cooperation with prison officials and the subsequent branding of Hamilton as a ‘snitch’...” a fact finder could infer that Lewis knew that the threat to Hamilton’s safety was imminent. The court noted that “A prison official’s knowledge of a substantial risk is a question of fact and can, of course, be proven by circumstantial evidence.” The court held that the circumstantial evidence presented by Hamilton in this case was sufficient to preclude summary judgment because a jury could conclude that Lewis “must have known” of the risk to Hamilton’s safety and was therefore liable for the injuries he sustained.

The lower court also erred when it held that the classification committee members who recommended PC were not liable for Hamilton’s injuries. “The failure of the MDT defendants to take additional steps beyond the recommendation of protective custody could be viewed by a fact finder as the sort of deliberate indifference to inmate safety that the constitution forbids.” Hamilton claimed he should have been placed in administrative segregation immediately after the committee recommended PC.

The court held that the district court abused its discretion when it denied Hamilton’s motion to appoint counsel under Tabron v. Grace, 6 F.3d 147 (3rd Cir. 1993). On remand the district court was instructed to appoint counsel to represent Hamilton. See: Hamilton v. Leavy, 117 F.3d 742 (3rd Cir. 1997).

Class Action Certification Clarified

The court of appeals for the ninth circuit held that a district court erred when it dismissed as moot a jail detainee’s lawsuit challenging conditions on a jail chain gang, before ruling on the plaintiff’s motion for class certification. Timothy Wade filed a lawsuit seeking only injunctive relief challenging chain gang work conditions at the Washoe county jail in Nevada. While his motion for class certification was pending, Wade was moved to a different jail and the district court dismissed the suit as moot. The court of appeals reversed and remanded for a ruling on the class certification motion.

The court noted that the district court never really ruled on the class certification motion, it essentially postponed that ruling in order to decide the defendants’ motion for summary judgment. The appeals court treated the class certification motion as outstanding at the time of Wade’s transfer. The court held that Wade had standing to appeal even though his class certification motion was never decided by the lower court. The court noted it could not review a decision before it was made. Therefore, the case was remanded to the district court to decide the outstanding certification motion; whether Wade could continue as a class representative or whether other putative class members should be allowed to intervene.

The court held that the claims in this case, by short term jail detainees, present “a classic example of a transitory claim that cries out for a ruling on certification as rapidly as possible.”

“If the district court finds the claims are indeed ‘inherently transitory,’ then the action qualifies for an exception to mootness even if there is no indication that Wade or other current class members may again be subject to the acts that gave rise to the claims... This is because there is a constantly changing putative class that will become subject to these allegedly unconstitutional conditions... Moreover, if transitory, the court could validly certify a class on remand, even though the named plaintiff’s claims are already moot, since the ‘relation back’ doctrine will relate to Wade’s standing at the outset of the case in order ‘to preserve the merits of the case for judicial resolution.’” See: Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970 (1994). The court also noted that “The court could validly certify a class on remand, even though the named plaintiff’s claims are already moot, since the ‘relation back’ doctrine will relate to Wade’s standing at the outset of the case in order ‘to preserve the merits of the case for judicial resolution.’”

Anyone litigating class action suits will find this ruling useful. For a more ample discussion of class action litigation see PLN, December, 1996. “Pro Se Tips and Tactics.”

Prison Legal News 25 March 1998
New Jersey DOC Required to Follow Own Rules

The appellate division of the superior court of New Jersey held that a prisoner was entitled to reversal of a disciplinary sanction because the prison hearing officer disobeyed a court ordered prison rule requiring the prisoner to sign a form documenting what procedures take place at disciplinary hearings.

Melvin Johnson is a New Jersey state prisoner. He was convicted of assaulting another prisoner. At his disciplinary hearing Johnson sought to question the alleged victim, who denied being assaulted, and the hearing officer refused. Johnson was found guilty and sentenced to 120 days in segregation and 120 days loss of good time. After exhausting his administrative remedies within the DOC Johnson appealed to the state appeals court, which reversed the guilty finding for a new hearing.

At the outset the court criticized the illegible handwriting of prison employees. "Preliminarily, we note that our review of this matter has been grossly hampered by the indecipherability of most of the record. The various statements and reports which comprise the record all consist primarily of handwritten materials. We have no difficulty reading Johnson’s handwritten materials. But a combination of illegible handwriting and of reproductions which are either smudged or blurred have made a substantial portion of the forms completed by officers of the state prison or of the department of corrections entirely unreadable. Since an inmate has a right to appeal the imposition of disciplinary sanctions, he is also entitled to have us furnished with a record which makes our review possible. Because of the nature of appeals by prison inmates, the responsibility for assuring that the reviewing court has a useable record must fall to the attorney general representing the state or its agents. The illegibility of the record would be a sufficient reason for a remand in the present case even if there were no other reason. See: McDonald v. Pinchak, 139 N.J. 188, 199, 652 A.2d 700 (1995)."

The court reversed, instead, on the fact that Johnson claimed he requested the live testimony of the alleged victim, which the hearing officer denied. In McDonald the court required that prison hearing officers and prisoners sign an "adjudication form" which states what took place at the hearing procedurally. This form was not used at Johnson’s hearing, thus no contemporaneous record existed as to whether Johnson requested a witness or the hearing officer’s reason(s) for denying the request.

"Because the Department of Corrections failed to follow its own procedures to document that Johnson did not want to call Jones as witness, we accept Johnson’s contrary contention.

"Johnson is entitled to the opportunity to call Jones as a witness at his disciplinary hearing unless the Department of Corrections specifies some justifiable reason for refusing to permit the testimony. If Jones does testify, the hearing officer should reconsider his determination in the light of that testimony. See: Johnson v. New Jersey DOC, 688 A.2d 1123, 298 N.J. Super. 79 (1997)."

Pelican Bay $600,000 Wrongful Death Settlement

California taxpayers coughed up another $600,000 to settle a use-of-force lawsuit at Pelican Bay State Prison. The biggest chunk of the award goes to the family of Jesse Castillo, who was shot and killed by guards while engaged in a fistfight on Pelican Bay’s "A" Yard.

"It was an unjustifiable shooting," said plaintiff attorney Catherine Campbell. "The officers knew there was going to be a fight and they allowed it to occur. Then they had no way of controlling the yard except to shoot at people."

The settlement brings to $6.2 million the amount of money the state has paid plaintiffs and lawyers over the last four years to settle cases of alleged excessive force, wrongful death and constitutional violations at Pelican Bay. Deputy A.G. James J. Petzke, who represented the department of corrections in the Castillo case, said the $600,000 settlement concedes not even "negligent behavior" on the part of prison officials.

"While I’d like to say its all about justice, the taxpayers of the state also would expect that we look at the scenario that could play out at trial, as well as the costs," Petzke said. "Unfortunately it’s not just about justice."

Castillo’s family gets $250,000 of the award. Another $100,000 goes to three other prisoners who were shot, but not killed, during the same incident. Another $100,000 goes to defense experts. The remaining $150,000 goes to attorneys, according to Campbell.

Source: Sacramento Bee

IN FACT

• The British prison population increased 25 percent, from 48,000 to 60,000, from 1986-96. The incarceration rate is 135 per 100,000. But for blacks it is 1,000 per 100,000 (more than seven times higher).

• A National Crime Victimization Survey released in April, 1997, showed the largest annual decline in crime since 1973— a 12 percent drop between 1994 and 1995. A different study, the FBI’s Uniform Crime Reports, showed that violent crime dropped 1.7 percent in "Three Strikes" states from 1994-95. In non-three strikes states, the UCR violent crime rate dropped 4.6 percent.

• Prisoners who receive at least two years of higher education have a 10 percent re-arrest rate, according to the Correctional Education Association (CEA). That compares with a national re-arrest rate of 60 percent. The national re-incarceration rate is 35 percent, says the CEA.

• According to a 1996 report from the National Criminal Justice Commission, a non-profit research organization, the annual cost for housing a prisoner over the age of 55 averages $69,000, more than three times the $22,000 average to imprison the typical adult prisoner.